

IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)
BEFORE SH. N.K.BILLAIYA, ACCOUNTANT MEMBER
AND
SH.ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 2087/Del/2022, A.Y. 2018-19

UK Grid Solution Limited St. LOeonards Building, Harry Kerr Drive, Stafford, ST16 1WT, United Kingdom PAN : AAICA6271A	Vs.	Deputy Commissioner of Income Tax Circle- 3(1)(1), International Taxation New Delhi
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Assesseeby	Sh. Ajay Vohra, Sr. Adv., Aditya Vohra, Adv. & Arpit Goyal, CA
Revenue by	Shree Jitender Kumar, CIT(DR)

Date of hearing:	09.02.2023
Date of Pronouncement:	12.04.2023

ORDER

Per Anubhav Sharma, JM :

The assessee has come in appeal challenging the final assessment order dated 28.07.2022 passed u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for the assessment year 2018-19 coupled with challenge of findings of Ld. DRP.

2. The facts in brief are the assessee appellant ALSTOM is a foreign company incorporated in United Kingdom and a tax resident of that country in terms of Article 4 of India-UK Double Taxation Avoidance Agreement (hereinafter referred to as for short 'DTAA'). Assessee company accordingly had claimed to be governed as per the provisions of the Act or the DTAA whichever

is more beneficial to the assessee in terms of beneficial provisions of Section 90(2) of the Act. Assessee is engaged in the business of designing, engineering, manufacturing and supply of electric equipment that help in the transmission and distribution of power, commissioning and servicing of transmission and distribution systems on turnkey basis. During the relevant assessment years, the assessee had earned income from various Indian customers which the assessee claimed was not taxable as income was from offshore supplies only. The case of assessee was selected for scrutiny due to large claim of refund against tax deducted source. The record shows the assessee was awarded a contract by Power Grid Corporation India Ltd. (hereinafter referred to as 'PGCIL) for setting up a 3000 MW HUDC Terminal in Chhattisgarh, India.

2.1 There were three contracts of following nature;

'First contract', also called 'off-shore contract' was for supply of plant and equipment including spares outside India, Type test and Training to be conducted outside India.

'Second' and 'third contract' were 'on-shore supply contract' and 'on-shore service contract' which were assigned to an associate enterprise M/s. GE T&D India Ltd (here in after also referred also as 'ALSTOM-I' or 'Indian Associate').

2.2 The Ld. AO, considered it to be a case of artificial division of composite contract into three special contracts by the assessee while all the responsibilities and liabilities of the project based with the assessee. Taking into consideration recital of the contract, Ld. AO made following relevant observations in para no. 4 and 5 :-

"4. These provisions clearly indicate that the assessee's role is an all-encompassing one for the purposes of the project i.e. the onus of completion of every step is on the assessee and it is answerable to PGCIL for the same at all

times. Hence, in no way can it be inferred from the contract document that the assessee's association with and its responsibility towards the project is restricted to mere supply of equipments. Therefore, the contract with all its components has been awarded in full to the assessee.

5. A plain reading of the clauses indicates that the entire offshore supply hinges critically and completely on inputs and consequent approval of PGCIL. The entire installation has to be designed in accordance with the specifications of PGCIL taking into account the peculiarities of each project site. Hence, the offshore supply component of the project cannot be de-linked with the entire set of activities that contribute to the completion of the project. Rather, the offshore supply is governed by the project site itself.”

3. Thereafter, Ld. AO formed an opinion that the Indian Associate was actively involved in soliciting business for the assessee while also taking on the India-Lag of the composite contracts. Thus, concluded that there was a dependent agent PE in India. Thereafter based upon the legal propositions with regard to taxation of business profits u/s 9 (1)(i) of the Act and under the Article 7 of the DTAA the Id. AO concluded as follows in Para 13:-

“UK Grid has been awarded a single composite (EPC) contract on a turnkey basis by PGICL to complete a power project in India. The taxability of UK Grid in India is, therefore, to be decided as per the provisions of the Income-tax Act and relevant provisions of the India-UK DTAA. From the facts of the case, there is no doubt that UK Grid has a “business connection” under section 9(1)(i) of the Act and a 'Construction PE' under the provisions of Art. 5(2) of the India-UK DTAA.

Therefore, the business profits of the PE of UK Grid are taxable in India as per the provisions of Article 7 of the India-IJK DTAA. The sub-article (2) of Article 7 of the DTAA which prescribes the mechanism is reproduced as under:

“(2) Where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, the profits which that permanent establishment might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities

under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment shall be treated for the purposes of paragraph 1 of this Article as being the profits directly attributable to that permanent establishment. ”

Therefore, the profits attributable to the PE should be the Arm’s length profit i.e. profit that an independent person under the same or similar conditions engaged in similar activities (EPC contract for Power Project on turnkey basis) should earn.

From the above discussion, it is now clear that both offshore as well as onshore components of the single composite project have to be taken into account in determining profit attributable to the PE as leaving one part would deviate from Arm’s length profit.

It is also noteworthy to mention that BEPS Action Plan 7 extensively dealt with and prohibited various arrangements by the taxpayers for artificial avoidance of PE status including splitting up j) f_con tracts. This was included in Article 13 of the MU. Accordingly, as a minimum standard, the signatories of MLI would now modify their treaties to address arrangements directed to artificially avoid PE status.

In view of this, in the present case, the arrangement of the assessee to split the Otherwise single contract into various contracts with a view to avoid PE status is not permissible. As UK Grid already has a PE in India, in the capacity of an awarded of contract, the offshore sub-contract would also form part of the same PE.”

4. Thereafter Ld. AO having taken into consideration the mechanism to determine profit of PE in terms of Rule 10 of the Income Tax Rules concluded that the total receipt source in India should be taken and the tax paid. The profit margins to be applied on these Indian receipts should be at arms length. So as to arrive at arms length profit the Ld. AO concluded in para 14, “*in the instant case the assessee company has not furnished the financial statements for the relevant period pertaining to this assessment year. Hence, the relevant provisions of the Act are invoked*”. Thereupon applying special provisions of

Section 44BBB of the Act, proceeded to attribute business income to PE in India. Ld. AO also considered the global operation fee as FTS.

5. The assessee approached the Ld. DRP which had sustained the draft assessment order except to the extent directing Ld. AO to exclude the receipts on account of off-shore supplies made by assessee to GE T&D and SFO, if they are not related to PGCIL contract.

6. Thus, the assessee is in appeal raising following grounds :-

“1. That on the facts and circumstances of the case and in law, the assessment order dated 28.07.2022 passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (“the Act”) for assessment year 2018-19 assessing the total income of the Appellant at Rs. 131,37,79,750 is bad in law, void-ab-initio and therefore, liable to be quashed and/ or set aside.

2. That on the facts and circumstances of the case and in law, the assessment order passed under section 143(3)/ 144C(13) of the Act on 28.07.2022, being barred by limitation, is bad in law, and void-ab-initio.

Re: Offshore supply receipts of Rs.1 107,81,49,081 from PGCIL

3. That the DRP/ assessing officer erred on facts and in law in holding that receipts of Rs. 1107,81,49,081 from offshore supplies to Power Grid Corporation of India Ltd (“PGCIL”) are taxable in India under the provisions of the Act.

4. That the DRP/ assessing officer erred on facts and in law in arbitrarily holding that the Appellant had business connection in India during the subject assessment year.

5. That the DRP/ assessing officer erred on facts and in law in arbitrarily holding that GE T&D India Limited (“GETDIL”) constitutes Dependent Agent Permanent Establishment (“PE”) of the Appellant in India and that the Appellant has Construction PE in India.

6. That the DRP/ assessing officer erred on facts and in law in attributing 100% profits from offshore supplies made to PGCIL to the alleged business connection/ PE.

7. *Without prejudice, that the DRP/ assessing officer erred on facts and in law in computing incoMs-fem-effehere supplies by applying section 44BBB of the Act.*

8. *That the DRP/ assessing officer erred on facts and in law in alleging that the Appellant was awarded single composite contract on turnkey basis, which was artificially split into three separate contracts to avoid payment of legitimate taxes in India.*

Re: Offshore supply receipts of Rs. 51,85,13,082 from GETDIL & Rs.1,35,55,339 from SFO Technologies

9. *That the assessing officer erred on facts and in law in holding that receipts of Rs.51,85,13,082 from GETDIL and Rs.1,35,55,339 from SFO towards offshore supply were taxable in India, contrary to the binding directions of the DRP.*

10. *That the assessing officer erred on facts and in law in bringing to tax receipts of Rs.51,85,13,082 from offshore supply made to GETDIL, i.e., customer on the ground that said customer itself constituted Dependent Agent PE of the Appellant in India.*

11. *Without prejudice, that the assessing officer erred on facts and in law in bringing to tax receipts towards offshore supply from GETDIL and SFO Technologies by applying section 44BBB of the Act, not appreciating that said offshore supplies were not linked to any turnkey contract.*

Re: Global operation fee of Rs.8,12,37,030 received from GETDIL

12. *That the DRP/ assessing officer erred on facts and in law in taxing global operation fee of Rs.8,12,37,030 received from GETDIL as Fees from Technical Services (“FTS”) under the provisions of the Act and the India-UK DTAA, without appreciating that provision of said services by the Appellant did not satisfy the ‘make available’ clause contained in Article 13(4)(c) of the India-UK DTAA.*

Re: Other grounds relating to computation of tax demand & penalty proceedings

13. *That the assessing officer erred on facts and in law in levying interest under section 234A, 234B and 234C of the Act.*

The Appellant craves leave to add to, amend, alter or vary the above grounds of appeal at or before the time of hearing.”

7. Heard and perused the record. The Bench has given thoughtful consideration to the matter before it and submissions and has gone through the law cited.

The ground wise findings are as follows;

8. **Ground no 1 and 2;** While opening arguments, Sh. Sh. Ajay Vohra, Ld. Sr Counsel appearing for appellant assessee, has not pressed ground no. 2 and ground no. 1 is general in nature.

9. **Ground no 3 to 8.**Ld. Sr. Counsel for the assessee/ appellant contended that Ld. Tax Authorities below have erred in understanding the nature of three agreements entered between the assessee, its associate ALSTOM-I and employer PGCIL. It was submitted that Ld. Tax Authorities have fallen in error in concluding that there was an artificial splitting of the contract between the assessee and ALSTOM-I. Referring to the contracts executed between the assessee and PGCIL, made available on page no. 6 to 249 of the paper book, it was submitted that engaging an Associate was an integral part of the bid proposal and the execution of two separate contracts between PGCIL and ALSTOM-I was part of bidding documents. It was submitted that Ld. Tax Authorities below have selectively construed the recitals of the bid and contract documents.

9.1 It was submitted that tax authorities below have also fallen in error in construing the business connection in India without appreciating that the sales were concluded outside India and the property in goods under the offshore agreement had passed outside India. No payment or consideration was received within India. Specially referring to judgment in **IshikaWasma- Harima Heavy**

Industries Ltd. vs. DIT : [2007] 288 ITR 408 (SC) Ld. Sr. Counsel submitted that Hon'ble Supreme Court has held in many words that when the transfer of property in goods and the payment are carried out outside India the transactions cannot be taxed in India. In this context, judgment in **CIT vs. Hindustan Shipyard Ltd. 109 ITR 158 (AP)** was also relied.

9.2 It was submitted that when the scope of work under the bid documents covered off-shores supply and off-shores services as distinguished from on-shore supply and construction work, Ld. Tax Authorities had fallen in error in considering the three contracts to be part of one consolidated contract. It was submitted that in case of contracts by consortium, the law is settled that when a project is executed by consortium then income of foreign entity has to be assessed on the business of income occurring to it in India. Specially referring to Board Circular dated 07.03.2016 he submitted that even the Board recognizes the fact that in case of projects executed under consortium arrangement and if each member is independently responsible for executing its part of work, then accordingly the income is taxable. In this context, he specially referred to judgment of Hon'ble Delhi High Court in **Linde AG, Linde Engineering Division vs. DDIT : [2014] 365 ITR 1 (Del)** of Income Tax.

9.3 He submitted that over stress is laid by Ld. Tax Authorities on the fact that the primary liability of execution of contracts and damage for breach of the contracts being upon the assessee ALSTOM only, so the ALSTOM-I was merely an extended arm. And thus the Ld. Tax Authorities have fallen in error in considering the associate M/s. ALSTOM-I to be Agency PE. It was submitted that there was no legal and financial dependency between the assessee and its associates.

9.4 Ld. Sr. Counsel submitted that the assessee had earned revenues from offshores supplies and no activity was performed in India for earning its

revenue. He specifically stressed on fact that no employee of the assessee visited India and as such there is no branch or place of business in India.

9.4.1 As with regard to Dependent PE it was submitted the Tax Authorities have not discussed any evidence and an incorrect observation is made by Ld. AO that GE India was actively involved in soliciting business for the assessee as the assessee had procured the contract by way of open bidding.

9.5 It was submitted that the Associate was engaged in independent contracts under the bid and was independent entity. Referring to the financial statements of GE T &D India Limited, available on page no. 429 to 437 for F.Y. 2017-18 and 438-445 for F.Y. 2018-19 it was submitted that related party transactions have been disclosed and it was submitted that the Indian associates has several independent source of revenue. The income earned from the two contracts was independently offered to Tax under the Act.

9.6 As with regard to the Associate constituting a Construction PE, he submitted that the associate was independent and responsible for concluding the contracts and the role of assessee was limited to off-shore supplies. In this context he specifically contended in regard to the findings of construction PE that there was no factual evidence to support the findings. Assessee was not involved into any activity of construction project and as “supply” is not included in the activities taxable in the provisions, so Article 5(2) of the treaty was not applicable.

9.7 He also referred to Section 44BBB of the Act and submitted that as assessee was merely a supplier to PGCIL so provisions which are otherwise applicable in case of business of civil construction or the business of erection of plant or machinery or testing or commissioning thereof, in connection with the turnkey power project is not applicable and the income received against offshore supply of equipments cannot be taxed by virtue of section 44BBB.

9.8 As with regard to the submission that the agreements were not deliberately split for tax avoidance, Ld. Sr. Counsel relied **Linde AG, Linde Engineering Division vs DDIT: [2014] 365 ITR 1 (Del)** where the Department's SLP dismissed in 242 Taxman 371 (SC). He also relied **DIT vs Ericsson AB: 343 ITR 470 (Del)**.

9.8.1 In support of the submission that there is no business connection of assessee in India, Ld. Sr. Counsel relied, **CIT vs. R D Aggarwal and Co. [1965] 56 ITR 20 (SC)**, **CIT vs Hindustan Shipyard Ltd: 109 ITR 158 (AP)** and **CIT vs Atlas Steel Company Ltd: 164 ITR 401 (Cal)**.

9.8.2 As with regard to the submission that Offshore supply are not taxable under the Act, he relied **Ishikawajma-Harima Heavy Industries Ltd vs DIT: [2007] 288 ITR 408 (SC)**, **DIT vs LG Cable Ltd: [2011] 237 CTR 438 (Del)**, **DIT vs Nokia Networks OY: 358 ITR 259 (Del)** and **Siemens Mobile Communications SPA vs DCIT: [2020] 182 ITD 479 (Del Trib.)**

9.8.3 The non applicability of Section 44BBB qua offshore supply was supported by Ld. Sr. Counsel by relying **DDIT vs Mitsui & Co Ltd: 118 taxmann.com 379 (Del Trib.)**, **DOT vs Whessoe Oil & Gas Ltd: 87 taxmann.com 342 (Mum Trib.)** and **Atomstroy Export vs DCIT: ITA No.6945/Mum/2017 (Mum Trib.)**

9.8.4 He supported his contentions with regard to law on Dependent Agent Permanent Establishment ("PE") under the India-UK DTAA he referred to the Copy of India-UK DTAA and section 182 of Indian Contract Act, 1872. He also cited judgments in **National Petroleum Construction Company vs DIT: 383 ITR 648 (Del)**, **Western Union Financial Services Inc vs ADIT: 101 TTJ 56 (Del Trib.)**, **Mitsui & Co Ltd vs ACIT: ITA No.4764/Del/2016 (Del Trib.)**, **ITO vs International Reinsurance and Insurance Consultancy & Broking Services (P) Ltd: 142 taxmann.com 509 (Mum Trib.)**, **DCIT vs Adobe**

Systems Software Ireland Ltd: ITA Nos.1978/Del/2019 &Ors. dated 27.07.2022 (Del Trib.), Net App BV vs DDIT: [2017] 78 taxmann.com 97 (Del Trib.), TVM Ltd vs CIT: 237 ITR 230 (AAR) and KronenAktiengesellschaftvs CIT: ITA No.907/Del/2017 dated 30.12.2022 (Del Trib.)

9.8.5 The Ld. Sr. Counsel stressed that the onus is on Department to prove existence of PE and for that he relied **CIT vs eFunds IT Solution: 399 ITR 34 (SC), DIT vs Samsung Heavy Industries Co Ltd: 426 ITR 1 (SC), DIT vs Mitsui & Co Ltd: 399 ITR 505 (Del) and AB SciexPte Ltd vs ACIT: 195 ITD 384 (Del Trib.)**

9.8.6 As with regard to principles of attribution to business connection/ PE he relied **DIT vs Morgan Stanley & Co Inc: 292 ITR 416 (SC), DIT vs Morgan Stanley & Co Inc: 292 ITR 416 (SC), The Anglo French Textile Co Ltd vs CIT: 25 ITR 27 (SC), Annamalais Timber Trust and Co vs CIT: 41 ITR 781 (Mad), CIT vsBertrams Scotts Ltd: 31 Taxman 444 (Cal), CIT vs Hyundai Heavy Industries Co Ltd: 291 ITR 482 (SC), Samsung Heavy Industries Co Ltd vs DIT: 265 CTR 109 (Uttarakhand), Affirmed by the Supreme Court in 426 ITR 1(SC), DCIT vs Roxon OY: 106 ITD 489 (Mum Trib.)**

10. Ld. DR however, supported the findings of Ld. Tax Authorities below and submitted that it was not a case of consortium but one consolidated bid was fragmented. It was submitted that the PGCIL had invited bid and assessee was the contractor and the Associate, Indian entity was given authority to execute the local work while the responsibility continued to stay with the assessee. He referred to various clauses of agreement trying to show that when over all responsibility was of assessee, then PE has to be presumed.

11. Now, giving thoughtful consideration to the matter on record and the submissions, at the outset, the Bench feels relevant to observe that in the assessment order the Ld. AO has discussed more about the various provisions and principles of law governing the taxability in case of income which is deemed to accrue or arises in India for the purpose of Section 9 of the Act and how there has to be attribution to profit to the PE, without discussing the evidence in the case in hand, to give conclusive findings as to how the Indian associate of the assessee happens to be an agent or construction PE. His primary and ultimate reliance was on the fact that there was single composite contract which was divided into three contracts and that in two contracts, which were to be performed by the Indian entity, the ultimate liability for non-performance or compensation being on assessee, therefore, the Indian entity was a PE and the provisions of profit attribution were applicable.

12 At the same time the Ld. DRP bettered it little while discussing quite more of the recitals of the agreements and contracts but reached same finding that as there was no separate bid for each contract and that in case of any default in second or third contract, it was to be construed to be default of the assessee and result into right of termination and recovery of damages from the assessee by PGCIL, accordingly it too concluded that Associate as PE was involved throughout the contract period. DRP observed that the off-shore supply of equipments by the assessee would have been rendered meaningless in the absence of service of supervision, erection, commissioning etc. all of which was an integral and indivisible part of the contract.

13. So the key question is if this was independent contract as claimed by assessee or there was artificial spilt of one contract to the benefit of assessee, into three contracts leading to evasion of tax. The first and a very important concept that has to kept in mind is that the controversy regarding taxability event, in case of complex arrangement of contracts, may arise at several stages

and with different tax incidences. The adjudication of an issue should be on basis of wholesome reading of the contract and context of terms. In regard to this principle of law the Hon'ble Supreme Court in **Ishikawajma-Harima Heavy Industries Ltd. (supra)** has observed in para no. 60 as follows :-

“In construing a contract, the terms and conditions there of are to be read as a whole. A contract must be construed keeping in view the intention of the parties. No doubt, the applicability of the tax laws would depend upon the nature of the contract, but the same should not be construed keeping in view the taxing provisions.”

14. Thus, it will be relevant to reproduce some major clauses of agreements and contracts entered between the PGCIL and the assessee, unlike selectively done by the Revenue Authorities below. The Off-shore contract agreement along with 11 Appendices dated 17.08.2012 is available at page no. 6 to 43 of the paper book and is the basic document and the relevant clauses of same starting from page 9, are reproduced as below :-

“WHEREAS the Employer is desirous of setting up $\pm 800kV$, 3000 MW HVDC Terminal ' Package associated with Western / Northern Region Interconnector for IPP Projects in Chhattisgarh under "National Grid improvement Project" and had invited bids for complete project- management, design, engineering, manufacture, testing, supply, port handling and customs clearance for the Plant and Equipment including mandatory Spares to be supplied from abroad, further handling, inland transportation and delivery at destination Site, unloading, storage, - handling at site, erection/installation including associated civil works, employer staff training, testing and commissioning including performance testing of Plant and Equipment including mandatory Spares and any other services as required for complete execution of the package.

WHEREAS M/s. ALSTOM Grid 'UK Limited participated in the above referred bidding vide its First Stage bid proposal reference rro.T0193 dated 26.11.2011, updated Technical Bid, Compliance to Amendment No.-I and Clarification to the

provisions of the Bidding Documents pursuant to First Stage Bid Evaluation. submitted vide communication reference CC-CS/156-WR1/HVDC-1489/7/G10 dated 12.03.2012 and Second Stage Bid vide ref. No. T0193 dated 21st March 2012 read alongwith discount letter ref no. T- 0193/01 dated 22.03.2012.

WHEREAS, as per the provisions of the Bidding Documents (Part I) and confirmations as per the documents referred in Notification of Award mentioned under Article 1.1 below, the construction of contracts shall be as follows:

First Contract' for CIF Indian Port of Entry supply of Plant and Equipment including mandatory Spares from outside India, Type Test and Training to be conducted outside India (also referred to as Off-Shore Contract),

'Second Contract' for Ex-works supply of Plant and Equipment including mandatory Spares from within India and Type Test to be conducted within India (also referred to as On-Shore Supply Contract), and

Third Contract' for all services to be performed in India covering, inter alia, port handling, port clearance, inland transportation, insurance, delivery at site, handling, storage, erection including associated civil works, testing and commissioning of all equipment and materials, including the equipment supplied under the First Contract end the Second Contract, Training in India etc. (also referred to as On-Shore Services Contract).

WHEREAS M/s. ALSTOM Grid UK Limited in their Bid, had proposed M/s. ALSOM T&D India Limited having its Registered Office at A-18, First Floor, Okhla Noida-201301, U.P. Area, Phase-II, New Delhi-110020 and business address as A-7, Sector-65, : ca-201301, (hereinafter referred to as "ALSTOM-I" as their Associate for the purpose of executing the On-Shore Supply Contract and On-Shore Services Contract) and furnished "ALSTOM-I" written unequivocal consent vide their letter dated 26.11.2011 (enclosed in their First Stage bid) to work as Employer's independent Contractor, on the terms and conditions as laid down in the Bidding Documents.

WHEREAS the associate proposed by ALSTOM has been accepted by the Employer, as above, subject to the condition that ALSTOM shall be overall responsible and liable for the execution of all the three Contracts irrespective of the fact that the Employer will enter into the 'First Contract' with them and the 'Second Contract' and the Third Contract' with ALSTOM-I. Further, in the Contract Documents, for 'First Contract' the word 'Contractor' shall mean ALSTOM, who had submitted the bid and shall, for the purpose of 'Second Contract' and 'Third Contract', include' ALSTOM-I - the Permitted Associate of ALSTOM. Accordingly, without prejudice to the overall responsibility and the liability of ALSTOM for the execution of all the three Contracts, the word 'Contractor' wherever appearing in the 'Second Contract' and the Third Contract' shall also mean ALSTOM-I.

*WHEREAS the Employer desires to engage the **Contractor for the CIF Indian Port of Entry supply** of all Plant and Equipment including mandatory Spares inter-alia including Design, engineering, manufacture, testing at manufacturer's works and CIF supply of all off-shore equipment and materials from country(ies) outside India including Type Testing and training to be conducted outside India for the complete execution of the ± 800 kV, 3000 MW HVDC Terminal Package associated with Western / Northern Region. Interconnector for IPP Projects in Chhattisgarh under "National Grid Improvement Project" as detailed in the Contract Documents ("the Facilities"), and the Contractor has agreed to such engagement upon and subject to the terms and conditions hereinafter appearing.*

Article 6.

ALSTOM having proposed ALSTOM-I as its Associate for the purpose of executing the On-Shore Supply Contract and On-Shore Services Contract and furnished ALSTOM-I's written unequivocal consent to work as the Employer's independent Contractor, on the terms and conditions as laid down in the Bidding Documents and, in accordance with the confirmations as per the documents referred in Notification of Award mentioned under Article "1.1 above, Contract Agreement Nos. CC-CS/156-WR1/HVDC-1489/7/G10/CA-II/4336 and CC-CS/156-WR1 /HVDC-1489/7/G10/CA-III/4337 between the Employer and the Contractor's Associate - ALSTOM-I has

also been made on 17.08.2012, respectively for the On-Shore Supply Contract (also referred to as the 'Second Contract') and On-Shore Services Contract (also referred to as the Third Contract').

*The scope of 'Second Contract' includes Design, engineering, manufacture, testing at manufacturer's works and Ex-works supply of all the equipment and materials including mandatory spares from within India and Type Testing, as detailed in the Contract Documents of said contract, required' for the complete execution of $\pm 800\text{kV}$, 3000 MW HVDC Terminal Package associated with Western / Northern Region Interconnector for IPP Projects in Chhattisgarh under "National Grid Improvement Project". **The scope of 'Third Contract'** includes all services to be performed covering, inter alia, port handling, port clearance, inland transportation, insurance, delivery at site, handling, storage, erection including associated civil works, testing and commissioning of all the Plant and Equipment including mandatory Spares supplied under the Off- Shore Contract and On-Shore Supply Contract, Training in India etc. and any other services specified in the Contract Documents of said contract, for complete execution of $\pm 800\text{kV}$, 3000 MW HVDC Terminal Package associated with Western / Northern Region Interconnector for IPP Projects in Chhattisgarh under "National Grid Improvement Project".*

Notwithstanding the award of work under three separate Contracts in the aforesaid manner, ALSTOM shall be overall responsible to ensure the execution of all the three Contracts to achieve successful completion and operational acceptance / taking over of the facilities by the Employer as per the requirements stipulated in the respective Contract Documents. It is expressly understood and agreed by ALSTOM that any default or breach by its Associate, ALSTOM-I under the 'Second Contract' and/or Third Contract' shall automatically be deemed as a default or breach of this 'First Contract' also and vice-versa, and any such default or breach or occurrence giving the Employer a right to terminate the 'Second Contract' and/or Third Contract', either in full or in part, and/or recover damages under those contract(s), shall give the Employer an absolute right to terminate this Contract, at ALSTOM risk, cost and responsibility, either in full or in part and/or recover

damages under this 'First Contract' as well. However, such default or breach or occurrence in the 'Second Contract' and/or 'Third Contract', shall not automatically relieve ALSTOM of any of its obligations under this 'First Contract'. It is also expressly understood and agreed by ALSTOM that the Plant and Equipment including mandatory Spares supplied by ALSTOM under this 'First Contract' and by its associate, ALSTOM-I under the 'Second Contract', when erected and commissioned by its associate, ALSTOM-I under the 'Third Contract' shall give satisfactory performance in accordance with the provisions of the Contract".

14.1 Further, from the notification of award of off-shore contract dated 21.06.2012 and the relevant minutes dated 28.10.2011, page 125-127 of PB, relevant clauses are reproduced as below :-

"1.3 Your First Stage Bid submitted for the subject package under Proposal reference no. T0193 dated 26.11.2011; which was opened on 28th November, 2011. In your bid, you have confirmed that M/s. ALSTON T&D India (ALSTOM INDIA) (earlier known as M/s. AREVA T&D India Limited) shall be your Associate for the purpose of executing the On-Shore Supply Contract and On-Shore Services Contract (refer para 2.2 below) and furnished ALSTOM INDIA'S written unequivocal consent vide their letter dated 26.11.2011.

.....

*12.1 We confirm having accepted your Bid referred to at para 1.3, 1.7 & 1.8 above) read in conjunction with all the specifications, terms & conditions of the Bidding Documents (referred to at para 1.2, 1.2.1, 1.2.2, 1.2.3 & 1.6 above) and your confirmations as per the documents referred above, and award on you the 'Off-Shore Contract' (also referred to as the 'First Contract') covering inter-alia supply on CIF Indian Port of Entry of all equipment and materials, mandatory spares including Type Testing to be conducted outside India, Training to be imparted abroad for the complete execution of the ± 800 kV, 3000 MW HVDC Terminal Package associated with Western / Northern Region Interconnector for IPP Projects in Chhattisgarh under "National Grid Improvement Project", as detailed in the Bidding Documents referred hereinabove. **The scope of work inter-alia includes the following: Design,***

engineering, manufacture, testing at manufacturer's works and CIF supply of all off-shore equipment and materials from country(ies) outside India including Type Testing and training to be conducted outside India.

The scope of work under this Notification of Award (NOA) shall also include all such items which are not specifically mentioned in the Bidding Documents and/or your bid but are necessary for the successful completion of your scope under the Contract for the construction of ± 800 kV, 3000 MW HVDC Terminal Package associated with Western / Northern Region Interconnector for IPP Projects in Chhattisgarh under "National Grid Improvement Project", unless otherwise specifically excluded in the Bidding Documents or in this NOA.

2.2 *As per the Record Notes of Clarification Meetings (referred to in para 1.5 above) and the acceptance of proposed Associate confirmed vide our communication dated 01.03.2012 (referred to in para 1.6 above), we have notified your Associate M/s. ALSTOM T&D India Limited vide our Notification of Award Ref. No. CC-CS/156- WRI/HVDC-1489/7/G10/NOA-II/4336 dated 21.06.2012 for award of 'On-Shore Supply Contract' (also referred to as the 'Second Contract') for the subject package which includes the Ex-works supply of all equipment/materials including Type Testing to be conducted within India, required, for the complete execution of ± 800 kV, 3000 MW HVDC Terminal Package associated with Western / Northern Region Interconnector for IPP Projects in Chhattisgarh under "National Grid Improvement Project", 'as set forth in the Bidding Documents., viz. Design, engineering, manufacture., testing at manufacturer's works and Ex-works supply of all the equipment and materials including mandatory spares and Type Testing from within India. We have also notified your Associate M/s. ALSTOM T&D India Limited vide. our Notification of Award Ref. No. CC-CS/156-WRI/HVDC-1489/7/G10/NOA-III/4337 dated 21.06.2012 for award of 'On-Shore Services Contract' (also referred to as the Third Contract') for performance of all other activities, as set forth in the Bidding Documents, viz. port handling, port clearance, inland transportation, insurance, delivery at site, handling, storage, erection including associated civil works, testing and commissioning of all equipment and materials, including the*

equipment supplied under the First Contract and the Second Contract, Training in India etc. required for the complete execution of +800kV, 3000 MW HVDC Terminal Package associated with Western / Northern Region Interconnector for IPP Projects in Chhattisgarh under “National Grid Improvement Project”

Notwithstanding the award of work under three separate Contracts in the aforesaid manner, you shall be overall responsible to ensure the execution of all the three Contracts to achieve successful completion and taking over of the works under the package by the Employer as per the requirements stipulated in the Bidding Documents. It is expressly understood and agreed by you that any default or breach by your Associate , M/s. ALSTOM T&D India Limited under the ‘Second Contract’ and/or the Third Contract’ shall automatically be deemed as a default or breach of this ‘First Contract’ also and vice-versa, and any such default or breach or occurrence ,, giving us a right to terminate the 'Second Contract' and/or 'Third Contract', either in full or in part, and/or recover damages under those contract(s), shall give us an absolute right to terminate this Contract, at your risk, cost and responsibility, either in full or in part and/or recover damages under this ‘First Contract’ as well. However, such default or breach or occurrence in the ‘Second Contract’ and/or Third Contract’, shall not automatically relieve you of any of your obligations under this 'First Contract. It is also expressly understood and agreed by you that the equipment/materials supplied by you under this 'First Contract' and by your Associate M/s. ALSTOM T&D India Limited under the ‘Second Contract’, when erected, installed & commissioned by your Associate M/s, ALSTOM T&D India Limited under the Third Contract' shall give satisfactory performance in accordance with the provisions of the Contract.”

15. When these minutes dated 28.10.2011 are considered, the clause 1.3 makes it apparent that in the bid itself ALSTOM-I was proposed and confirmed as an Associate for the purpose of executing the on-shore supply and service contracts. So having an Indian Associate was an integral part of the Bid and not introduced at the discretion of the assessee. Reference in this context can be

made to the bid document of September, 2011 containing special conditions of contract available at page no. 231 of the paper book which required that successful bidder shall be under an obligation for entering into the three contracts. The first for off-shore contract and second & third for on-shore supply contract.

16. Next in the notification of the award, the **‘scope of contract’** of the off shore contract, given to the assessee was limited to, *“Design, engineering, manufacture, testing at manufacturer’s works and CIF supply of all off-shore equipment and materials from country(ies) outside India including Type Testing and training to be conducted outside India.* As distinguished with Scope of contract, meant for Second and Third Contracts. Thus there was not one scope of contract under which the assessee and Indian Associate were working together.

17. In aforesaid context only, this notification of award letter dated 26.06.2012 in clause 2.2 mentions that as ALSTOM-I was **‘awarded’** contract 2 and 3 for which **‘separate notification’** of award on-shore supply contract and on-shore service contract was made on 21.06.2012. Thereupon the off-shore contract was executed on 17.08.2012 where it was specifically mentioned that ALSTOM-I was made part of the contract as the part of proposal at the bid stage itself. This off-shore contract specifically mentions that ALSTOM-I shall be **‘independent contractor’** of PGCIL on the terms and conditions as laid down in the bidding document. Article 6 of this document dated 17.08.2012 specifically makes reference to ALSTOM-I’s **‘written unequivocal consent to work as the independent contractor of PGCIL’** and that separate contracts have been entered between PGCIL and Indian Associate of the assessee, ALSTOM- I, on the same date 17.08.2012 for the second and third contract.

18. The aforesaid discussion of the relevant clauses leave no doubt in the mind of this Bench that at the stage of bid itself ALSTOM-I had joined the

assessee in terms of the requirement of the bid. These clauses and stipulations go on to establish that there was a collaborative effort of the assessee and the Indian associate and as such there was not actually a consortium to which one contract was awarded with bifurcation at level of the members of Consortium. The award of separate off shore contract by the PGCIL to assessee and on shore contracts to the permitted associate ALSTOM-I, which was classified as independent contractor of employer, coupled with the execution of separate contracts with defined scope of work of each contract, required each party to perform its obligation under the respective contracts awarded to them separately and to receive the consideration under the contracts independent to each other. The terms negotiated and document executed firmly establish that there was no mix up in the role and identity.

19. The Ld. Tax Authorities below have actually fallen in error in construing the aforesaid discussed clauses because what appears to be a narrow and not a pragmatic approach. As observed above, they were selective in considering the bid and contract documents clauses and failed to take note of it as a whole and to understand the business prudence of such Bidding involving International entities, while dealing with Indian entities, for such infrastructural contracts. The Ld. AO has merely focused on the fact of three contracts, alleging that a single composite contract awarded on turnkey basis was split artificially into three sub-contracts by the assessee. The matter of fact happens to be it was a condition in bid and there was nothing on the part of assessee to do the splitting of a composite contract.

20. Then the Ld. DRP has fallen in error in making certain factual errors in observations. As for instance in para no. 5 of its order Ld. DRP mentions that there are only two signatories to all the three contracts namely PGCIL (the Employer) and the assessee company (the Contractor). The above discussion has established there were three different award of contract and three different

contracts were signed and executed. Only the 'first contract' was executed and signed between the assessee and PGCIL.

20.1 Further in para 5, the Ld. DRP has taken into account 'Part D' of a document relating to "commercial issues", and mentioned that it provided that "*if ALSTOM-I fails to enter into the second contract and the third contract, the said contracts shall be entered into between ALSTOM and Power Grid in lines with the provisions of the bid document*". Now as a matter of fact this clause is part of Appendices 10, to the off-shore agreement which contains 'specific agreements' made during meetings held from 03.07.2012 to 05.07.2012 between the PGCIL and M/s. ALSTOM, along with its associate ALSTOM-I. This agreement was on the part of ALSTOM to execute second and third contract, merely as an assurance that at advance stage after the bid is accepted and before the contract is actually executed the bid is not frustrated. In any case when the three contract stand executed on 17.08.2012, the issues discussed in the meeting between 03.07.2012 and 05.07.2012 became superfluous but Ld. DRP has unnecessarily stressed upon the same to draw a conclusion that primary commitment in all the three contracts was of the assessee.

20.2 Further in para 5.2, the Ld. DRP has reproduced para 3.2 of the notification of award dated 21.06.2012 without understanding the context in which the same was made. As for the convenience para 5.2 of the order of DRP is reproduced as below :-

"5.2 It has also been clarified at para 3.2 therein that-

"3.2 Notwithstanding the break-up of the Contract Price, the Contract shall, at all times, be construed as a single source responsibility Contract and any breach in any part of the Contract shall be treated as a breach of the entire Contract."

As a matter of fact that this para 3.2 is part of clause 3.0 in notification of award, which makes reference to contract price and it will be beneficial to

reproduce the whole of it, from the notification of award dated 21.06.2012, available at page no. 127 of paper book as under :-

“3.0 Contract Price

3.1 The total Contract Price for the entire scope of work under this Contract shall be GBP 107,590,567 + EURO 68,835,118+USD 13,559,144 (Great Britain Pound One Hundred Seven Million Five Hundred Ninety Thousand Five Hundred Sixty Seven Plus Euro Sixty Eight Million Eight Hundred Thirty Five Thousand One Hundred Eighteen Plus USD Thirteen million Five Hundred Fifty Nine Thousand One Hundred ' Forty Four Only) as per the following break-up :

<i>Sl. No.</i>	<i>Price Component</i>	<i>Amount</i>	
<i>1.</i>	<i>CIF Price Component</i>	<i>GBP</i>	<i>107,590,567</i>
		<i>EURO</i>	<i>68,835,118</i>
		<i>USD</i>	<i>13,559,144</i>
<i>2.</i>	<i>Type Test Charges</i>		<i>Included</i>
<i>3.</i>	<i>Training Charges</i>		<i>Included</i>
	<i>Total for Off-Shore Contract</i>	<i>GBP</i>	<i>107,590,567</i>
		<i>EURO</i>	<i>68,835,118</i>
		<i>USD</i>	<i>13,559,144</i>

3.2 Notwithstanding the break-up of the Contract Price, the Contract shall, at all times, be construed as a single source responsibility Contract and any breach in any part of the Contract shall be treated as a breach of the entire Contract.

20.3 Ld. DRP has fallen in error in considering that the reference here to “single source of responsibility” is with regard to three contracts but the matter of fact is that it was only in context to the contract price for the off-shore contract. The off shore contract had three components; first being ‘CIF price component’ for which the contract price was disclosed and further the assessee was supposed to provide ‘type test’ and ‘training’ but the charges for same were included in the contract price for ‘CIF price component’ and in reference to that it was agreed that any breach in any part of the contract shall be treated as a breach of the entire contract. Here the entire contract has reference to the off-shore contract and not all the three contracts.

20.4 Further, Ld. DRP has fallen in error in considering the ‘scope of work’ mentioned in the bid to be the contract which has been awarded by PGCIL to assessee while as discussed above, the notification of award of the off-shore contract dated 21.06.2012 gave the limited scope of work in off-shore contract and there is a separate delineation of scope of the work for second and third contract awarded to ASTOM-I. Thus Ld. DRP has fallen in error to conclude there is no separate delineation of work.

21. Lastly, the major focus of tax authorities below and Ld. DR has also been on the fact that under the bid and the three contracts the ultimate responsibility of execution and liability in case of breach remained with the assessee. In this context, the Bench is of considered opinion that the business prudence involving such major infrastructure projects cannot be examined and questioned by the revenue authorities attributing bare motives and to assume that the different contracts under one bid are with only intention to escape taxation. Such arrangements are more out of business prudence and usually for the safeguard of the rights of Indian entity, like PGCIL, which negotiates and gets executed such infrastructural facility contracts. The intention being successful commissioning of the project and that it is not abandoned or frustrated due to involvement of many parties, each performing some part, by shouldering any delay or latches, on other unrelated party.

21.1 In this context, reliance can be placed on the judgment of Hon’ble Delhi High Court in **Linde AG, Linde Engineering Division (supra)** wherein dealing with the reasons for having such clauses to make parties to a consortium being joint and safely liable under a contract, Hon’ble High Court observed in para 53 and 55 as follows :

“53. We are also unable to accept the contention that the fact that Samsung and Linde had agreed to be jointly and severally liable for performance of the contract, would be sufficient to hold

that they constituted an Association of Persons for the purposes of the Act. Linde and Samsung agreeing to be jointly and severally liable to OPAL for due performance of the Contract only indicates that Linde and Samsung had accepted a contractual obligation towards a third party, the same does not by itself lead to a conclusion that the said members had formed an Association of Persons. Any entity/individual may agree, for its own business purposes, to accept a liability for due performance of an obligation of another. This by itself would not lead to a conclusion that the said persons had formed a common enterprise or an association which was moved by joint action for a common purpose. As a matter of illustration, let us take a case where a director of a company provides a personal guarantee for a loan taken by the company. Having stood as a surety for the company, the director and the company would be jointly and severally liable to the lender. However, they continue to be independent of each other and the fact that are jointly and severally liable cannot possibly lead to the conclusion that the company and its director constitute an Association of Persons for the purposes of the Act. In order for independent entities/individuals to be considered as an Association of Persons, they must exhibit some trappings of a partnership in relation to their common enterprise.”

“55. In every project which is executed by multiple independent agencies, a certain level of cooperation and coordination is required to ensure that the agency involved performs its work in a timely manner as per a predetermined schedule in order to enable the other agency to commence and complete its portion of work. The level of cooperation as agreed between Linde and Samsung was also akin to the level of cooperation as expected from independent agencies executing a project. This can be understood by taking an illustration of a simple project for construction of a building. It is only after an Architect or a Designer provides the detailed drawings that a civil contractor can commence construction. Similarly, it is only after the civil construction is commenced and progressed to a certain level that space for electrical contractors is available for them to perform their work. The work of Interior finishing can take place only after the civil works are complete. The fact that each of the aforesaid agencies, namely, the architect, the civil and electrical contractors are required to complete their work in a pre-determined sequence and are required to cooperate with each

other in providing the necessary information and adhering to a specified schedule would not necessarily imply that the architect, civil contractors and electrical contractors had formed an Association of Persons. In this illustration each one of the participants works towards a common project with a certain level of cooperation. However, since the said participants do not act as a single cohesive entity, but perform their independent allocated works, they cannot be considered as an Association of Persons. In order to consider independent agencies as an Association of Persons, it is necessary that they form a joint enterprise with a greater level of common management. An element of mutual agency and joint action for mutual purpose is also necessary. Mere obligation to exchange information, between independent agencies, for co-ordinating their independent tasks would not result in an inference that the agencies had constituted an Association of Persons.”

22. Hon’ble Delhi High Court in the **Linde AG Case (supra)** has also referred to case of **Hyundai Rotem Co., in re [2010] 323 ITR 277/190 taxman 314 (AAR)** which was also referred by the assessee before Ld. Tax Authorities below and where the facts were that Hyosung Corporation submitted a bid for execution of the works relating to 800 KV/400KV Tehri Pooling Station which was floated by Power Grid Corporation of India Limited (Power Grid). The applicant was successful and its bid was accepted. As per the terms and conditions of the bid, the applicant could assign the whole or part of the work to an independent contractor subject to the approval of Power grid. In terms of this provision, the applicant requested that part of the contract relating to onshore supply and services be assigned to M/s L & T. Accordingly, Power Grid entered into a separate contract for onshore supplies and services with M/s L & T. Although, Hyosung continued to be responsible for the overall execution of the project, the scope of work of Hyosung was limited to the offshore portion of the contract. The facts of this case are quite identical; with PGCL being a common party and Ld. AAR in this matter vide application AAR no. 773 of 2008 order dated 17/6/2009, after taking into consideration the overall responsibility stipulations for the successful completion of the three contracts rested with the

applicant Hyosung in line with the proposal in the bidding document, observed in para 7.4 that;

“By incorporating various safeguards in the contract, Power Grid took the necessary precautions to see that notwithstanding the split up of contract into three, the applicant and L&T would act in harmony and maintain requisite coordination for the timely and successful completion of project. Such a role assigned to the applicant by Power Grid was in the overall interest of the project. It is an arrangement conceived of and agreed to by the parties keeping in view the overall objective of successful commissioning of the project.”

23. Thus, the bench is of considered opinion that the Ld. Tax Authorities below have fallen in error in concluding that there was an artificial split of a contract and that there was one inseparable, indivisible and composite contract.

24. On the basis of aforesaid discussion the question of assessee having a permanent establishment (PE) can be examined. Ld. AO has not given any substantial reason on the basis of evidence while what weighted heavily in the mind of Ld. DRP was that the supply of equipment on the basis of off-shore contract would have been rendered meaningless in the absence of services of supervision, erection commissioning etc. all of which was an indivisible part of the contract.

25. The Bench is of considered opinion that when the allegation of the Revenue about an artificial split of contract is not sustained and it is established that the assessee has entered into the ‘First Contract’, in its independent capacity, there is no force in the finding of Ld. AO that GE India (Alostom-I) was actively involved in soliciting business for the assessee. In fact, there is substance in the contention of Ld. Sr. Counsel that in the bidding structure of present nature there is no question of someone ‘soliciting’ the business, as it was a case of open bid to which Indian and Foreign entities, both, were eligible to make the offer of bid.

25.1 There is no question of any agent and principle relationship between the assessee and the Indian associate for a very substantial reason that PGCIL has treated in its contract documents, ALSTOM-I to be its 'Independent Contractor'. There is substance in the argument of Ld. Sr. Counsel on the basis of judgment of Hon'ble Supreme Court in **CIT vs. E-funds IT solutions (supra)** that the onus was on the department to prove the existence of PE. The Bench is of considered opinion that such an onus can be considered discharged by specific reference to the evidence. No evidence is brought on record to show that the Indian Associate was employed by any 'act' of the assessee to represent the assessee independently while dealing with PGCIL. On the contrary what is established is that it was the assessee at whose proposal, ALSTOM-I was accepted to be an Associate of the assessee and the employer PGCIL treated ALSTOM-I as its 'independent contractor' on the terms and conditions, as laid down in the bidding document. If there was any involvement of the employees of Indian Associate, at any stage in the meetings between assessee and the PGCIL that was bound to be there and outcome of the fact that assessee and its Indian associate were required to work in tandem and that does not give rise to existence of a dependent agent P E of the assessee.

26. As with regard to the question of Indian Associate being a Construction PE again there is force the contention of Ld. Sr. Counsel that the findings of Ld. Tax Authorities below are not on the basis of any facts and evidence. The case of assessee as submitted and established is that under 'First contract' it was merely liable to make offshore supplies. Thus, assessee was not engaged in any construction project in India. Its revenues were outcome of the offshores supplies and services rendered off shore. Thus, there was no question of constitution of the Construction PE as per Article 5(2) of the DTAA.

27. As for the applicability of Section 44BBB of the Act, is concerned, it can be observed that the foundation of it was existence of a PE. The assessee under

the 'First contract' was merely under obligation to make off shore supplies and wherein property in the goods transferred outside Indian, therefore as Section 44BBB does not speak of engagement of a foreign company for 'supply' in connection with the turnkey Power Project, the provisions of Section 44BBB are not applicable. Thus Ld. DRP has fallen in error in sustaining application of Section 44BBB of the Act, on premises that the assessee is involved in the end to end execution of the project in India. The revenue derived by the assessee were on the basis of offshore supplies and not out of any construction, erection, testing or commissioning activities of a turnkey power project in India. Thus, the application of section 44BBB to such revenue, which is not per se taxable India, is not sustainable.

28. It also appears that the Revenue is not disputing the fact that under the 'First Contract' assessee was only supposed to make off shore supplies. Otherwise too it is appearing from the recitals of 'First Contract' that the procurement by PGCIL, was on the basis of, "CIF Indian Port of Entry supply". The title in property had passed outside India. The payments were also made outside India in terms of this contract. The settled proposition of law in this regard, rightly relied by Ld. Sr Counsel for assessee, is sustainable and the relevant conclusion in para 79, from the judgment of Hon'ble Supreme court in the case of **Ishikawajma-Harima Heavy Industries Ltd. (supra)** is reproduced below;

“Re : Offshore Supply :

- (1) That only such part of the income, as is attributable to the operations carried out in India can be taxed in India.*
- (2) Since all parts of the transaction in question, i.e. the transfer of property in goods as well as the payment, were carried on outside the Indian soil, the transaction could not have been taxed in India.*
- (3) The principle of apportionment, wherein the territorial jurisdiction of a particular state determines its capacity to tax an event, has to be followed.”*

29. Thus, the Bench is inclined to conclude that there was not an artificial split of bid into three separate contracts to avoid taxes in India. In the present case, the Indian Associate's non-involvement in off-shore transaction excludes it from being a part of the cause of the income itself, and thus there is no business connection. The Ld. Tax authorities below failed to appreciate the distinction between the existence of a business connection and the income accruing or arising out of such business connection, which is clear and explicit. It is established that assessee had no business connection or dependent agent PE or construction PE in India. The attribution of profit from off-shores supplies made to PGCIL to the alleged business connection or PE and application of Section 44BBB is not sustainable. The Ld. Tax Authorities below have fallen in error to hold that off-shores supplies to PGCIL are taxable in India. The assessee was merely under liability for making off-shores supplies to PGCIL under the 'First contract' for which the revenue earned is not taxable in India. **Consequently, ground no. 3 to 8 are decided in favour of the assessee.**

30. **Ground no. 9 to 11;** It was contended on behalf of the assessee by the Ld. Sr. Counsel that at the time of passing final assessment order, the Ld. AO has not complied with binding directions of DRP. Raising the question that Offshore supply receipts from GETDIL & SFO Technologies- Ld. AO did not follow DRP directions Ld. Sr. Counsel relied **ESPN Star Sports Mauritius SNCET Companies vs Union of India: 388 ITR 383 (Del)**, **Global One India Pvt Ltd vs DCIT: ITA No.1980/Del/2014 (Del Trib.)** and he submitted such addition is not sustainable. Ld. DR however, supported the findings of Ld. Tax Authorities below.

31. It can be appreciated in regard to these grounds that Ld. DRP in para 5.15 of its order had specifically directed the Ld. AO that receipts on account of offshores supplies made by the assessee to GE T&D and SFO, if they are not

related to the PGCIL contract, which is the basis of addition in the draft assessment order, be deleted. Ld. AO in para 20 of final assessment order observed as follows :-

“20. In view of the directions of the Hon’ble DRP the receipts from GE T& D India Ltd. and SFO Technologies have been reexamined and it is held that Since the company constituted a dependent agent PE in India (GET&D) as far as the assessee’s entire operations in India were concerned and the same has been upheld by the Ld. DRP. It is pertinent to mention here that once PE has been established for a transaction, it needs not to be established for each and every transaction. Moreover, the supplies are of very high technical specifications, customised machinery and given that the assessee company is a leader in its field, these supplies were to be assembled and made operational/commissioning in India only by itself or its associated enterprises (which is GE T&D in this case), thus such receipts are taxable as discussed in preceding paras.

Without prejudice to the above, the assessee company has not furnished copy of agreement of offshore supply with GE T&D and SFO Technologies. It has only furnished sample invoices in case of Offshore supply made to GE T&D. In absence of any underlying agreement, assessee’s claim that offshore supply made to GE T&D and SFO technologies is not related to PGIL contract can not be ascertained. In view of the above, the offshore supplies made to GE T&D and SFO Technologies are taxable as per DTAA and Income Tax Act. Further, the DRP has also upheld the taxability of Global operation fee amounting to Rs. 15,27,62,000 as Fee for Technical services as per DTAA and Income Tax Act.

32. The Bench is of considered opinion that once the foundation of the findings of Ld. AO on the basis of dependent agent PE status of GE T&D India and SFO technologies is not sustained by this Bench, the foundation of his reasoning in para no above stands washed away. At the same time what comes up is that assessee had claimed that there was no agreement with GE T&D and SFO technologies and on the basis of orders and invoices generated, the supplies were made. Ld. AO has stressed on the agreement without appreciating

that the invoices as made available in the paper book from 281 to 371, have terms and conditions described on the purchase order. Thus, on the basis of general terms and conditions, purchase orders were raised and on the basis of which the offshore supplies were made to these two Indian companies. Ld. AO was under obligation to give effect to the orders of DRP in a substantive manner but without there being anything on record to show on the part of the Ld. AO that the supplies were in regard to PGCIL contract with the assessee, the addition was made by ignoring invoices. Thus, these grounds are sustained and decided in favour of the assessee.

33. **Ground no. 12;** In regard to this ground it can be appreciated that Ld. AO made the general observations while Ld. DRP observed that the specialize / customize training provided by the assessee to the users for assessee and use of specific technical content available for their business ‘make available’ technical knowledge, skill and experience within the meaning of and scope of Article 13 of the DTAA. It has taken into consideration certain specific services on account of which the assessee had received global operation fees. **The relevant para 6.3 of the order of ld. DRP is reproduced below :-**

“6.3 On perusal of the relevant Global Operation Fees Agreements for the years 2017 and 2018 entered into between GE T&D India Ltd and the assessee, which are available in the paper book filed in DRP proceedings, the following services, inter alia, are seen to be provided therein under the respective Heads-

- a) *Technical support for manufacturing process.*
- b) *Test system- which includes Test System design, Test Software development and provision for upgrades and new products, design and provision of test jigs and fixtures, providing of technical support in respect of system failure, process performance, spares and maintenance and Training of local support engineers on system.*
- c) *Project managed introduction of new products*

into manufacturing units

d) Coordinate and manage introduction of design changes- Technical support and liaison between units and teams, E.g. R & D.

e) Master Data- Creation of product configurators on Global IT system, creation of products and materials on global system for use within local unit, training for local units in adaptation of Bom's, routings and configuration in line with global rules, providing of technical assistance and support and product structure related issues and Training of local team in configurator development.

f) Indirect support- Technical support to suppliers on process support, test system design and support, test fixture design and support, technical/quality issue resolution.

g) Component approval – Provide technical data and specifications and Training of local support engineers on system use.

h) Localisation- Provision of technical details, technical support for supplier development, facilitation of qualifications to global standard and facilitation of product approval for manufacture.

i) Creation of technical documentation for products.

34. In regard to this ground it was submitted on behalf of the assessee by Ld. Sr. Counsel that there were various services which were rendered for multiple functions to ALSTOM-I and those with regard to Global Industrialization function amounting to Rs. 7,15,24,966/- were offered to tax in the return of income and the balance services valued for Rs. 8,12,37,034/- were not offered to tax as the corresponding services do not fulfil the “make available” clause of paragraph 4(c) of Article 13 of the DTAA. Relying various judgments it was stressed that ALSTOM-I is not enabled to employ these services on its own so the ‘make available’ clause is not applicable. The service provisions were primarily managerial in nature and do not involve any technical knowledge etc. to fulfil the make available test. In context to the principle that the Global operation fee received from GETDIL is not taxable in India in absence of ‘make

available’ and as to how the phrase ‘ Make available’ is interpreted under law, the Ld. Sr. Counsel relied **CIT vs De Beers India Minerals (P) Ltd: 346 ITR 467 (Kar)**, **DIT vs Guy Carpenter & Co Ltd: 346 ITR 504 (Del)**, **Autoliv ASP Incvs DCIT (International Taxation): [2022] 194 ITD 253 (Del Trib.)**, **Anand NVH Products Incvs ACIT: ITA No.1951/Del/2021 (Del Trib.)**, **NTT Asia Pacific Holdings Pte Ltd vs. ACIT: 196 ITD 591 (Mum Trib.)**, **Raymond Ltd vs DCIT: 86 ITD 791 (Mum Trib.)**, **GE Energy Management Services Incvs ADIT: 193 ITD 485 (Del Trib.)**, **Bombardier Transportation Sweden AB vs DCIT: 90 ITR(T) 405 (Del Trib.)**, **Bio Rad Laboratories Incvs ACIT: ITA No.994 & 996/Del/2022 dated 30.12.2022 (Del Trib)Ld.**

34.1 Supporting his contention that Managerial services are not FTS in absence of ‘managerial’ word in India-UK DTAA the Id. Sr. Counsel relied **Steria (India) Ltd vs CIT: 386 ITR 390 (Del)** and **Everest Global Incvs DDIT: 194 ITD 729 (Del Trib.)**. Ld. DR however, defended the findings.

35. In this context, it can be observed that the Global Operation Fees Agreement made available at page no. 372-396 of paper book along with copy of invoices available at page no. 397-403 of the paper book establish, that the assessee had agreed to provide services which included industrialization of products, sources and procurement of raw materials, setting quality standers, supply general and contracts. The industrialization support for SMP services details and descriptions have been given in appendix II available at page no. 377 of the paper book. Ld. DRP has merely taken into consideration the sub-heads of Global Industrialization support services, which have infact already accrued to tax. Ld. Tax Authorities below have approached the issue with the very general discussion without appreciation of any evidence and facts to show that how the other services fall into the category make available clause. The essence of ‘make available’ clause is that the technical knowledge or skills of the provider should be imparted to be absorbed by the receiver so that the receiver

can deploy similar technology or technique in the future without dependent upon the provider. However, in the case in hand for the services rendered, there is renewal of contract on annual basis and the nature of services are all prima facie managerial in nature. They have also passed the arm's length tests. Thus Ld. Tax authority below have fallen in error in taxing global operation fee of Rs.8,12,37,030 received from GETDIL as Fees from Technical Services ("FTS") under the provisions of the Act and the India-UK DTAA, without appreciating that provision of said services by the Appellant did not satisfy the 'make available' clause contained in Article 13(4)(c) of the India-UK DTAA. Ground is adjudicated in favor of assessee.

36. Consequent to determination of raised and argued grounds no 3 to 12 in favour of assessee, **the appeal is allowed**. Impugned final assessment additions are deleted with consequential effects.

Order pronounced in the open court on 12th April, 2023.

Sd/-

(N.K.BILLAIYA)

ACCOUNTANT MEMBER

Date:-12.04.2023

Binita, SR.P.S

Copy forwarded to:

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

Sd/-

(ANUBHAV SHARMA)

JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT, NEW DELHI