

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“I” BENCH, MUMBAI**

**BEFORE SHRI KULDIP SINGH, JM &  
MS PADMAVATHY S, AM**

**I.T.A. No. 575/Mum/2023  
(Assessment Year: 2020-21)**

<b>Atomstroyexport</b> C/o Nuclear Power Corporation of India Ltd., 16, Centre 1, World Trade Centre, Cuffe Parade, Mumbai-400005.  <b>PAN :AAFCA3658N</b>	Vs.	<b>DCIT International Tax Circle-1(1)(2),</b> Room No. 517, 5 <sup>th</sup> Floor, Air India Building, Nariman Point, Mumbai-400021.
<b>Appellant)</b>	:	<b>Respondent)</b>

**Appellant/Assessee by** : Shri Manish Kanth / Manas  
Kulkarni, AR  
**Revenue/Respondent by** : Shri Ajay Kumar Sharma, CIT-DR  
  
**Date of Hearing** : 22.11.2023  
**Date of Pronouncement** : 12.12.2023

ORDER

**Per Padmavathy S, AM:**

This appeal is against the final order of assessment passed by the Dy. Commissioner of Income Tax, International Tax Circle – 1(1)(2), Mumbai dated

30.01.2023 passed under section 143(3) r.w.s. 144C(13) of the Income tax Act, 1961 (in short 'the Act') for the AY 2020-21. The assessee raised the following grounds:

***“Taxability of payment received under Offshore Supply Contracts***

*1) The learned DCIT/DRP erred in holding that the amount of Rs. 3267,27,22,775 received by the appellant company from the Offshore Supply Contracts was taxable in India.*

*2) The learned DCIT/DRP erred in holding that the amounts received by the appellant company from the Offshore Supply Contracts are covered by the provisions of section 44BBB and consequently liable to tax in India.*

*3) The learned DCIT/DRP failed to appreciate that the receipts from the Offshore Supply Contracts are not taxable in India.*

*4) The learned DCIT/DRP erred in charging interest under section 234A of Rs. 4.57,92,447/-.*

*5) The learned DCIT/DRP erred in charging interest under section 234B of Rs. 38,92,35,799/-*

***Relief Claimed***

*Your appellant prays that*

*1. The amount received under the offshore supply contracts is not taxable in India*

*The appellant craves leave to amend or alter any of the above grounds or add a new ground, if and when necessary.”*

2. The assessee is a joint stock company under the Ministry of Atomic Energy, Moscow, Russian Federation engaged in the business of setting up of power projects worldwide which includes activities of construction, erection of plant and machinery and testing, commissioning of power projects. For the year under consideration the assessee filed the return of income on 10.02.2021 declaring a total income of Rs. 139,30,94,700/-. The case was selected for scrutiny and the statutory notices were duly served on the assessee. The Assessing Officer (AO) passed a draft assessment order by making an addition of Rs. 3267,27,22,775/- towards receipts from off shore supply contracts to be taxable as income under section 44BBB of the Act. The assessee filed its objections before the Dispute Resolution Panel (DRP). The DRP disposed of the objections through order dated 30.12.2022. The assessee is in appeal before the Tribunal against the final order of assessment passed by the AO pursuant to the directions of the DRP.

3. Brief facts with regard to the issue under consideration – The Nuclear Power Plant Units are being set up at Kudankulam, Tamil Nadu by Nuclear Power Corporation of India Ltd. (NPCIL). This Nuclear Power Project is being implemented in accordance with an agreement for co-operation for construction of Nuclear Power Station between Republic of India and Russian Federation. Joint stock company (Atomstroyexport) (ASE) i.e. assessee and NPCIL a Government of India Company are the authorized governmental bodies of Russian Federation and Government of India respectively to act as agency responsible for implementation of the Nuclear Power Plant,. The original agreement of co-operation for construction was entered into between the Republic of India and the then Union of Soviet Socialist Republic (USSR) on 20.11.1988 and subsequent to the disintegration of the USSR a supplementary agreement dated 20.06.1998 was agreed between Republic

of India and the Russian Federation. Both these agreements are referred to as Inter Governmental Agreements (IGA). Pursuant to the said agreement assessee and NPCIL have entered into three service contracts and four off shore supply contracts. Service contracts included supply of detailed project report for Nuclear Power Station, elaboration of working documentation for the project, deputation of contractors, specialists at Nuclear Power Plant site, training of NPCIL's operation and maintenance personnel. The offshore supply contract envisaged supply of equipment and materials from third countries on free on board basis. The status of the various Power Plants units as on 31.03.2020 was that Unit 1 & 2 is completed and commenced operations, Units 3 & 4 and 5 & 6 are construction in process.

4. During the year under consideration, the assessee has received the following income and offered the same to tax in India:

<b>Sr.No.</b>	<b>Particulars</b>	<b>Amount (In Rs.)</b>
(a)	For deputation of the contractor's specialist at site KK 3 & 4	1,02,76,14,584
(b)	For elaboration of working Documentation KK 3 & 4	3,96,42,00,675
(c)	<b>Total</b>	<b>4,99,18,15,259</b>

5. The assessee has also offered the income received from contact consulting service for post warranty period at Unit 1 & 2 aggregating to Rs. 18,17,88,448/- as fees for technical service and also the income from first priority design work for Unit 5 & 6 for Rs. 70,83,45,236/-. During the course of assessment, the AO noticed that the assessee has received a sum of Rs. 3267,27,22,775/- as receipt by way of offshore supply contract. The AO was of the view that the said receipt is taxable in India and should be part of the income offered to tax under section 44BBB of the Act. The AO though made note of the fact that the Co-ordinate Bench in assessee's

own case for AY 2009-10, 2010-11, 2012-12, 2013-14, 2014-15 & 2015-16 has held that the receipts towards supply contracts do not form part of the business receipts for computation of income under section 44BBB of the Act made the addition towards the same for the reason that the Department is in appeal before the Hon'ble Bombay High Court and the issue should be kept alive for the year under consideration. The DRP also confirmed the addition made by relying on its own order for earlier AYs in assessee's own case.

6. The ld. Authorized Representative (AR) submitted that the impugned addition is made by the Revenue in all the AYs for the reason that the receipt from offshore supply contracts are inextricably linked to the offshore service contract and therefore, should be part of the business income under the provisions of section 44BBB of the Act. The ld. AR further submitted that one more ground on which the addition was made by the Revenue is that they cannot be any splitting of contract between onshore and offshore activities and therefore the income arising from service contract as well as offshore supply contract should be considered together for the purpose of section 44BBB of the Act. The Ld. AR also submitted that the Coordinate Bench of the Tribunal has considered the same issue in assessee's own case for AY 2009-10, 2010-11, 2012-12, 2013-14, 2014-15 & 2015-16 and has been consistently holding that the receipts towards offshore supply contract should not form part of the income to be taxed under section 44BBB of the Act. The Ld. AR in this regard drew our attention to the findings given by the Tribunal for AY 2007-08 (ITA No. 8074/Mum/2010 dated 10.01.2017) which is the lead year with regard to the impugned issue. The ld. AR also drew our attention to the finding given by the AO and DRP wherein the facts for the year consideration being identical to the above AYs and that the addition is made for the reason that the issue should be kept alive. Accordingly, it is a submission of the ld. AR that the findings given by the Co-

ordinate Bench of the Tribunal in earlier years with regard to the impugned issue is applicable for the year under consideration also.

7. The Ld. Departmental Representative (DR) on the other hand, relied on the order of the AO and the DRP.

8. We have heard the parties and perused the material on record.

9. We noticed that the Co-ordinate Bench in assessee's own case has considered the same issue for earlier AYs and has been consistently holding that the receipt towards offshore supply contract cannot form part of the business income chargeable to tax under section 44BBB of the Act. The relevant finding to the Tribunal for the AY 2007-08 (supra) is extracted below:

“14.1 We have heard the rival contentions and perused material available on record including contractual terms and cited case laws. Both Ld. AR and DR have adduced their arguments which are well reasoned and supported by various judicial pronouncements.

14.2 First of all, we note that the assessee has entered into four supply contracts pursuant to master IGA entered into between the two governments:

No.	Contract No.	Description
1.	77-252/20500 dated 12/02/2002	Delivery of equipment with long manufacturing cycle and first priority equipment and materials
2.	77-252/22600 dated 23/08/2002	Delivery of Equipment and material
3.	77-252/22700 dated 23/08/2002	Sale of Material and equipments from third countries
4.	77-252/26000 dated 7/10/2003	The supplies from CIS countries and functions to performed by the contractor for offshore supplies

We find that all the four contracts have more or less similar terms and conditions. A perusal of terms of contract No. 77-252/20500 dated 12/02/2002 reveals that as per Article 2.1, the assessee was required to make deliveries on 'FOB Russian Port basis'. As per Article 3.2, the contractee was required to carry out at his own expenses approximate transportation, loading/unloading, delivery etc. to the place of erection for supplies as well as take care of the storage of the supplied goods. As per Article 5.2.1, the date of delivery for supply was to be considered as the date of Clean Bill of Lading for FOB "Incoterms 2000" supplies. As per Article 9.4, the ownership/title of supplies under the contract was to pass at the moment the cargo crossed ship's rail at the port of dispatch or handed over to the air carriers. As per Article 9.5, the contract was to be carried out on 'FOB basis at Saint-Petersburg Sea port and/or Russian Black Sea Port'. As per Article 9.6 all costs related to customs formalities, transportation, loading/unloading, conservation and storage of the supplies as well as transport insurance was to be borne by the contractor and customer, respectively, in their countries. As per Article 20.1.1 of Appendix-1 General Terms and Conditions, the risk or damage of supplies to the contract was to be transferred from the contractor to the customer at the moment of transfer of such supplies to the carrier. Further Article 13.3 & Article 23 of the Appendix-1 provided for consequences of termination of contract and liquidated damages respectively. Similar terms are contained in other agreements. An analysis of the above clauses indicates that the overall contract provided for separate/specific terms & conditions for supply of the equipment and also provided for consequences for default of the terms. The same was not dependent upon the service contracts. The supplies were made on FOB basis at Russian Port and undisputedly, the payments for supplies were made in US Dollars. The consideration for each of the contract was separate and they were fixed for FOB Russian Port deliveries.

14.3 Regarding applicability of CBDT instruction No. 1829, a perusal of clauses 4 & 7 of the said instruction shows that the instructions were meant to be applied in case projects were undertaken by Consortium of foreign companies. Due to its misuse, the circular was subsequently withdrawn by Instruction No. 5 of 2009 and upon perusal of clause 2 of these instructions, it becomes more clear that instruction no. 1829 were with regard to the

execution of power projects on turnkey basis with certain specified features and covered specific situations in which there is actually a consortium of foreign companies. But in the present case, we find that there is only one foreign company namely ASE which has entered into the agreement with the Indian company and it is not a case of Consortium of foreign companies and hence, the said instructions, in our opinion, do not apply to the present case.

14.4 Proceeding further, to understand the nature of Section 44BBB, it would be prudent to reproduce the relevant extract of this Section as follows:

***'Special provision for computing profits and gains of foreign companies engaged in the business of civil construction, etc., in certain turnkey power projects.***

***44BBB.*** (1) *Notwithstanding anything to the contrary contained in sections 28 to 44AA, in the case of an assessee, being a foreign company, engaged in the business of civil construction or the business of erection of plant or machinery or testing or commissioning thereof, in connection with a turnkey power project approved by the Central Government in this behalf, a sum equal to ten per cent of the amount paid or payable (whether in or out of India) to the said assessee or to any person on his behalf on account of such civil construction, erection, testing or commissioning shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".*

.....

We find that 44BBB forms part of Part-D in chapter IV dealing with computation of profits and gains of business or profession. The said section starts with a non-obstante clause with respect to sections 28 to 44AA and those sections deals with computation of profits and gains of business of profession.

14.5 Further, Section 44BBB applies to a foreign company engaged in the business of civil construction or the business of erection of plant and machinery or testing or commissioning thereof in connection with a turnkey power project. Once this condition is fulfilled, then, 10% of the amount paid or payable whether in or out of India to the said assessee or to any person on his behalf on account of such civil construction, erection, testing or commissioning shall be deemed to be the profits and gains of such business chargeable to Tax as 'business income'. There is no dispute that, in the present

case, the assessee fulfils the eligibility test as provided in the section. The only dispute is with respect to the quantum of the receipts to which 10% is to be applied for the purposes of arriving at the business income. The Ld. AR submits that section 44BBB could be invoked for the purposes of computation of business income only when a receipt is chargeable to tax under the act. The AR further submits that reference to the expression 'turnkey power project' in section 44BBB of the act has no effect on the issue arising in the present case. There is no dispute that the project in the present case is Turnkey power project which satisfies conditions of 44BBB. Further, the presumptive taxation as per the provisions of section 44BBB could be claimed by eligible assessee who is only engaged in civil construction or only erection or only testing or only commissioning of plant and machinery in connection with a turnkey power project. Such assessee may not even supply the plant and machinery. If in such a case, section 44BBB would apply only to income relating to civil construction or erection or testing or commissioning of plant and machinery as the case may be, there is no reason why income relating to supply of plant and machinery should also be taxed under the section where the assessee, as in the present case, has undertaken such function. Therefore, an assessee engaged only during construction or erection or testing or commissioning of plant and machinery in connection with a turnkey power project would be in a better position than a person who supplies the plant and machinery (which is otherwise not taxable) along-with such activities. The only manner in which such absurdity could be avoided by applying the provisions of section 44BBB only to those receipts which are chargeable to tax under regular charging provisions of the act. Reliance has been placed on the decision of Hon'ble Supreme Court in CIT v. Hyundai Heavy Industries Co. Ltd. [2007] 291 ITR 482] wherein the court approved computation of income arising from installation and commissioning receipts as per Section 44BB of the act, while simultaneously holding that receipts under the supply contract was not taxable. Hence, as per Hon'ble Supreme Court also the provisions of section 44BB of the act, which is one of the section dealing with presumptive taxation, would apply only to such income which is chargeable under the provisions of the act. Further, Reliance was also placed on the decision of third member of Delhi bench of the tribunal in Saipem S.P.A. v. Dy. CIT [ 2010 [2004] 88 ITD 213 (TM) This decision

has been followed by Mumbai Bench of Tribunal in the case of Jt. DIT (OSD) (International Taxation) v. J. Ray McDermott Eastern Hemisphere Ltd.] 42 SOT 26 (URO) wherein following observations have been made:

'8. In such a situation, in our considered opinion the first appellate authority has rightly observed that section 9(1)(i) Explanation 1 provides that the income from business deemed under this clause to accrue or arise in India, shall be only such part of the income, as is reasonably attributable to the operations carried out in India. We also agree with the finding that the income in question should be first taxable in view of section 5 of the Act read with section 9 and that section 44BB cannot override section 5 which is the charging section. The Delhi B-Bench of the Tribunal in the case of Saipem S.P.A. v. Dy. CIT [2004] 88 ITD 213 (Delhi) (TM) held as follows:

"Section 44BB is no doubt described as a "Special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils" but the terms "Notwithstanding anything to the contrary" refer to sections 28 to 41 and as sections 43 to 43A. In other words, section 44BB is no doubt a special provision but only with reference to the system of computation of the taxable income, which was earlier being done by sections 28 to 41, etc. It cannot replace, supersede or "lean" in favour of section 5 which is the charging section whereby the scope of total income of an assessee whether it be of a resident or it be of a non-resident is worked out. It would be necessary in every case whether it be that of a resident or that of a non-resident to first of all decide as to whether a particular receipt or an item of income is liable to be included in the total income vis-a-vis section 5 and if it is to be so included then the question would arise as to how the taxable part thereof is to be computed and at this stage section 44BB steps in and the said section having replaced the earlier system of comparing the income which was by resort to provisions of sections 28 to 41 etc. The decision taken by the AM renders otiose/redundant the provisions of section 5 inasmuch as all assessee engaged in the business of exploration of mineral oils would have their income computed for taxation purposes only with reference to section 44BB and the entire exercise of

deciding the question of accrual of income or the place of accrual would become inoperative. There would be no need to refer to the provisions of section 5 or for that matter section 9. In considering the background leading to the introduction of section 44BB, this was never the intention of the legislature and provisions of sections 5 and 9 were always meant to operate and remain effective online statute book. Section 5 is the charging provision and no income can be brought to tax unless it falls within the scope, of the said section and the use of the expression "subject to other provisions of the Act" in section 5 would mean that if any other section operates to exclude from the total income of any person any income, which otherwise falls within the broad framework of his total income as laid down in section 5 such section would prevail. To emphasis, the provisions of section 44AB vis-a vis the legislative intent only mean that the replace the system of computation of income earlier envisaged by application of the provisions of sections 28 to 41 and sections 43 and 43A, but the provisions of section 5, which is the charging section would remain intact and these by no maxim of interpretation would be superseded by the provisions of section 44BB. As per Circular No. 495, dated 22nd Sept., 1987, section 44BB was no doubt described as a special provision for computing profits and gains in connection with the business of exploration of mineral oil but these were a measure of simplification providing for determination of income of such taxpayers at 10 per cent of the aggregate of a certain amount ...

9. Similarly the Mumbai D-Bench of the Tribunal in the case of Mcdermott ETPM Inc. v. Dy. CIT 92 ITD 385 held as follows:

"This the assessee can be charged only in accordance with section 9, is undisputed. And as per Explanation 1( a) to section 9(1)(i), where part of the operations of business are carried out outside India, only part of the income reasonably attributable to operations carried on in India shall be deemed to accrues for arise in India. The use of the word 'shall' in the said Explanation is unequivocally indicative of the legislative mandate contained therein. The Explanation, in no uncertain terms, envisages only such type of income to be deemed to accrue or arise in India, under section 9(1)(i). Thus, the income

presently under consideration cannot be said to be deemed income just because either the agreement was signed in India or the income has been received in India. The requirements of the Explanation to section 9(1)(i) having not been met, the income is not deemed income. Since the income in question cannot even be construed to be deemed income of the assessee. Since the income in question cannot even be construed to be deemed income of the assessee, there is no taxable income to be computed and so section 44BB is inapplicable. Only a part of mobilization/demobilisation work, which is attributable to the operations carried out by the assessee in India, is taxable in India. The services rendered by the assessee are not covered by the notification bearing No. GSR-304 (E), dated 31st March, 1983 - Saipem SPA v.. Dy. CIT [2004] 86 TTJ 1 (Delhi)(TM) followed."

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11. In view of the above discussion, we uphold the order of the first appellate authority and dismiss ground No. 1 of the Revenue.'

This decision has been approved by Bombay High Court in ITA No. 1328 of 2011 order dated 18/03/2014 wherein the Bombay High Court has placed reliance on the decision of Supreme Court in Hyundai Heavy Industries Co. Ltd. (supra). Similar view has been taken by Bombay High Court in DIT v. Sonat Offshore Drilling Inc. [IT Appeal No. 508 of 2007, dated 16-9-2008] and also in Vodafone India Services (P.) Ltd. v. Union of India [2014] 50 taxmann.com 300/368 ITR 1/[2015] 228 Taxman 25 ( Bom .). Further, the Machinery Section of the act cannot be read de-hors charging section. The act has to be read as integrated manner. Supreme Court in CIT v. B.C. Srinivasa Setty [1981] 128 ITR 294, held that:

*"No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrity of the statutory scheme provided for each head."*

AR further contended that reliance placed by DR on the decisions of Uttarakhand High Court in Sedco Forex International Inc.(supra) and Halliburton Offshore Services Inc.(supra) are contrary to views expressed by Supreme Court in Hyundai Heavy Industries Co. Ltd. (supra) and Bombay High Court in J.Ray Mcdermott Eastern Hemisphere Ltd .(supra) and Sonat Offshore Drilling Inc. (supra) Further, the decision of Valentine Maritime Gulf LLC.(supra) is distinguishable as the said decision was not concerned with the application of Section 44BB. The only dispute was with respect to application of Section 44BB to a particular receipt.

14.6 Concurring with the above legal position, and following Hon'ble Apex Court fortified by Hon'ble Bombay High Court judgments, we are of the considered opinion that Section 44BBB is computational provision and hence, it cannot enlarge the scope of total income which is otherwise provided in Section 4,5, & 9 of the Income-tax Act.

14.7 Further, we find that contracts have been entered into between two Government representatives and hence the question of tax evasion does not arise as per decision of Hon'ble Bombay High Court dated 16/10/2008 in ITA No. 389 of 2008 .West Coast Paper Mills Ltd., (supra) wherein the court has observed:

*"The Tribunal has considered that aspect of the matter in the light of the material on record and recorded the findings that it is not a sham or bogus transaction. One of the grounds considered for recording that finding is that when the other party is a statutory body, the question of evasion of tax does not arise, and therefore, according to the tribunal, influence of collusion cannot be drawn. Hence, no question of law arises."*

Hence, the argument that the contract is skewed in favour of supply contracts cannot be presumed. Revenue has nowhere made those allegations and there is nothing on record to substantiate the same.

14.8 Now, the only question left to be decided is whether the impugned income from OSC are taxable as per the substantive provisions and DTAA. As per Section 5, a non-resident is liable for tax on incomes where are received/accrued in India or which are

deemed to be received/deemed to be accrued in India. Section 9 deals with income which are deemed to accrue or arise in India. The relevant of Section 9 is extracted below:

*'Income deemed to accrue or arise in India.*

*9. (1) The following incomes shall be deemed to accrue or arise in India :—*

- (i) *all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.*

*Explanation 1—For the purposes of this clause—*

*(a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operation carried out in India;*

*(b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export ;*

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*Explanation 4.—For the removal of doubts, it is hereby clarified that the expression "through" shall mean and include and shall be deemed to have always meant and included "by means of", "in consequence of" or "by reason of".'*

We find that Explanation 4 has clarified the meaning of expression of the word 'through'. The word 'through' as been used in Article 7(1) of the DTAA and as per the Article 3(2) of the said treaty, the expressions not defined in the treaty could derive their meaning from the domestic law. Therefore, harmoniously reading all the provisions, we conclude that expression 'through' not defined by the treaty could derive its meaning from the domestic law as contained in Explanation 4 of Section 9(1). Though we are conscious of the fact that as per the provisions of Section 90(2), in case of assessee to whom DTAA applies, the provisions of the act apply to the extent they are more beneficial to the assessee but here is a case where we are dealing with interpretation of certain words and not enlarging the scope of total income as per

DTAA vis-à-vis domestic taxation laws. Hence, in our considered opinion, the meanings given to certain expression which were not otherwise defined/clarified in the Treaty could derive their meaning from domestic law.

14.9 Having observed so, we now proceed to analyze the effect of explanation 1(a) vis-à-vis Section 9(1)(i). Explanation 1(a) restrict the applicability of deeming provisions of Section 9(1)(i) in respect of those business incomes of which all the operations are not carried in India. Conversely, deeming provisions are restricted to only those part of the income which can reasonably be attributable to the operations carried in India meaning thereby in case business operations are carried in two different taxing territories, then deeming provisions of Section 9(1) (i) shall apply qua operations carried in India only and not to any other operations. In other words, explanation 1(a) provides for separate treatment of business operations carried in India and carried outside India.

14.10 After analyzing the various contractual terms of supply contracts in para 14.2, we have already concluded that title in goods passed outside India, payments were in foreign currency, the deliveries were on 'FOB basis'. There were separate contracts for supply as well as services and supply contracts were not dependent upon service contracts. This being the factual position, we find that explanation 1(a) comes into play in the instant case. Hence, the income which is deemed to accrue/arise in India shall be only with respect to those business operations that are carried out in India.

14.11 In the light of above discussion, we proceed to analyze the various case laws relied upon by both counsels.

14.12 In the case of Ishikawajma-Harima Heavy Industries Ltd. (supra), the assessee along with other consortium partners entered into a Turnkey Project which involved both offshore supply/services as well as onshore supply/services and construction and erection to be carried out by the non-resident assessee and assessee received consideration under all the heads. The title in goods was to pass outside India but the

contractor was required to retain care, custody and control of such equipment and materials and exercise due care even after they were transferred to the buyer. The supplier had a 'business connection' for the purposes of the act and a 'permanent establishment' for the purposes of the DTAA in India. The apex court observed as under:—

*"17. The contract is a complex arrangement. Petronet and Appellant are not the only parties thereto, there are other members of the consortium who are required to carry out different parts of the contract. The consortium included an Indian company. The fact that it has been fashioned as a turnkey contract by itself may not be of much significance. The project is a turnkey project. The contract may also be a turnkey contract, but the same by itself would not mean that even for the purpose of taxability the entire contract must be considered to be an integrated one so as to make the appellant to pay tax in India. The taxable events in execution of a contract may arise at several stages in several years. The liability of the parties may also arise at several stages. Obligations under the contract are distinct ones. Supply obligation is distinct and separate from service obligation. Price for each of the component of the contract is separate. Similarly offshore supply and offshore services have separately been dealt with. Prices in each of the segment are also different.*

*18. The very fact that in the contract, the supply segment and service segment have been specified in different parts of the contract is a pointer to show that the liability of the appellant thereunder would also be different.*

*19. The contract indisputably was executed in India. By entering into a contract in India, although parts thereof will have to be carried out outside India would not make the entire income derived by the contractor to be taxable in India. We would, however, deal with this aspect of the matter a little later."*

Therefore the court clearly held that mere fact that the contract is a 'turnkey' one would not make the entire income of the non-resident assessee from such contract as being chargeable to tax in India. The court thereafter referred to the principle of apportionment as enshrined in the act and considered the aspect of taxability of such receipts to the extent relatable to the operations carried out in India and further observed as under:

*"25. For our benefit we may notice the provisions of section 42 of the Income-tax Act, 1922. It provided that only such part of income as was attributable to the operations carried out in India would be taxable in India.*

26. *Territorial nexus doctrine, thus, plays an important part in assessment of tax. Tax is levied on one transaction where the operations which may give rise to income may take place partly in one territory and partly in another. The question which would fall for our consideration is as to whether the income that arises out of the said transaction would be required to be proportioned to each of the territories or not.*

27. *Income arising out of operation in more than one jurisdiction would have territorial nexus with each of the jurisdiction on actual basis. If that be so, it may not be correct to contend that the entire income 'accrues or arises' in each of the jurisdiction. The Authority has proceeded on the basis that supplies in question had taken place offshore. It, however, has rendered its opinion on the premise that offshore supplies or offshore services were intimately connected with the turnkey project."*

In the above judgment the Apex Court referred to its own decisions in the case of Anglo-French Textile Co. Ltd. v. CIT [1954] 25 ITR 27 (SC), and also ITO v. Sriram Bearings Ltd. [1997] 224 ITR 724 (SC). After detailed discussion, the Hon'ble Court summarized its conclusion in respect of the offshore supply contract in the following manner:

*"79. We, therefore, hold as under :*

*Re : Offshore Supply :*

*(1) That only such part of the income, as is attributable to the operations carried out in India can be taxed in India.*

*(2) Since all parts of the transaction in question, i.e. the transfer of property in goods as well as the payment, were carried on outside the Indian soil, the transaction could not have been taxed in India.*

*(3) The principle of apportionment, wherein the territorial jurisdiction of a particular state determines its capacity to tax an event, has to be followed.*

*(4) The fact that the contract was signed in India is of no material consequence, since all activities in connection with the offshore supply were outside India, and therefore cannot be deemed to accrue or arise in the country.*

*(5) There exists a distinction between a business connection and a permanent establishment. As the permanent establishment cannot be said to be involved in the transaction, the aforementioned provision will have no application. The permanent establishment cannot be equated to a business connection, since the former is for the purpose of assessment of income of a non-resident under a Double Taxation Avoidance Agreement, and the latter is for the application of section 9 of the Income tax Act.*

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

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

*(8) There exists a difference between the existence of a business connection and the income accruing or arising out of such business connection.*

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

Therefore, though the contract in that case was a turnkey or a composite contract, the Supreme Court dissected the activities to be performed as per the said contract into several components based on the place where the operations were performed. It was concluded that the taxability of income arising from a receipt in India would depend upon the fact whether any operation in connection with the earning of such received was carried out in India. Applying the said principle to the assessee's case, we find that the assessee stand on a better footing as it has separate supply and service contracts, the terms of which are independent of each other. The impugned receipts were relatable to the offshore supply contracts, which have been entirely performed outside India. The revenue has nowhere pointed out which part of the operation relating to offshore supply contracts is carried out in India. With respect to attribution of profits to a permanent establishment it has been held that the state of the permanent establishment can tax only those profits which are economically attributable to the permanent establishment i.e. which result from the activities of the permanent establishment or which arises economically from the business carried on by the permanent establishment. In the present case, offshore supply contract has nothing to do with the activities of the permanent establishment. In the above-cited case, the court was concerned with India Japan treaty where article 7(1) for attribution of profits which referred to profits 'directly or indirectly' attributable to the permanent establishment. The phrase 'directly or indirectly' widens the scope of attribution of profits. Whereas in the present case 'India Russia DTAA' is involved and Article 7(1) of the treaty refers only to attribution simplicitor and do not use the term 'directly or

indirectly' and hence, from this point of view also, the assessee stands on a better footing.

14.13 Similarly in the case of Xelo Pty. Ltd., (supra) the non-resident assessee was under an obligation to supply equipment and also provide the design, supervision, installation and testing the commissioning of Metrorail. The question before the Hon'ble court was whether the consideration received by the assessee against offshore supply could be brought to tax in India. The court upheld the judgment of Tribunal which, in turn, relied upon Apex Court's judgment in Ishikawajma-Harima Heavy Industries Ltd. (supra). The Court concluded that:

*"Though there was one composite contract, the terms of the contract distinctly set out the quantum of offshore supplies to be made by the assessee to the Metro railways and also the quantum of payment to be received by the assessee from Metro Railways outside India. In our opinion, if the composite contract specifically record the quantum of goods to be supplied outside India and even the payment is made outside India, then no fault can be found with the decision of ITAT in holding that the income arising from offshore supplies are not taxable in India"*

14.14 Similarly, in L.G. Cable Ltd., (supra) there was only one contractor and revenue contended that property in the equipment passed only after the satisfactory performance. The court made the following observation:—

*"19. The contention of the learned counsel for the revenue during the course of arguments that offshore supplies are not taxable only in the case of sale of goods simpliciter, and that the contract is a turnkey contract split/divided into offshore and onshore supplies at the instance of the respondent assessee, in our considered opinion, is not sustainable in view of the authoritative pronouncement of the Supreme Court in the case of Ishikawajma Harima Heavy Industries Co. Ltd. v. Director of Income tax [2007] 288 ITR 408 wherein it has been held that offshore supplies are not taxable even in the case of a turnkey contracts as long as the title passes outside the country and payments are made in foreign exchange.*

.....  
*27. Applying the aforesaid law enunciated by the Supreme Court in the case of Ishikawajma Harima Heavy Industries Co. Ltd. (supra), there can be no manner of doubt that the offshore supplies in the instant case are not chargeable to tax in India. The instant case, in fact, in our view stands on a better footing as two separate contracts have been entered into between the parties, albeit on the same*

*day, one for the offshore supply and the other for the onshore services, but even assuming that both these contracts need to be read together as a composite contract, the issue in controversy is nevertheless squarely covered by the decision of the Supreme Court in Ishikawajima Harima Heavy Industries Co. Ltd. 's case (supra) . It is beyond dispute that PGCIL had issued irrevocable letter of credit in favour of the respondent assessee and in paragraph 31.2 agreed that the property in the goods will pass to the buyer (PGCIL) as and when the respondent assessee loads the equipment onto the mode of transport for transportation from the country of origin. The stipulation in the second agreement (Erection Contract) relating to certain performances by the respondent assessee including port handling, custom clearance, transportation, insurance, handling on site, unloading at transportation site, testing and commissioning to the satisfaction of the buyer are in a separate agreement for a separate consideration which is clearly enunciated in the second agreement as follows :—*

*"Whereas the employer desires to engage the contractor for performance of all activities within India..... subject to the terms and conditions hereinafter appearing."*

*30. Then again, in our considered opinion, undue importance cannot be attached to the fact that the agreement imposed on the assessee company the obligation to handover the equipment functionally completed.....'*

Hon'ble court placed reliance on the decision of Supreme Court in Mahabir Commercial Co. Ltd. v. CIT [1972] 86 ITR 417 and Sriram Bearings Ltd. (supra) and finally summed up the conclusion in the following manner:—

*"35. In the final analysis we have no hesitation in holding that viewed from any angle, the fact situation in the instant case is almost identical to that in the case of Ishikawajima Harima Heavy Industries Co. Ltd. (supra) and the law as enunciated by the Supreme Court in the said case will squarely apply to the facts of the present case. If at all there is a difference, the facts in the present case stand on a better footing than in Ishikawajima Harima Heavy Industries Co. Ltd.'s case (supra). In Ishikawajima Harima Heavy Industries Co. Ltd.'s case (supra) there was a turnkey contract with four separate component activities, viz., offshore supply, offshore services, onshore supply and onshore services awarded by Petronet LNG to a consortium of companies led by the Japanese company Ishikawajima-Harima. In the instant case there are two separate contracts i.e., offshore supply and the onshore services contract awarded by the PGCIL to the respondent assessee. As in the said case the consideration for offshore contract and onshore contract are separate and distinct from each other, inasmuch as the consideration in the case of offshore supply contract was received outside India through the mechanism of a Letter of Credit in foreign exchange while the consideration for onshore contract was received, for the most in Indian rupees*

*with a nominal amount in foreign currency, the latter being for training charges. The title to the equipment supplied from outside India was transferred in favour of PGCIL outside India. In the case of Ishikawajima Harima Heavy Industries Co. Ltd. (supra), it was transferred on the high seas but in the instant case, it was transferred in the country of origin itself as soon as the goods were loaded upon the mode of transfer to be used to convey the plant and machinery, i.e., the shipping vessel, even prior to the goods reaching the high seas. Once the title was transferred in the aforesaid manner, there was no provision either in the agreement or in law providing a recourse to the respondents to take back the title.*

*36. With regard to the setting up of a permanent establishment also, the permanent establishment of the respondent in the instant case, as in the case of Ishikawajima Harima Heavy Industries Co. Ltd. (supra), had no role to play in the execution of the offshore supply contract and as a matter of fact was set up for the sole purpose of enabling the performance of the onshore services contract.*

*37. The contract, however, in the instant case as in the case of Ishikawajima Harima Heavy Industries Co. Ltd. (supra) would be said to have been successfully performed only after the satisfactory commissioning and erection of the plant and equipments. Since the permanent establishment was not at all involved in the transaction of the offshore supply of equipment, the existence of the permanent establishment [which as held in Ishikawajima Harima Heavy Industries Co. Ltd. 's case (supra) is for the purpose of assessment of income of a non-resident under the Double Taxation Avoidance Agreement], would be irrelevant in the instant case. Clause (a) of Explanation (1) to section 9(1) would not be attracted at all which provides that in the case of a business where all operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. In the instant case there were no operation qua the agreement for supply of equipment, which was carried out in India, and therefore, no income could be deemed to have accrued or arisen in India whether directly or indirectly or through any business connection in India."*

Therefore this decision also brings out that though the contract was a composite and an indivisible one as well as a non-resident assessee was required to perform certain functions to the satisfaction of the buyer after completion of the sale of the equipment, the income relating to offshore supply of equipment was not chargeable to tax in India.

14.15 Similarly the decision of Delhi High Court in Ericsson A.B. (supra) was also related with turnkey project being executed by a non-resident assessee. The main contention of the revenue was that as assessee had overall responsibility in respect of

entire contract and hence offshore supplies were also chargeable to tax. The court observed as under:—

*'36. In order to decide the issue at hand, let us recapitulate some of the salient features. The assessee is a foreign Company. Its activities involved supply of hardware and software as well as installation and commissioning of the two and also after sale services. It entered into agreements with various Cellular Operators and entered into three contracts with them namely (1) Overall Agreement, (2) the Supply of Agreement and (3) the Installation Agreement.*

*37. In the present case, we are concerned with the income earned by the assessee as a result of supply of hardware and software licence under the Supply Agreement. If this Supply Agreement is taken as standalone Agreement, the facts on record show that such supplies under this agreement were made overseas. The property in goods had passed on to the buyer under the Supply Contract outside India where the equipment was manufactured. As per the judgment of Supreme Court in Ishikawajima Harima Heavy Industries Ltd.'s (supra), such agreement would not be taxable in India. In Ishikawajima Harima Heavy Industries Ltd.'s case (supra ) the Supreme Court held that no part of profit arising from the supply of equipment outside India would be chargeable to tax in India. Mr. Dastur is right in his analysis of the present case on the basis of the ratio of Ishikawajima Harima Heavy Industries Ltd.'s case (supra) inasmuch as :*

- (i) In both the cases the property in the equipment passed outside India and in the assessee's case even the risk passed outside India;*
- (ii) In the case of Ishikawajima Harima Heavy Industries Ltd's case (supra) even though it was to perform onshore services including the erection and commissioning of the equipment supplied by it, nevertheless, the Supreme Court held that no part of the profit on the offshore supply of the equipment was taxable in India as a consequence of the performance of such activities in India. In the assessee's case the assessee does not perform any service in India in connection with the installation of the equipment or otherwise;*
- (iii) the performance of the acceptance test in India was not considered a relevant circumstance whilst determining whether any part of the profit on the offshore supply was chargeable to tax in India in the case of Ishikawajima, so also in the assessee's case.*
- (iv) although admittedly a permanent establishment existed in the case of Ishikawajima, nevertheless, the Court held that no part of the profit arising from the supply of the equipment was chargeable to tax in India as the permanent establishment had no role to play in the transaction sought to be taxed as it took place abroad, whilst in the case of the assessee, it has been found as a fact by both the appellate authorities that no permanent establishment existed;*
- (v) the mere signing of the contract pursuant to which the supply was made in India, in both cases does not result in giving rise to a tax liability in India;*

- (vi) *the existence of the overall responsibility clause was held to be irrelevant in Ishkawajima's case and likewise the overall agreement executed in the assessee's case should not make any difference to the taxability of the equipment supplied;*
- (vii) *giving the nomenclature of a turnkey project or works contract is not relevant in determining whether any profit arising from the supply of equipment pursuant to such contract was chargeable to tax in India;*
- (viii) *the Supreme Court relied upon Instruction No. 1829 to come to the conclusion that the existence of an overall responsibility clause was not material in determining the tax liability arising from the offshore supply of equipment and as the said instruction continues to be in force for the assessment year relevant to the present appeals, the existence of an overall agreement should make no difference to the taxability of the equipment supplied by the assessee.*

.....

41. *We, find that the terms of contract make it clear that acceptance test is not a material event for passing of the title and risk in the equipment supplied. It is because of the reason that even if such test found out that the system did not conform to the contractive parameters, as per article 21.1 of the Supply Contract, the only consequence would be that the Cellular Operator would be entitled to call upon the assessee to cure the defect by repairing or replacing the defective part. If there was delay caused due to the acceptance test not being complied with, Article 19 of the Supply Contract provided for damages. Thus, the taxable event took place outside India with the passing of the property from seller to buyer and acceptance test was not determinative of this factor. The position might have been different if the buyer had the right to reject the equipment on the failure of the acceptance test carried out in India. In Skoda Export Prabha (supra), the Andhra Pradesh High Court dealt this issue in the following manner:*

*"We may also mention that learned standing counsel for the Department challenged the finding of the Tribunal that the sale of machinery was completed outside India; According to him, the sale was completed only in India, inasmuch as the assessee was entitled to inspect and satisfy itself about the quality and standard of the machinery supplied. We do not see any substance in this contention. The various clauses in the agreement referred to above make it clear that the sale of machinery was F. O. B., European port, and the time of fulfilment of delivery was prescribed as the date of the bills of lading. The payment was also to be made outside India. The agreement further makes it clear that the insurance risk during the course of the journey was that of the assessee and it paid for the same : even the freight charges from the European port to the place of destination were paid by the assessee. Thus, judged from any angle, the sale of machinery, which are "goods" within the meaning of the Sale of Goods Act, was completely outside India. A mere provision in the agreement that the assessee is entitled to satisfy itself about the quality and standard of the machinery in India cannot, in the circumstances of this case, detract from the fundamental position that the sale took place outside India. In such a situation, one has to apply the test of predominance and decide where the sale took place ? On a combined reading of*

*the clauses of the agreement, we have no doubt that the sale of machinery did take place outside India."*

42. We may also usefully referred to the judgment of the High Court in Mahabir Commercial Co. Ltd. v. CIT [1972] 86 ITR 417 (SC) wherein following principle was enunciated:

*"Even though the property in the goods may pass to the buyer when the documents are handed over, the buyer may yet retain the right to examine and repudiate the goods but this right generally which a buyer has in c.i.f. contract does not by itself indicate that the property in the goods has not passed to him. This supposed incongruity was sought to be explained per curiam in Kwei Tek Chao v. British Traders and Shippers Ltd. (1954) 2 K.B. 459. that if property passed when the documents are transferred that property is subject to the condition that the goods should revert in the seller if on an examination by the buyer he finds them not to be in accordance with the contract. It is not necessary to consider this aspect because in any case the ascertainment of the obligations under the contract will determine to what extent the transfer of property is subject to a condition or if the property passes conditionally whether the ownership left in the seller is the reversionary interest in the property in the event of the conditions subsequent operating to restore it to him. In any case where the performance of some condition is imposed upon the buyer but is not made a condition of the transfer of the property, the property once passed is not revested in the seller by the buyer's subsequent default."*

43. Thus, Overall Agreement does not result the income accruing in India. The execution of an overall agreement is prompted by purely commercial considerations as the India Cellular Operator would be desirous of having a single entity that he could liaise with, a fact which even the Board has noted in its Instruction No.1829 dated 21st September, 1989. Although Instruction number 1829 stands withdrawn by virtue of Circular No.7/2008 dated 22nd October, 2009, such withdrawal can have no retrospective effect and the principle laid down in Instruction No. 1829 must continue to govern the assessment for the relevant year.

44. The aforesaid analysis will bring forth the legal position that the place of negotiation, the place of signing of agreement, or formal acceptance thereof or overall responsibility of the assessee are irrelevant circumstances. Since the

transaction relates to the sale of goods, the relevant factor and determinative factor would be as to where the property in the goods passes. In the present case, the finding is that property passed on the high seas. Concededly, in the present case, the goods were manufactured outside India and even the sale has taken place outside India. Once that fact is established, even in those cases where it is one composite contract (though it is not found to be so in the present case) supply has to be segregated from the installation and the only then would question of apportionment arise having regard to the expressed language of Section 9 (1) (i) of the Act, which makes the income taxable in India to the extent it arises in India.'

We find that, in the instant case in hand, there was no clause in the contract for return of the material to ASE and in case of default by assessee, the contract could be terminated in which eventuality the assessee was entitled to contract price attributable to the supply and services executed as at the date of termination. In case of deficiencies/default in the equipment, the assessee was liable to pay liquidated damages only for the delay. Therefore there may be an overall responsibility for carrying out the entire agreement but yet the same was not relevant for determining the taxability of income arising from offshore supply of equipment. Similar view has been taken by the Delhi High Court in *DIT v. Nokia OY* [2013] 358 ITR 259/212 Taxman 68/[2012] 25 taxmann.com 225 and Delhi High in *Linde AG, Linde Engg. Division*, (supra) which, in turn, placed reliance on Apex Court's decision in *Ishikawajima-Harima Heavy Industries Ltd.* (supra).

14.16 Ld. DR has relied upon the decision in *Roxar Maxmium Reservoir Performance WLL* (supra), where the authority for advance rulings has held that a contract has to be read as a whole. The purpose for which the contract is entered into by the parties is to be ascertained from the terms of the contract. AAR held that income from offshore supply of goods was taxable in India. But as rightly pointed by Ld. AR, the decision was rendered by 'Authority for advance Ruling' and as per Section 245S, the decision is binding only on the applicant and also in respect of those transactions in relation to which ruling has been sought.

14.17 DR contended that Madras High Court in *Ansaldo Energia Spa v. (supra)* distinguished the case of SC in *Ishikawajima-Harima Heavy Industries Ltd. (supra)* and held as under:

*"Therefore, what follows is, if a contract is a composite contract in spite of the apparent demarcation into separate parts, the mere fact that for offshore supply the title passed outside India alone will not decide taxability. In Ishikawajima Harima Heavy Industries Ltd.'s case (supra), both the title and consideration passed outside the taxable territory and very importantly, it was found that it was not a composite contract, nor was there any involvement of the PE in the transaction. It was further factually found that the contract was a divisible one segregating the supply segment and service segment, and that by agreement the parties had decided when title passed.*

We find that in his case, after holding that the splitting of contract into four and assigning the onshore work to a subsidiary was a façade, the Hon'ble Madras High court not only held that the assessee had a PE in India in the form of project office but also held that the assessee's income from offshore supply was taxable in India. We find the same also distinguishable on the ground that in this case, there were allegations of loading of supply contracts to compensate for services. Further, Tribunal, accepting the assessee's contentions, had held that 25% of total receipts were attributable to operations performed outside India and hence, not chargeable to tax. Moreover, this decision has been distinguished by Delhi High Court in *L.G.Cable Ltd. (supra)* by making following observations:—

*"34. Heavy reliance was placed by the learned counsel for the revenue on the decision of the Madras High Court in Ansaldo Energia SPA v. ITAT [2009] 310 ITR 237. But in our view the said case is clearly distinguishable on facts. In the case of Ansaldo Energia SPA (supra) it was held by the Madras High Court that the Indian subsidiary of Ansaldo, i.e., ASPL, was a legal facade which was created for taxation purposes and was not actually engaged in executing onshore contracts. It is for this reason that the Madras High Court also noticed that the subsidiary company i. e., ASPL already existed in India prior to the award of the contract. In the instant case, there is no such allegation made by the Department and as a matter of fact also the respondent assessee in the present case had established a Permanent Establishment in India after the award of the contract for the specific purpose of executing the onshore contract. Again in Ansaldo*

*Energia SPA's case (supra), it is noteworthy that initially a single contract was awarded to Ansaldo Energia SPA's case (supra) and later on at the instance of Ansaldo Energia SPA's case (supra) the contract was split into four separate contracts. In the instant case, right from the inception and as part of the documents, two separate contracts, i. e. , a contract for offshore supplies and another contract for onshore services were executed between the PGCIL and the respondent assessee. Yet again, in Ansaldo Energia SPA's case (supra) there was a specific allegation that the contract was 'loaded on' to the contract price for offshore contract whereas no such allegation has been made in the case of the respondent assessee. It therefore stands on an altogether different footing. Finally in Ansaldo Energia SPA's case (supra) even after the goods were supplied from abroad, the manufacturing activities continued in India 'as a continuous and ongoing process' and there was a reference in the supply contract itself that the responsibility was with the assessee company till the local parts and the portion of the machinery which was to be designed, fabricated, manufactured and sent from abroad were fused together. In the instant case, however, no activities under the supply contract were carried out in India and there was no such overlapping of responsibilities envisaged under the Supply Contract and the Erection Contract performed by the respondent through its head office and permanent establishment. Ansaldo Energia SPA's case (supra) is thus clearly inapplicable to the fact situation in the present case and is therefore of no avail to the revenue."*

14.18 DR has further relied upon Mumbai ITAT decision in Orpak Systems Ltd. (supra) where it was held that even though the consideration in respect of offshore supply was received outside India in foreign exchange, the same was taxable in India as the contract was a composite contract entered by the assessee in single bid and the assessee being responsible for the entire project till the commissioning stage. After holding that the sub-contracting of onshore installation work to a third party by the assessee was only a method of execution of a composite contract, the Hon'ble Tribunal in this case not only held that the assessee had PE in India, it also held that the assessee's income from offshore supply was taxable in India. But we find the same also distinguishable on the ground that assessee was awarded a contract for supply, installation, implementation and support retail automation system in retail outlets of the contractee. Execution of the said contract involved supply of certain equipment and installation of automation system. The assessee entered into sub contract with one party and supplied the goods to him but raised the invoices directly upon the contractee and the payment was also made directly by the contractee to the assessee. On the premises of these facts, it was held that title of goods did not passed outside

India but in India and hence taxable. But no such analogous facts are present in the instant case in hand.

15. Therefore, after analyzing the various case laws, statutory provisions, DTAA provisions and contractual terms and respectfully following judgment of Hon'ble Supreme Court in *Ishikawajma Harima Heavy Industries Ltd.*, (supra) we are inclined to hold that Offshore Supply contracts were 'carried and concluded' outside India and hence no income there-from deemed to accrue or arise in India as per Section 9(1) and DTAA provisions and accordingly, not chargeable to tax. The receipts thereof do not form part of receipts for the purpose of computational provisions of Section 44BBB. Explanation 4 could not overcome the limitation imposed by Explanation 1(a) to Section 9(1)(i) and hence, the impugned income do not form part of business receipts for computation of income u/s 44BBB of the Act. We held so.

16. At the same time, we also observe that impugned payment has been paid by NPCIL to ASE on 'net' basis and NPCIL has borne the burden of tax on behalf of the assessee. DRP rightly observed that 'Grossing up' of the impugned payment was required to be done as per Section 195A before applying 44BBB of the act. But Section 44 BBB has been applied on 'net payment basis' by the assessing officer. Revenue is free to recompute the income of the assessee as per the statutory provisions. With these observations, Ground No.3 of assessee's appeal is allowed. The payment towards offshore supply contracts being accruing outside India, would not form part of business receipts for the purpose of Section 44BBB.”

10. It is an admitted fact that the fact with regard to the impugned issue are identical to the earlier years and that the same contract are applicable for the year under consideration, therefore respectfully following the above decision of the Co-ordinate Bench, we hold that for the year under consideration also the impugned income do not form part of business receipts for computation of income under section 44BBB of the Act.

11. During the course of hearing, the ld. DR made a without prejudice submission that the service contract income of the assessee should not have been tax under section 44BBB of the Act but should have been taxed as fee for technical service under section 91(1)(7) of the Act. The ld. DR in this regard presented a detailed written submission and also arguments during the course of hearing. The ld. DR prayed that the issue should be set-aside to the AO with regard to the applicability of section 44BBB of the Act in assessee's case.

12. On the other hand, the ld. AR submitted that the revenue has been accepting the taxability of income from service contract under section 44BBB of the Act from AY 2009-10 and even for the year under consideration, the AO has considered the income from supply contract also as taxable under section 44BBB of the Act. The ld. AR therefore, submitted that the revenue has never disputed the taxability of the receipts under section 44BBB of the Act and that the DR cannot raise this issue to improve the case now. The ld. AR further submitted that this contention of the ld. DR is never raised before the lower authorities and that even in the appeal filed before the Hon'ble Bombay High Court, this particular contention is raised. The ld. AR therefore, argued that the ld. DR is not correcting bringing up this without prejudice contention before the Tribunal and therefore, cannot be entertained.

13. We heard the arguments of both the parties on the contention that the income from service contract should not be taxed under section 44BB of the Act. It is now settled position that the ld. DR cannot improve the case of the AO and therefore, we are unable to accept the without prejudice contention raised by the ld. DR. Further, we noticed that the Department has not raised this specific contention

even before the Hon'ble Bombay High Court where the following question of law has been raised by the Department.

14. *Whether the Tribunal erred in directing to exclude the amount received by the assessee on account of offshore supply contracts from computation of its total income under section 44BBB of the Act and whether the Tribunal correctly interpreted the provisions of section 44BBB of the Act and the terms of India-Russia DTAA on this aspect ?)*

15. From the above, it is clear that the Department is not contesting the taxability of income from service contracts under section 44BBB of the Act before the Hon'ble High Court also, given this we are not in a position to admit the alternate plea of the Id. DR and we restrict our adjudication to the issue raised by the assessee before us with regard to whether the receipts from offshore supply contract is forming part of the income considered for taxability under section 44BBB of the Act.

16. In the result, the appeal of the assessee is allowed.

*Order pronounced in the open court on 12-12-2023.*

*Sd/-*  
**(KULDIP SINGH)**  
**Judicial Member**

*Sd/-*  
**(MS. PADMAVATHY S)**  
**Accountant Member**

\*SK, Sr. PS

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt. Registrar)  
**ITAT, Mumbai**