IN THE INCOME TAX APPELLATE TRIBUNAL, 'H' BENCH MUMBAI

BEFORE: SHRI B R BASKARAN, ACCOUNTANT MEMBER
&
SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA No.2153/Mum/2014
(**Assessment Year :2009-10**)

Siemens Aktiengesellshaft C/o. B S R & Co. LLP Lodha Excelus, 1st Floor Apollo Mills Compound N.M. Joshi Marg Mahalakshmi Mumbai – 400 011	Vs.	Dy. Director of Income Tax (International Taxation) – 2(1) Mumbai
PAN/GIR No.AABCS8516K		
(Appellant)	..	**(Respondent)**

ITA No.2179/Mum/2014
(**Assessment Year :2009-10**)

Dy. Director of Income Tax (International Taxation) – 2(1) Mumbai	Vs.	Siemens Aktiengesellshaft C/o. B S R & Co. LLP Lodha Excelus, 1st Floor Apollo Mills Compound N.M. Joshi Marg Mahalakshmi Mumbai – 400 011
PAN/GIR No.AABCS8516K		
(Appellant)	..	**(Respondent)**

Assessee by	Shri P.J. Pardiwala a/w. Nitesh Joshi
Revenue by	Shri Neehar Ranjan Pandey
Date of Hearing	**11/03/2024**
Date of Pronouncement	**07/06/2024**

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid cross appeals have been filed by the assessee as well as by the department against final assessment order dated 30/01/2014, passed by Dy. Director Income Tax (IT)-2(1), Mumbai in pursuance of directions given by the DRP vide order dated 16/12/2013 u/s.144C(5).

2. In both the appeals five issues have been raised by the assessee as well as by the department, which in summary manner is reproduced hereunder:-

Sr.	Issue	Grounds Of Appeal reference
I.	Characterisation of receipts towards software as royalty	Ground nos. 2 to 5 of the assessee's appeal
2.	Alleged constitution of an AOP between the assessee and Siemens Limited in respect of contract with DMRC	Ground nos. 6 to 8 of the assessee's appeal and Ground No. 2 and 3 of the Revenue's appeal
3.	Compensation for delayed receipt pursuant to Arbitration award	Ground Nos. 9 to 1 1 of the assessee's appeal
4.	Transfer pricing adjustment	Ground nos. 12 to 19 of the assessee's appeal
5.	Assessment of royalty and fees for technical services on receipt basis	Ground no. I of the Revenue's appeal

3. Besides this, assessee has also raised certain additional grounds on various occasions through letters which are as under:-

Sr.	**Issue**	**GOA reference**
1.	Assessment order is barred by limitation under Section 144C of the Income-tax Act, 1961.	Additional ground no. 1 filed on 9 March 2020
2.	Assessment order is barred by limitation under section 153 of the Income-tax Act, 1961.	Additional ground no. 2 filed on 24 November 2022
3.	Final assessment order contrary to directions of DRP is invalid.	Additional ground no. 3 filed on 1 7 January 2024

4. The assessee is a non-resident company incorporated and tax resident of Germany. During the relevant previous year assessee has derived income by way of royalty and fee for technical services under various agreements and contracts entered into by its group entities. It has also entered into a contract with Delhi Metro Rail Corporation in consortium alongwith Siemens Ltd which is an Indian group company of the assessee.

5. Ground Nos.2-5 of the assessee's appeal is with regard to characterization of receipts towards software as 'royalty'.

6. The brief facts are that during the years under consideration assessee received an amount of Rs. 407,769,950/- as consideration for supply of software to Siemens Ltd and its

affiliate entities. Before the ld. AO assessee stated that the software suppy forms an integral part of the equipment supplied and, therefore, partakes the character of supply of equipment and mere supply of equipment without the software would amount to supply of incomplete machinery, as the machinery cannot function without the software. The software supplied by the assessee can only be used on the equipment / hardware supplied by the assessee. Therefore, these softwares have no other utility except on its own equipments. Before the ld. AO assessee submitted the copies of invoice on a sample basis and it was explained that the receipts are for non-exclusive, non-transferrable license for software which had to be utilized only on the equipment supplied by the assessee and therefore, it cannot be treated as royalty. In support of his contention it cannot be taxed as royalty, Assessee placed reliance on orders passed by the Tribunal in assessee's own case from A.Ys. 2001-02 to A.Y.2006-07 and also placed reliance on the judgment of the Hon'ble Delhi High Court in the case of DIT vs. Ericson A.B.[2pll| 16jaxmann.com 371 and on the AAR ruling in the case of Dassault Systems K.K. (2010) 322 ITR 225. Ld. AO however, following the assessment orders in the previous year held that consideration for supply of software would be treated as royalty not only u/s.9(1)(vi) under the Income Tax Act as well as India-Germany DTAA. In sum and substance his observations were as under:-

- The software supplied is of specialized nature and customized to the specification of the client.

- Each software supplied has been independently priced in the invoice independent from the supply price of the equipment. Almost all the equipment supply invoices produced have some element of software supply, independently priced included therein.

- Few invoices relate only to the supply of software and there is no equipment supply in respect of the same.

- The prices charged for the software is an indication of its importance in the transactions.

- Software has also been supplied without the hardware and thus the software has independent use as well. Hence claim of the Appellant that the supply of software is an integral part of equipment supply is untenable.

7. Apart from that, the contention of the ld. AO was that income has to be assessed on accrual basis and not on actual receipt basis and for which he has relied upon Special Bench of the Tribunal in assessee's own case for A.Y.1980-81. Though ld. AO had referred in detailed various observations made in the assessment order for the earlier years, however the same are not reiterated because all those observations have not been upheld by the Tribunal in assessee's own case for A.Y. 2001-02 to 2006-07.

8. Ld. DRP upheld the action of the ld. AO relying upon the judgment of the Hon'ble Karnataka High Court in the case of **CIT vs. Samsung Electronics reported in 345 ITR 494 (KAR).**

However, the ld. DRP directed the ld. AO to tax the impugned software transactions as 'royalty' only with respect to three invoices where software was independently supplied and not other transactions. The ld. AO in his final assessment order had failed to comply with the specific directions of the ld. DRP and has taxed the entire consideration for supply of software as 'royalty' instead of taxing the consideration only related to three invoices.

9. It has been submitted before us that this issue stands covered by the decision of the Tribunal in assessee's own case for the earlier years.

10. After considering the relevant finding given in the impugned orders and the case made out by the assessee before the authorities below and also before us that consideration received for supply of software cannot be deemed to be royalty for the reasons that :-

- *Firstly,* the software provided are standard off-the-shelf software.
- *Secondly,* the assessee grants a non-exclusive and non-transferable license to its customers, allowing them to copy the software for single user use only on their equipment.
- *Thirdly*, the end-user license agreement includes several restrictions, prohibiting the use of the software for purposes other than those specified in the agreement or the creation of copies for commercial exploitation.

- *Fourthly,* even in cases where the relevant hardware and software are itemized separately on the same invoice, or when separate invoices are issued, or when updates to the software are supplied, or additional features are validated at a later date, such distinctions should not affect the stance. These software products are exclusively compatible with the equipment manufactured by the assessee and hold no utility on similar equipment produced by its competitors.
- *Lastly*, the software supplied by the assessee, as delineated in the three invoices mentioned in the DRP's directions, is exclusively designed for utilization with the Medical Diagnosis Devices manufactured by the assessee.

10.1 Apart from that, we find that this issue stands covered by the decision of the Tribunal in assessee's own case in various assessment years details of which are as under:-

AY	**ITA No.**	**Date of Order**
2006-07	8094/Mum/2010	06.05.2014
2005-06	1174/Mum/2010	20.05.2014
2004-05	4502/Mum/2009	18.05.2012
2003-04	2520/Mum/2008	09.07.2010
2002-03	2099/Mum/2007	10.12.2008
2001-02	1957/Mum/2007	08.12.2008

11. The Tribunal in A.Y.2001-02 has held that supply of software is not taxed as 'royalty' which has been followed in the subsequent Tribunal orders from A.Y.2002-03 to 2006-07. The relevant extracts are as under:-

"6. We have heard the rival submissions and perused the relevant material on record. There is no dispute on the fact that the assessee had not separately sold software but it was part and parcel of the equipment supplies to M/s Siemens Limited. The case of the assessee is that it should be taken at "Business Profits as per Article 7 to DTAA between India and Germany. On the other hand the Department wants it to be considered as falling under Article 13, being the royalty. We have to decide whether the sum of Rs.5.29 crores is to be considered as "Business profits" or "royalty. The Special Bench of the Tribunal in the case of Motorola Inc. Vs. DCIT (2005) 95 ITD 269 (Delhi)(SB) has considered this aspect and held that "the payment made to the assessee for use of software in the equipment did not amount to royalty either under the Income- tax Act or the DTAA." The facts involved in the instant case are akin to those considered by the Special Bench in the afore-noted case. The Learned Department Representative could not point out any distinguishing feature in the facts of the instant case vis-a-vis that decided by the Special Bench. Respectfully following the view taken by the Special Bench in this aspect of the matter, we are of the considered opinion that the amount received by the assessee towards supply of software cannot be segregated from the supply of equipment and hence that portion cannot be considered as "royalty". We, therefore, approve the view taken by the learned CIT(A) on this issue."

12. Furthermore, in AY 2005-06, the Tribunal has examined the scenario wherein software was provided separately from any hardware, and it has adhered to the precedent established in assessee's own case for A.Y.2001-02. The relevant extract of the observations made by the Tribunal is as under:-

"6. During the year under consideration, the assessee had supplied equipment to the various parties in India. The software required for the said equipment was also supplied by the assessee to its Indian customers. During the course of assessment proceedings, the A.O. verified the relevant invoices and found on such verification that the software in some cases was supplied by the assessee independently without any reference to the supply of corresponding equipment. He therefore treated the income earned by the assessee from the supply of software as in the nature of royalty and the same was brought 10 tax in the hands of the assessee as income from royalty. On appeal, the Id. CIT(A) held that the value of software could not be taxed as royalty in the hands of the assessee following the decision of the Tribunal in assessee's own case on similar issue for the earlier years ie. 2001-02 & 2002-03. He also took note of the fact that a similar issue was decided by his predecessor in favour of the assessee in assessment years 2003-04 & 2004-05."

13. Now, this issue of taxation of royalty under the DTAA has been decided by the Hon'ble Supreme Court in the case of **Engineering Analysis Centre of Excellence Private Limited vs. CIT reported in (2021) 432 ITR 471(SC).** The Hon'ble Supreme Court vide its order grouped various appeals before it into following four categories:

- The first category deals with cases in which computer software is purchased directly by an end-user, resident in India, from a foreign, non-resident supplier or manufacturer.
- The second category of cases deals with resident Indian companies that act as distributors or resellers, by purchasing computer software from foreign, non-resident suppliers or manufacturers and then reselling the same to resident Indian end-users.

- The third category concerns cases wherein the distributor happens to be a foreign, non- resident vendor, who, after purchasing software from a foreign, non-resident seller, resells the same to resident Indian distributors or end-users.
- The fourth category includes cases wherein computer software is affixed onto hardware and is sold as an integrated unit/equipment by foreign, non-resident suppliers to resident Indian distributors or end-users

14. The Hon'ble Supreme Court held that the amounts paid by resident Indian end-users/distributors to non-resident computer software manufacturers/suppliers, as consideration for the resale/use of the computer software, is not payment of royalty for the use of copyright in the computer software and that the same does not give rise to any income taxable in India in all the categories of transactions mentioned above.

15. Before us comparison between facts of the case and the terms and conditions which have been submitted to the ld. AO during the assessment proceedings for later assessment years vis-à-vis the conclusions outlined by Supreme Court in the case of Engineering Analysis Centre of Excellence (P) Ltd. has been given in the following manner:-

	Facts in Engineering Analysis Centre of Excellence (P.) Ltd.	Facts in the case of assessee

1.	GRANT OF LICENCE. Samsung grants you a limited non-exclusive license to install, use, access, display and run one copy of the Samsung Software on a single Samsung Mobile Device, local hard disk(s) or other permanent storage media of one computer and you may not make Samsung Software available over a network where it could be used by multiple computers at the same time.	The Purchaser shall have the perpetual and non-exclusive right to use the Software Product on the devices for which it is intended, whereby each Software Product may only be used on one device at any given time.
2.	You may make one copy of the Samsung Software in machine readable form for backup purposes only; provided that the backup copy must include all copyright or other proprietary notices contained on the original.	The Purchaser may make up to three copies of the Software Product to be used for back-up purposes only.
3.	LIMITATIONS ON END USER RIGHTS You shall not, and shall not enable or permit others to, copy, reverse engineer,	The Purchaser shall not change, reverse engineer or reverse compile the Software Products and shall not extract any parts

	decompile, disassemble, or otherwise attempt to discover the source code or algorithms of, the Software (except and only to the extent that such activity is expressly permitted by applicable law notwithstanding this limitation), or modify, or disable any features of, the Software, or create derivative works based on the Software. You may not rent, lease, lend, sublicense or provide commercial hosting services with the Software.	thereof. Furthermore, the Purchaser shall not remove any alphanumeric identifiers, markings and Copyright notices from the data carriers and shall copy such in their unchanged form. The above provisions shall apply analogously to all associated documentation.
4.	You may not transfer this EULA or the rights to the Samsung Software granted herein to any third party unless it is in connection with the sale of the mobile device which the Samsung Software accompanied. In such event, the transfer must include all of the Samsung Software (including all component parts,	The Supplier shall grant the Purchaser the right to transfer the right to use granted to it to a third party. In such case, an agreement is to be concluded with the third party by which the third party shall not be granted any rights of use over and above those granted by the

	the media and printed materials, any upgrades, this EULA) and you may not retain any copies of the Samsung Software. The transfer may not be an indirect transfer, such as a consignment. Prior to the transfer, the end user receiving the Samsung Software must agree to all the EULA terms.	Supplier to the Purchaser
5.	2. License Grant " The Program is owned by IBM or an IBM supplier, and is copyrighted and licensed, not sold. Licensee receives a license to the Programs from Assimil8 Limited through a sublicensing agreement between IBM and Assimil8 Limited. Assimil8 Limited grants Licensee a non-exclusive license to (1) use the Program up to the Authorized Use specified in the PoE (2) make and install copies to support such Authorized Use,	The Purchaser shall not change, reverse engineer or reverse compile the Software Products and shall not extract any parts thereof. Furthermore, the Purchaser shall not remove any alphanumeric identifiers, markings and Copyright notices from the data carriers and shall copy such in their unchanged form. The above provisions shall apply analogously to all associated documentation.

	and (3) make a backup copy, all provided that a. Licensee has lawfully obtained the Program and complies with the terms of the Agreement; b. The backup copy does not execute unless the backed-up Program cannot execute c. Licensee reproduces all copyright notices and other legends of ownership on each copy, or partial copy of the Program. d……. e. Licensee does not: (1) use, copy, modify, or distribute the Program except as expressly permitted in this agreement; (2) reverse assemble, reverse compile, otherwise translate, or reverse engineer the program, except as expressly permitted by law without the possibility of contractual	The Purchaser may make up to three copies of the Software Product to be used for back-up purposes only.

	waiver; (3) use any of the Program's components, files, modules, audiovisual content, or related licensed materials separately from that program; or (4) sublicense, rent, or lease the Program	

Thus, the ratio and principle laid down by the Hon'ble Supreme Court is clearly applicable on the facts of the assessee's case and accordingly we hold that consideration received for supply of software cannot be taxed as royalty under India German DTAA.

16. During the course of hearing, the ld. DR had strongly relied upon the observation made in the assessment order and submitted that a review petition had also been filed before the Hon'ble Supreme Court in the matter of Engineering Analysis Centre of Excellence Pvt Ltd., However, the same is not entertained because judgment of the Hon'ble Supreme Court as on todfay is binding on us. Moreover, there are various other decisions of the Hon'ble High Courts on this issue which has been highlighted before us, the same is not being reproduced. Accordingly, we hold that this issue is covered in favour of the assessee not only in its own case as well as by the judgment of the Hon'ble Supreme Court and therefore, we hold that income derived by the assessee from supply of software cannot be subject to taxation as royalty either under Income Tax Act or

under the treaty. Thus, ground Nos. 2-5 raised by the assessee are allowed.

17. **Ground Nos. 6-8 of assessee's appeal and ground No.2-3 of Revenue's appeal regarding Constitution of AOP which has been argued at length by both the parties**.

18. The brief facts qua the issue are that the assessee, Siemens AG has received payments from various entities like Delhi Metro Rail Corporatin (DMRC), Reliance Industries Ltd, MCC PTA India Corp. Pvt. Ltd. Tata Power Ltd. Chemtrois Engineering Ltd. etc. in respect of off-shore supplies of electrical equipments etc., as well as services. During the year under consideration DMRC project itself involves 75.81% of the total turnover of off-shore supplies and 96.13% of the turnover of off-shore services and the controversy revolves around this contract, whether the project done by Siemens Ltd. Seimens AG constitue AOP a separate tax entity.

19. Delhi Metro Rail Corporation Limited ('DMRC') sought to extend Line-3 in Phase-II of the Mass Rapid Transport Systems for Delhi under the Japanese Yen Credit Loan. In this regard, it had inter alia invited tenders for design, manufacture, supply, installation, testing and commissioning of train control and signaling system on the extensions, integration with existing Line-3 systems for the BS03 project. Considering the terms and conditions of the tender documents, the assessee, Seimens AG and Siemens Limited desired to participate in the project and mutually agreed to work together in good faith on an exclusive

basis during the preparation and submission of the tender proposal for the project and to execute the project in their respective and independent scope of work if the tender proposal was accepted. For this purpose, a Memorandum of Understanding dated 11.09.2006 (MOU) was entered into between the assessee and Siemens Limited. The relevant MoU has been filed in the paper book from pages 540-562. The clauses therein, as may be relevant to adjudicate the issues under consideration, are as under:

i. That the said arrangement was established only for the limited purpose of representation and dealings with DMRC with independent and separate scope of work as set-forth therein. That the parties shall be liable jointly and severally vis-à-vis DMRC for the obligations of the project in accordance with the terms and conditions of the tender documents. However, such joint and several liability shall not extend to any third party other than DMRC, nor for any purpose other than the project and each party shall be liable in respect of its separate and independent scope of work set forth therein (refer clause 1.2)

ii. Nothing in the BS03 contract shall be deemed to constitute, create, give effect to or otherwise recognize a corporation, association, partnership, joint venture or formal or informal business entity of any kind. It shall also not be construed as providing for common management, capital contribution and sharing of profit and losses arising out of the project. (refer clause 1.3)

iii. The scope of work to be carried out by Siemens Limited was as specified in MOU (refer Clause 5) and such scope of work to be carried out by the assessee was as specified in the MOU (refer Clause 6)

iv. Each party shall be solely and entirely responsible to the other party for the performance of the contract in respect of its scope of work and for any or all liabilities arising in connection therewith. In this regard, each party would indemnify and hold harmless the other party from all costs, claims, actions, expenses or liabilities incurred by or imposed upon the other party as result of or in connection with its failure, breach, delay or any other default in the performance of its obligations (refer clause 9.1)

v. The payment terms were as agreed in Clause 10 thereof entitling Siemens Limited to invoice and receive payment from DMRC for the scope of its work as set out in clause 5, while Siemens AG to invoice and receive payment from DMRC for the scope of its work as set out in clause 6.

20. Before us, Ld. Sr. Counsel Mr, Pardiwala submitted that the scope of work to be carried out by each of the parties to the agreement was separate and identifiable. Since, each party had to independently carry out the work falling within its respective scope there was no joint management and control except for co-ordination required for smooth execution of the project. Though, they were jointly and severally liable to DMRC, they have agreed to indemnify the other party for loss suffered by them in view of

any default by either party. That the arrangement was to directly receive consideration relating to the individual scope of work carried out by the respective parties and there was no sharing of profits or losses. Theoretically, it was possible that one of the parties may make a profit while the other may make a loss. It has been submitted that, a bare perusal of the MOU shows that no Association of Person ('AOP') came into existence Limited) between the assessee and Siemens Limited

21. Since, the assessee, Seimens AG and Siemens Limited were successful in the tender, the project was awarded to them, and a contract dated 08 10.2007 was entered into between DMRC on one side (as the Employer) and the assessee and Siemens Limited on the other side (as the Contractor/s). Relevant contract has been placed before us at pages 510 to 582 of the Paper-book.

22. It has been pointed out from the contract of DMRC and as from the MoU, that there were four streams of income which has arisen from the execution of the said project being income from: (a) offshore supply of equipment, (ii) offshore rendering of services, (iii) onshore supply equipment and (iv) onshore rendering of services. Of the above, the assessee had to perform the former two activities and Siemens Limited had to perform the later two. In respect of individual work to be carried out by each of the parties they have raised their respective invoices and received payments in respect thereof. Siemens Limited has offered the income arising to them from the onshore supply of equipment and the onshore rendering of services which position

stands accepted in the assessment order passed in their case on a substantive basis. Similarly, the income arising from offshore rendering of services has been offered for tax by the assessee herein which has been accepted by the AO in the assessment order passed by him.

23. Thus, the issue arising in the grounds before us is, whether the said arrangement will constitute AoP between the assessee, Seimens AG and Siemens Ltd.

24. In the draft assessment order, the ld. AO has alleged that the income earned by the assessee from BS03 contract is in the nature of composite contract and the income therefrom is subject to tax on account by and large on the following observations made by him:-

- The BS 03 Contract is a singular one even with a lump-sum payment for all services and supplies.
- The BS 03 Contract is an indivisible one having closely inter-related elements of on-shore as well as off-shore supplies as well as services.
- In sum and substance, the BS 03 contract is a composite one with no specific assignment or distribution of scope of work. Even para 5 and 6 of the MoU merely fixes the responsibility by making one of the parties as 'member-in-charge' and the paras do not specify that the relevant works have to be performed by the designated members only

- On a reading of the contract entered into in the context of the object sought to be achieved by the contract, the conclusion is inevitable that it is a contract for installation and commissioning of equipment(s) which the tenderer itself has supplied and has been commissioned through an associated enterprise upon association and assignment by the tenderer. Hence, it is an indivisible and composite contract.
- Through the cross-fall breach clause enshrined in Clause 9, the very nature of the contract becomes singular and composite. Any claims for an artificial division of the contract can be ignored.
- In performance of the Contract, the assessee along with, Siemens Limited (SL), India, entered into an 'Consortium' arrangement (The term 'arrangement' is used as no 'Agreement" in that respect has been furnished by the Assessee) in respect of which no detail has been furnished. Hence, such an consortium arrangement appears to be informal but binding due to associated nature of the 2 parties. In such a scenario, association of 2 persons, viz., Siemens AG and Siemens Limited (India) has been formed to undertake the contract.
- It is noteworthy that despite consortium of part of the contract, Siemens AG was to be solely bound by the terms of the tender and was to be liable to the Consortium Leader/lead partner for the performance of all obligations under the contract

- The Permanent Establishment of Siemens AG in this case, Siemens Limited (India), is directly involved in the relevant contract as an 'associate of parts of the contract and directly stands to profit from the involve transaction.

25. Based on the above finding, the AO has alleged the existence of an AOP between the Seimens AG and Siemens Limited and held that the income from offshore supplies should be taxed in the hands of the said AOP. Accordingly, the AO proposed that the income arising from offshore supplies was taxed in the hands of the AOP on substantive basis and in assessee's hand only on protective basis.

26. The ld. DRP vide its directions held that the issue relating to constitution of the AOP cannot been gone into and the issue relating to taxability of offshore supply of equipment is considered on the basis as if a substantive assessment thereof has been made in the assessee's hands. The ld.DRP relied upon the judgment of the **Hon'ble Supreme Court in the case of Ishikawajma-Harima Heavy Industries Limited (2007) 158 Taxman 259 (SC)** and the tax Treaty between India and Germany including the protocol thereto and concluded that the income arising from the offshore supply of equipment is not chargeable to tax in India. **The DRP has also followed the judgment of the Hon'ble Bombay High Court in the assessee's own case in ITA No.1033 of 2010 for the AY 1997-**

98 and ITA No.5591 of 2010 for AY 1999-00 which is to the same effect.

27. However, pursuant to ld. DRP's direction, the ld. AO while passing the final assessment order replicated the entire text from the draft assessment order and followed the DRP directions of non- taxability of offshore supplies in the hands of assessee. While the DRP's directions regarding the non-taxability of income from offshore equipment supply thus remain unchallenged by the Revenue before this Tribunal. Hence, the matter concerning the constitution of an AOP is the only issue for adjudication before this Tribunal.

28. We have heard both the parties and also perused the observation and the findings of the ld. AO whether the contract receipts from DMRC would be taxed as AOP of Siemens AG and Siemens Ltd. The term AOP has not been defined under the provisions of the Income-tax Act, 1961 ('the Act'). However as per Section 2(31) of the Act while defining "person' includes under clause (v) "an association of persons or body of individuals whether incorporated or not." The explanation to Section 2(31) of the Act clarifies that an AOP shall be deemed to be a person whether or not such association was formed, with the object of deriving income, profits or gains.

29. As the term AOP has not been defined in the Act, one has to consider certain judicial precedents to determine the characteristics of an AOP. The concept of when an AOP comes into existence can be fairly clear as a result of several Supreme

Court decisions on the subject. The **Supreme Court in the case of CIT v. Indira Balkrishna [1960] 39 ITR 546 (SC)** has held that to constitute an AOP, earning of income by joining together in a venture and sharing of profits or loss is essential. Further the Supreme Court in the case of **G. Murugesan & Bros. v. CIT [1973] 88 ITR 432 (SC)** held that the finding members "joined for common purpose or common action" or they helped in producing income to form an AOP is essential. Thus, it is evident that there must be a common design to produce income and in the absence of such a common design, there cannot be an association. Mere existence of common interest or the fact that the persons receive income jointly or that they are joint owners of the income yielding property is not enough.

30. From the above-mentioned decisions, it can be concluded that the following are the essential ingredients of an AOP:

- joining together by two or more persons,
- volition or will to come together,
- for the purpose of producing income,
- common management of affairs, and
- sharing of profit or loss between the members of AOP.

These ingredients are cumulative and not exclusive. All of them must be present for an entity to constitute an AOP. Even if one of the ingredients is absent, then such an association cannot be assessed in the status of a ΛOP.

31. Before us ld. Sr. Counsel Mr. Pardiwala submitted that none of these conditions have been fulfilled in the present case therefore, no AoP has come into existence. He submitted that now this issue stands squarely covered by the decision of the Hon'ble Delhi High Court in the case of ***Linde AG, Linde Engineering Division vs DDIT [2014] 365 ITR 1 (Delhi),*** wherein, the High Court has discussed this issue in paragraphs 25 to 70 held that under these circumstances no AOP was constituted. He submitted that it is admitted by the AO in the assessment order that the facts in the present case are similar to that of Linde AG as he has extensively relied upon the order of Linde AG by the AAR which now stands reversed by the Delhi High Court. Further, he submitted that it is an admitted fact that the facts of the present case are more or less similar to that of Linde AG. The ld. AO has strongly relied upon the decision of AAR in the case of Hyundai Rotem Co. reported in 323 ITR 277. Before us assessee submitted similarities between assessee's case and the case of CIT vs. Linde AG, Linde Engineering Division vs. DDIT in the following manner:-

No.	Points for consideration	Points considered by Delhi High Court in case of Linde AG	Factual Position in the contract under consideration (DMRC-BS03 Contract)
1	Facts of the case	ONGC Petro Additions Limited (OPAL), floated a tender notice inviting bids for executing the work	DMRC floated a tender notice inviting bids for executing the work (including undertaking

		(including undertaking all activities and rendering all services) for the design, engineering, procurement, construction, installation, commissioning and handing over of a plant. The project was to be executed on turnkey basis. Linde AG and Samsung Engineering Company Ltd. (Samsung) entered a Memorandum of Understanding (MOU) whereby both the parties agreed to form a consortium, for jointly submitting a bid to secure the contract for execution of the aforesaid project. An internal MOU was also executed between the two parties to segregate the scope of responsibilities between them. The contract was awarded to the consortium.	all activities and rendering all services) for the design and construction of a rail-based mass transport system. SAG and SL entered into a MOU whereby both the parties agreed to form a consortium, for jointly submitting a bid to secure the contract. The said MOU also segregates the scope of responsibilities between consortium members. The contract was awarded to the consortium.
2	Issues under consideration	Whether the consortium could be treated as an AOP?	
3	Contractual documents specify	Clause 4.8 of the MOU expressly provided that "the	Clause 1.2 of the MOU forming part of the Contract states as under;

	that there is no AOP	CONSORTIUM shall constitute an unincorporated arrangement established for the limited purpose of representations and dealing with ONGC/OPAL with independent and separate scope of work as set forth" in the MOU (Para38)	*"....The Parties mutually agree and confirm that they shall constitute an unincorporated arrangement established for the limited purpose of representations and dealing with DMRC with independent and separate scope vis-a-vis DMRC for the obligations of the Project in accordance with the terms and conditions of the Tender document. Such Joint and Several Liability shall not extend to any third party other than the Project and each one will be liable in respect of its separate and independent scope of work set forth herein. "* Clause 1.3 of the MOU forming part of the Contract states as under: "*...Nothing in the BS03 Contract Agreement shall be deemed to constitute, create, give effect to, or otherwise recognize a*

			cooperation, association, partnership, joint venture or formal or informal business entity of any kind (incorporated or not incorporated)."
4	Scope of work specified	Responsibilities of each member were separate and independent. Neither of the members had any role to play with respect to the scope of work which was allocated to the other member (Para 39)	Nature of work undertaken and capable of being executed by each member is very much different as defined in Clauses, 5 and 6 of the MOU, forming part of the Contract
5		The allocation of the work was done in such a manner that each member was required to perform work which was within its field of expertise and could not be performed by the other party. The work to be performed by both the members was separate, definite & divisible. (Para 40)	
6		The said MOU formed an integral part of the Contract entered into between Linde, Samsung and OPAL and was	The MOU between SAG and SL also forms a part of the Contract which has been duly accepted and

		appended as Annexure J to the said Contract. And, to that extent OPAL also recognized the relationship between Linde and Samsung.	tamped by DMRC
7		The annexures to this agreement included a Gantt Chart which indicated the schedule for execution of the project. This schedule clearly specified the separate tasks/work to be executed by Linde and Samsung. (Para 41)	The Annexure A to MOU ("Value Activities and Non Value Activities) specifies the separate tasks to be done by each member
8		Each of the members was also responsible for any deficiency in performance of the work falling within their scope of works. Although, the parties had agreed to be joint and severally liable to OPAL, the members had internally agreed that each of them would be responsible and liable for performance and completion of their scope of work. (Para 43)	Clause 3,6 of the MOU forming part of the Contract states as under: " *.....Joint and several liability means that the members of consortium shall be jointly and severally liable to the Employer for the fulfillment of the terms of the Contract. However, between the members of the consortium, each Party shall indemnify and*

			hold harmless the other Party to its MOU from all costs, claims actions, expenses or liabilities incurred by or imposed upon the other Party as a result of or in connection with its failure, breach, delay or other default in the performance of its respective obligations under the contract.*
9	Separate Invoicing	Clause 6.3 contemplated that separate invoices would be issued by Linde and Samsung to OPAL (described as the 'company' under the Contract). (Para 42)	Clause 10 of the MOU forming part of the Contract provides for separate invoicing and payments in respect of the separate scope of work of each consortium member. Each member does not act as an agent of the other.
10	Payment separately	Linde and Samsung were to be paid based on the separate invoices raised by them respectively (Para49)	SAG and SL were to be paid on the basis of separate invoices raised by them respectively ***(Clause 10.2 and 10.3 ofMOU)***
11	Separate	The Internal Consortium	Clause 9.(1) of the MOU forming part of the

	Risks	Agreement was also explicit with regard to risk to be borne by the members. Linde and Samsung agreed to bear the risk for the work falling within their scope of work including on account of non-payment or default by OPAL. Neither of the members would be liable to each other on account of any loss or damages incurred by the other member on account of non-payment by OPAL. (Para 42)	Contract as under: "*... Each party shall be solely and entirely responsible to the other party for the performance of the contract in respect of its scope of work and for any and all liabilities arising in connection therewith. Each party shall indemnify and hold harmless the other party from all costs, claims, actions, expenses or liabilities incurred by or imposed upon the party as a result of or in connection with its failure, breach, delay or other default in the performance of its obligations under the contract referred to for the purposes of this clause as "default" .... "*
12	Sharing of Profits / losses	There was no arrangement for sharing of profits and losses between Linde and Samsung. And, each of them would make profits or incur	Clause 1.3 of the MOU forming part of the Contract states as under: "..... *Nothing herein shall be construed as providing for common management capital contribution and sharing*

		losses based on the price as agreed by them and the costs incurred by them for performance of the contract falling within their independent scope of work (Para47)	*of profits and losses arising out of the project. "*

32. Thus, he submitted that the judgment of the Hon'ble Delhi High Court is squarely applicable on the facts of the assessee's case and therefore, it cannot be held that this contract resulted into any kind of AoP.

33. Reliance was also placed on the decision of the Hon'ble Delhi High Court in the case of CIT vs. Oriental Structural Engineers (P.) Ltd. [2015] 374 ITR 35 (Delhi) which has relied on the Principles laid down in Linde AG (supra), and has held that JV was not an association of persons and liable to be taxed on that basis.

34. Now coming to the decision of Hyundai Rotem Co., which has been heavily relied upon by the revenue authorities, wherein similar issue was involved if the question of formation of an AoP in connection with a similar consortium contract of DMRC, held that an AoP does not exist as:

i. the nature of work undertaken and capable of being executed by each party is very much different and the scope of work assigned to one party cannot be undertaken or relocated to another,

ii. both parties have different skill-sets, that is why the evaluation was also done by DMRC separately in relation to each member,

iii. interchangeability or re-assignment of work and overseeing each other's work was not possible;

iv. each party did not act as an agent of the other;

v. though the performance guarantee was given by MRMB Consortium, the fact remains that DMRC insisted on a separate guarantee and undertaking from the parent company of each member;

vi. above all, there is a specific declaration that "nothing in the agreement is intended or shall be construed as creating a partnership, joint venture or any other legal entity among the parties":

vii. the profits and losses are being borne by the individual members themselves and common expenditure not being incurred by them;

viii. the joint and several liabilities towards the employer have been apparently introduced as a safeguard to Company to have better hold over the Consortium members.

35. Further, the analysis of assessee's case in Hyundai Rotem Co., (supra) have been highlighted in the following manner:-

No.	Points for Consideration	Points as discussed by AAR in the case of Hyundai Rotem Co.	Factual Position in the present contract
1	Scope of work	Nature of work undertaken by each- member is qualitatively	Nature of work undertaken and capable of being executed by each

		different and each member has distinct skills. Work assigned to one party cannot be undertaken or re-allocated to another member	member is very much different as defined in Clause 5 and 6 of the MOU, forming part of the Contract Work assigned to one party cannot be undertaken or re-allocated to another member
2	Evaluation of members	Evaluation done by DMRC separately in relation to each member	Evaluation of each member has been done separately. SL is the lead member of the consortium, as required by DMRC, only for performing the administrative and liasioning role on behalf of the consortium.
3	Payments in the name of consortium	Each member does not act as an agent of the other	Clause 10 of the MOD forming part of the Contract provides for separate invoicing and payments in respect of the separate scope of

			work of each consortium member. Each member does not act as an agent of the other.
4	Joint and several liability towards the DMRC	The joint and several liabilities towards the employer is a safeguard to DMRC to have better hold over the consortium members.	Clause 9.1 of the MOU forming part of the Contract states as under: "..... Joint and several liability means that the members of consortium shall be jointly and severally liable to the Employer for the fulfillment of the terms of the Contract. However, between the members of the consortium, each Party shall indemnify and hold harmless the other Party to its MOU from all costs, claims, actions, expenses or liabilities incurred by or imposed upon the

			other Party as a result of or in connection with its failure, breach, delay or other default in the performance of its respective obligations under the contract. Thus, the joint and several liability clause imposed by DMRC is only to safeguard itself by having a better hold over the parties for timely and successful completion of the project.
5	Contractual documents Specify that there is no AOP	Specific declaration in SCA that the members do not intend or hall be construed as creating partnership, joint venture or any other legal entity among the parties	Clause 1.3 of the MOU forming part of the Contract states as under; "..... Nothing in the BS03 Contract Agreement shall be deemed to constitute, create, give effect to, or otherwise

			recognize a co-operation, association, partnership, joint venture or formal or informal business entity of any kind (incorporated or not incorporated).
6	Insurance in the joint name of DMRC and consortium	Profit & losses borne by individual members themselves and common expenditure not being incurred by them	The insurance qua the contract has been taken by each member separately and not by the consortium.

36. Further reliance was also placed on the decision of another AA Ruling in the case of ***Hyosung Corporation v. DIT [2009] 314 ITR 343 (AAR)*** wherein similar observations as above were made and concluded that no AOP could be formed in that case also. The petition filed by the Revenue against the Ruling in Hyosung Corporation, was dismissed by Hon'ble Delhi High Court in ***WP(C) No. 2765/2010 dated25th March 2011*** where it was held that price for offshore supply is not taxable and therefore other questions on formation of AOP would not arise for consideration. The AAR accepted the division of work between the parties to the contract and the customer and held that: .. ,

"... *The assignment which was in terms of the Mo U paved the way for such separate contracts and the same was accepted*

and acted upon by Power Grid. Each party performs the obligations under the respective contracts awarded to them separately and receives the monies payable under the contracts independent of each other. L&T, which was not a party to the bid, is recognized as an independent contractor in various documents. L&T is entitled to raise the bills for the work carried out by it separately and such bills shall be payable by Power Grid directly to L&T without recourse to the applicant (vide para 3 of Assignment Deed). Thus, the individual identity of each party in doing the part of work entrusted to it is preserved, notwithstanding the coordination between the two and the overall responsibility of the applicant. It cannot therefore be said that the two contractors have promoted a joint enterprise with a view to earn income".

37. Thus, ld. Counsel submitted that the action of the ld. AO bringing to tax other streams of income in the hands of the assessee and Siemens Ltd separately would itself show that no AOP has been constituted between the parties.

38. The case of the AO has been elaborated specifically in paras 11.7 to 11.9 of the final assessment order, whereby the aspects which have been put against the assessee for constitution of an AOP are that, the BS 03 contract between DMRC on the one side and the assessee and Siemens Limited on the other side is a single and composite one, where the contractors are jointly and severally liable to the employer A24 for execution of the contract. In this regard, AO has made reference to 'Cross Fall Breach Clause' in the said contract. AO has also made reference to the orders of the Authority for Advance Ruling in the case of Linde AG and Alstom Transport SA which according to the AO, on similar facts and circumstances an AOP has been found to be

constituted. But now this AAR decision has been reversed by the Hon'ble Delhi High Court.

39. On the other hand, ld. DR has filed his written submissions which is reproduced as under:-

From perusal of the facts and circumstances of the case, it appears that the arguments of the assessee are not tenable on account of the following broad reasons:

(1) The income of the Assesses is being earned from Indie in respect of a composite contract having significant on-shore elements also. In view of this, the income of the Assessee is taxable in India in terms of Sec. 9(1)() of the Income Tax Act 1961.

The assessee has entered into a Consortium arrangement with its Indian A.E. Siemens (India) Limited:

The Assessee is having regular income from India from the contract(s); hence the Assessee has a clear-cut business connection in India.

In order to appreciate the nature of the contract and the associated income, the details of the contract and related information are discussed in detail below:

7 Scope of Contract

The DMRC and Siemens AG Siemens (India) Limited Consortium Contract Agreement (BS 03) dated 08.10.2007 between as per

Clause 1 mentions that

DMRC agrees to hire and the Contractor agrees to be hired to implement the design, manufacture, supply, install and commission Train

Control & Signaling system for Extension of Line 3 of the Mass Rapid Transport System Phase I Project under the terms and conditions specified in this Contract Agreement and the other Contract Documents attached hereto Delhi Metro Rail Corporation, hereinafter referred to as DMRC floated Instruction to Tenderers (ITT) in respect of the relevant Contract BS-03 with the following scope of work

"Instructions to Tenderers

Volume I

The work comprises design, manufacture, supply, installation, testing and commissioning Train Control & Signaling system on the extensions, integration with existing Line systems, supply of spares, and the training of Operation and Maintenance personnel

"the Contract has established a consortium in accordance with Indian law and offered a tender for the design and construction of a rail based mass rapid transport system by procuring the design, execution and completion, and remedying any defects in the Works of the design, manufacture, supply, installation and commissioning of Train Control & Signaling system including training of operation and maintenance personnel, supervision of maintenance of Train Control & Signaling system, supply of spares, and Operation and Maintenance Manuals and agrees to undertake performance of work." Clause 2. Obligation of the Contractor

...To design, manufacture, supply, install, test and commission of Train Control & Signaling system, and To supply spares, O&M Manuals, training of 08M personnel, supervision of maintenance, and To provide all equipment, materials, labor and other facilities requisite for or incidental to the successful completion of the Works" In the tender process, the assessee, Siemens AG with its Associated Enterprise Siemens (India) Limited was the successful bidder.

DMRC and the assessee entered into a contract on 08.10.2007. In the contract DMRC has been described as "Employer" and the Consortium comprising of Siemens (India) Limited and the assessee Siemen AG (Transport Systems TS R.A.) has been described as

"Contractor". It has been mentioned that Siemens (India) Limited and Siemens AG would be jointly and severally liable for undertaking the contract, and collectively referred to as the Contractor It is relevant to set down the terms of the contract at this stage:

Clause 4 Value of Work and Completion Time

The Employer agrees to pay for the total cost of the Works and the Contractor agrees to accept the sums mentioned below in the Following currencies, to be the total cost for the Work carried out by him. Total Fixed Lump Sum Price.

Foreign Currencies: Euro 23,573, 726 (Euro Twenty Three Million Five Hundred Seventy Three Thousand and Seven Hundred 'Twenty Six only); and
In Local Currencies: INR 347,476,911 INR Three Hundred Forty Seven Million Four Hundred Seventy Six Thousand and Nine Hundred Eleven only)

Hence, in this case the Contract document is a singular one even with a lump-sum payment for all services and supplies.

8. Further, the Annexure A to the MoU consists of a list of schedules which only list down the value of activities and does not clearly spell out the recipient of the amounts:

Sr. No.	*Activity*	*Value (In Euro)*	*Value (INR)*
1	*Schedule 1 - Project Management and Interface Management*	*3132305*	*13180303*
2	*Schedule 2- Application Design*	*5580693*	
3	*Schedule 3- Onboard Equipment (Manufacture, Supply, Delivery of Trainborne ATC system)*	*4360026*	*2552688*
4	*Schedule 4 - Depot Equipment (Manufacture, Supply, Delivery of Depot Equipment)*	*2018374*	*5794809*
5	*Schedule 5 Trackside and Station Equipment (Manufacture, Supply, Delivery of Trackside and Station Equipment)*	*5320035*	*25526882*

6	*Schedule 6 - OCC Equipment (Manufacture, Supply. Delivery of OCC Equipment)*	*319858*	*14465233*
7	*Schedule 7 - Installation (Installation Trackside, Stations and Depot)*		*68798923*
8	*Schedule 8- Testing and Commissioning*		*12447079*
9	*Schedule 9- Integrated Testing and Commissioning*	*1011830*	*66384421*
10	*Schedule 10 - Miscellaneous*	*1830605*	*19703840*
	Total	*Euro 23,573,726*	*INR 347,476,911*

Hence, it is clear that the Contract is an indivisible one having closely inter-related elements of on-shore as well as off-shore supplies as well as services.

Apart from the Contract BS-03, another old Contract 3503 has also been awarded to the relevant consortium:
The Contract Agreement (3S 03) dated. 10.09.2004 between DMRC and Siemens AG (Transport Systems)-Siemens (India) Limited
Consortium as per Clause 1 mentions that:

"Clause 1
DMRC agrees to hire and the Contractor agrees to be hired to implement the design, manufacture, supply, install and commission Train Control & Signaling and Telecommunication systems 3S03 of the Mass Rapid Transport System - Phase One Project under the terms and conditions specified in this Contract Agreement and the other Contract Documents attached... Hence, the Contract of 3S 03 is akin to the BS 03Contract are described in detail.

Therefore, it is clear and evident that in sum and substance, the BS 03 as well as 3S 03 contract is a composite one with no specific assignment or distribution of scope of work. Even the para 5 and 6 of the MoU merely fixes the responsibility by making one of the parties as 'member-in charge' and the paras do not specify that the relevant works have to be performed by the designated members only.

9. Composite Nature of the Contract

The MoU relevant to the BS 03 Contract mentions at Clause 3(6) that "Joint and Several Liability" means that the members of the consortium shall be jointly and severally liable to the Employer for the fulfillment of the terms of the Contract. However, between the members of the consortium, each Party shall indemnify and hold harmless the other party to this MOU from all costs, claims, actions, expenses or liabilities incurred by or imposed upon the other Party as a result of or in connection with its failure, breach, delay, or other default in the performance of its respective obligations under the Contract. Hence, in this case, even there no separate and independent contracts.

The purpose of the Contract can be laid down to be as under: ".. to implement the design, manufacture, supply, install and commission Train Control & Signaling system for Extension of Line 3 of the Mass Rapid Transport System (MRTS) -Phase I Project..."

However, the purpose for which the tender was invited by DMRC was for commissioning of Train Control & Signaling System. It was not for supply of offshore equipments and training independently of the designing, installation and commissioning project. Nor was it for independent installation and commissioning, divorced from the design and supply of the equipments necessary. Such a contract has necessarily to be read as a whole and is not capable of being split up.

On analysis the terms of contract in the context of the tender floated and the purpose sought to be achieved, it is clear that the contract involved herein is a composite contract and it cannot be dissected into parts. Clearly, for the purpose of taxation, the contract can be considered as one, for installation and commissioning of a railway MRTS project in India.

On a reading of the contract entered into in the context of the object sought to be achieved by the contract, the conclusion is inevitable that it is a contract for installation and commissioning of equipment(s) which the tenderer itself has supplied and has been commissioned through an associated enterprise upon association and assignment by the tenderer. Hence, it is an indivisible and composite contract.

The object in floating the tender is to get the MRTS commissioned and installed at sites indicated, in furtherance of Train Control& Signaling system. Hence, on a look at the contract in the light of the objective sought to be achieved, there appears to be no substance in the argument that the contract contains multiple distinct pats and they have to be separated for the purpose of taxation. It cannot be held that both the parties to the contract intended to treat the claimed scopes of work to be treated separately. Thus, on a true construction of the contract in question, it is clear that the income there-under has arisen to the assessee in Indian a composite manner.

10. Composite Nature of the Contract-Cross-fall Breach Clause
In this case, Siemens (India) Limited has been made the Consortium Leader/lead partner. It has been mentioned in the Clause 4 of the relevant MoU that:

"...4. Siemens Limited will be the Consortium Leader with the mandate to sign and submit all documents required to be submitted by the consortium in accordance with the requirement included in the Project Tender documents/bid documents, as well as to act as liaison officer for the consortium members each of whom has independent and defined scope of work under this MOU...."

Siemens Limited shall be the member exclusively and independently in charge of the Consortium in so far as the competence limited to onshore activities under the offer is Concerned...

Siemens AG shall be the member in charge of the Consortium in so far as the technical competence in relation to do sign, manufacture,

offshore supply of the products and Technical support services in relation there to under the offer are Concerned..."

Siemens AG and Siemens Limited agree to co-operate with each other in the Project on an exclusive basis as a consortium members and will be Jointly and Severally liable for the execution of the Contract work...

Liability of Parties: The lead partner in charge shall be authorized to incur liabilities, receive payments and receive instructions for and on behalf of other partner subject to that-

Each Party shall be solely and entirely responsible to the other Party for the performance of the Contract in respect of its Scope of Work and for any and all liabilities arising in connection therewith. Each Party shall indemnify and hold harmless the other party from all costs, claims, actions, expenses or liabilities incurred by or imposed upon the Party as a result of or in connection with its failure, breach, delay or other default in the performance of its obligations under the Contract referred to for the purposes of this clause as "default"...

Each Party shall undertake all reasonable efforts to mitigate the loss in the event of the other Party's default under the Contract.

Hence, through the cross-fall breach clause enshrined in Clause 9, the very nature of the contract becomes singular and composite.

Any claims for an artificial division of the contract can be ignored.

In the case of Dongfang Electric Corporation, China V. DDIT (IT)-1(1), Kolkata, the following has been held:
"While one may have legitimate issues as to whether these observations regarding "looking at the transactions as a whole and not adopting dissecting approach" can indeed be applied in all cases in which separate contracts are entered into for offshore supplies and onshore services, in our considered view, these observations are certainly applicable in the cases in which the values assigned to the onshore services are prima facie unreasonable vis-a-vis values assigned to the offshore supplies, which make no economic sense when viewed in isolation with

offshore supplies contract. To that limited extent, our views are the same as of the learned Authority for Advance Ruling. In other words, the transactions are to be essentially looked at as a whole, and not on standalone basis, when the overall transaction is split in an unfair and unreasonable manner with a view to evade taxes. In order that such a situation can arise, it is sine qua non that while the assessee submits the bids for different segments (e.g. offshore and onshore in the present case) separately, these bids are considered together, as a single cohesive unit, by the other party, and this fact must be apparent from material on record. On the facts of this particular case, we have also noted that each set of contracts, i.e. offshore supply contract and onshore services and supply contract, has a cross fall breach clause which provides that a breach in one contract will automatically be classified as breach of the other contract. ... While these clauses undoubtedly give an indication that the offshore supplies contract' and 'onshore services and supplies contract' are required to be viewed as an integrated contract, this fact by itself does not indicate that the onshore services and supplies contract is understated so as to avoid tax in the source country...

Hence, it is crystal clear that the Contract can be treated as a single, indivisible, composite Contract, which has been claimed by the assessee to be artificially split into several related and dependent parts.

Hence from the above discussion , it is found that the assessee had entered into a contract with DMRC for off shore supply and services only, that the payment therefore was received outside India and that the transaction of sale was not taxable in India, In such a scenario, the following factors come into play in respect of the taxability of the underlying transaction to the instant contract.
11. Ratio of Roxar Maximum Reservoir Performance WLL:

In the recent landmark ruling made by the Hon'ble Authority for Advance Rulings (AAR) In Re Roxar Maximum Reservoir Performance WLL (AAR), it has been held that a composite contract for installation & commissioning cannot be split so as to exempt the profits from offshore supply of goods. It has been held that:

Decisions and Rulings relied on by learned counsel of the assessee have now to be considered in the context of the pronouncement of the Supreme Court in Vodafone International Holdings BV Netherlands vs. Union of India and another (345 ITR 1 (SC). In that recent decision, a three judge bench of the Supreme Court has laid down that what is needed is to consider the transaction in its entirety and to look at the transaction as a whole. The Supreme Court has advocated that a transaction must be looked at and not looked through. The learned Chief Justice has held "it is the task of the Revenue / Court to ascertain the legal nature of the transaction and while doing so, it has to look at the transaction as a whole and not adopt a dissecting approach". This injunction has been followed by this Authority in its recent Ruling in AAR 962 of 2010...."

Though in Ishikawajima-Harima, a two judge bench of the Supreme Court had adopted a dissecting approach by dissecting a composite contract into two parts and holding one of the parts not amenable to taxation in India, this cannot be followed in view of the 3 Judge verdict in Vodafone International Holdings vs. UOI 345 ITR 1 (SC) where it has been held that a transaction has to be "looked at and not looked through" and seen as a whole and not by adopting a "dissecting approach". A contract for sale of goods differs from a contract for installation and commissioning of a project. The tests relevant for considering where the title to the equipment, passed would not be relevant while construing the terms of a supply and performance contract. On facts of this case, the contract is for Train Control & Signaling system of rail-based mass rapid transport system and not one for sale of equipment or fitting of the equipment. It is a composite & indivisible contract for supply and erection at sites within the territory of India and cannot be split. The income accrued in India and was assessable as business income.

It has been held by the Hon'ble AAR 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. In the case on hand, ONGC clearly called for a contract for "services for supply, installation and commissioning of 36 manometer gauges". The purpose of the contract is the

installation of the gauges at site to enable ONGC to carry out its operations. I have quoted earlier the relevant portion of the contract. On a reading of the same, there cannot be any doubt that the contract in question was for erection and commissioning of 36 manometer gauges for the use of ONGC. The contract is clearly not one for sale of equipment. Nor is it one for mere erection of the equipment. It is a composite contract for supply and erection at sites within the territory of India. What is paid for by ONGC is for the supply and erection done in India. The payment is received by the assessee for the performance of the contract as a whole in India. It is therefore clear that the income to the assessee accrued in India.

A contract for sale of goods differs from a contract for installation and commissioning of a project. The tests relevant for considering where the title to the equipment, passed would not be relevant while construing the terms of a supply and erection contract. Therefore the facts relied on by counsel for the assessee to argue that the title to the gauges passed outside the country, are of no avail. 12. Siemens AG and Siemens Ltd. (India) form an A_QP - Ratio of Alstom_T_ransport SA:

In this case for the purpose of obtaining the Contract, the assessee Siemens AG has formed a 'Consortium' with an associate enterprise, Siemens Limited (India), as 'Consortium Partner[1] and has shared the responsibilities of the contracts.

In performance of the Contract, the assessee along with, Siemens Limited (SL), India, entered into an 'Consortium' arrangement (The term 'arrangement' is used as no Agreement' in that respect has been furnished by the Assessee) in respect of which no detail has been furnished. Hence, such an consortium arrangement appears to be informal but binding due to associated nature of the 2 parties. In such a scenario, association of 2 persons, viz., Siemens AG and Siemens Limited (India) has been formed to undertake the contract. However, it is noteworthy that despite consortium of part of the contract, Siemens AG was to be solely bound by the terms of the tender and was to be liable to the Consortium Leader/lead partner for the performance of all obligations under the Contract.

As discussed in the above section, it is clear that the contract was one and indivisible and could not be split up as sought to be done by the assessee. The contract was one for Train Control & Signaling system of rail-based mass rapid transport system in India and the contract cannot be split up since essentially, it was a composite contract for the commissioning of an electrical transmission project. It appears that the contract has been deliberately split through an artificial 'consortium arrangement for no obvious reason of avoiding formation of a Permanent Establishment (At the site of installation and commissioning) in India and avoid taxability in India.

Further, clearly, the Members of the Consortium viz. Siemens AG and Siemens Limited (India), who have come forward to execute the Contract, form an 'Association of Persons' (AOP) within the meaning of section 2(31) of the Income Tax Act.
The following traits exist in the case of performance of the contract:

(a) There was clearly a common purpose in their coming together and common management.
(b) The coming together was with the intention to undertake an activity with a view to earn profits. (c) They were acting in concert in furtherance of their respective businesses.
(d) The association member permitted 'associate' is also the associated enterprise of the assessee. As per proper appreciation of facts, the tender floated by DMRC was a composite tender. The bid submitted by the association of
which the Siemens (India) Limited is the leader was for the work tendered. Subsequently, the contract that was entered into by the Consortium with DMRC. The object of the contract and the purpose of the contract were the designing, installation and commissioning of the Train Control & Signaling system.
The contract provided for the payment for the work in lump and it cast liability on the Consortium for carrying out the work. A contract has to be read as a whole in the context of the purpose for which it is entered into. A contract for the designing, installation and commissioning of a project like the present one cannot be split up into separate parts as consisting of independent supply or sale of equipments and for designing, installation at the work site, leading to the commissioning and SO on. In the case on hand, on a true construction of the contract between the parties (DMRC-

Consortium), it is obvious that it is a contract, the sole purpose of which is installation and commissioning of a Train Control & Signaling system and its delivery to DMRC.

Further, as per recent AAR ruling in case Alstom Transport SA vs. DIT (AAR) (A.A.R. No. 958 of 2010), it has been held that composite contract cannot be split to exempt profits from offshore supply of goods and a joint contract constitutes an AOP.

Hence, it is concluded that the assessee Siemens AG and Siemens Limited (India) form an A.O.P.

Siemens (India) Limited and the assessee have got into the contract as Consortium partners.

The assessee and Siemens (India) Limited have come together for executing the project upon acceptance of the tender. The contract was for performing the entire work, and the two associates, Siemens AG & Siemens Limited (SL), India, came together to perform the contract.

The Members of the association were all in business and they came together in pursuance of an intention to promote their businesses.

The common object was to perform the contract and earn income there from.

There was a common object in the coming together.
There was a common purpose and there was concerted action. It is a combination of persons formed for the promotion of a joint enterprise banded together, as per the language of the decision in B.N. Elias In re: B. N. Ellas, [1935] 3 I.T.R, 408]. On the facts of this case, it is clear that the assessee, alongwith the other member, formed an Association of Persons liable to be taxed as such.

The coming together of the members of the association is based on the tender floated for a particular work by DMRC. The coming together is to meet the performance obligations to the tenderer arising out of that tender notification. On winning the bid, the contract entered into is for the purpose of performing that

obligation. Thus, the tender is the raise and entre and the contract with the tenderer is the foundation for the combination of the associates coming together to perform the obligation there under. After committing themselves to perform the contract in terms of the contract with the tenderer, however the members of the group divide the performance of the obligation that would not affect the nature and content of the obligation undertaken by them jointly. Their arranging the inter se relationship (As the 'Consortium members') while performing then obligation, cannot alter the status they acquire as association members in performing a joint obligation undertaken by the association.

The source of the receipt in this case is the contract with DMRC and not the contract inter se or the understanding among the members of the association. Therefore, it is clear that what is relevant in this context is to consider the legal rights and obligations arising out of and undertaken under that composite contact/transaction to determine the status of the association as a person. Hence, the Association Members including the assessee and its related concern Siemens Limited, India, is a resident of India fiscal territory and is liable to be assessed as an Association of Persons and the income from the transaction was chargeable to tax in India.

Gist of Alstom Case (2012-TI-28-ARA-INTL) as applied to the instant Proceedings:

In the Alstom case, the following ratio have been laid down which is applicable to the case in hand:

As per Ground No. (i), it has been held that though in Ishikawajima-Harima 288 ITR 408 (SC), Hyundai Heavy Industries 291 ITR 482 (SC) & Hyosung Corp 341 ITR 18 (AAR)it was held that that a composite contract was capable of being dissected and it was open to the assessee to raise the contention that parts of the contract should be treated separately for the purpose of deciding whether income from the performance of that part of the contract arose onshore or offshore and that part of the income attributable to offshore transaction cannot be taxed in India; this is no longer good law in view of the larger bench decision of the Hon'ble Apex Court in Vodafone International Holdings BV Netherlands where it has been held that the

transaction has to be looked at as a whole and not by adopting a dissecting approach.

As per Ground No. (ii), it has been held that, on facts, the contract entered was a composite one for which a lump-sum consideration was paid. Such a contract cannot be split up into separate parts as consisting of independent supply or sale of goods and for installation at the work site, leading to the commissioning and so on. The ratio of Linde AG (AAR 962/2010) & Roxar Maximum (AAR) have been followed in the case.

In Ground No. (iii) it has been enunciated that as the assessee and the others came together for jointly executing the project, they constituted an A.O.P. & were liable to be taxed as such. The fact that between themselves, the members of the Association divide the performance of the obligation does not affect the nature and content of the obligation undertaken by them jointly.

Findings of DRP:

During the course of the proceedings before DRP , the findings of the DRP is as under:

"In the course of assessment proceedings, the assessing officer has made various additions under the Royalty and FTS on Accrual basis. The Assessing Officer has a/so held that the Income derived by the assessee under the consortium agreement with Delhi Metro Rail Corporation on account of offshore supply and offshore services is also liable to tax in India. In this regard, the AO has held that the income under the consortium agreement is liable to tax in the hands of an AOP consisting of the Assessee and Seimens limited i.e. another group company of the assessee. The AO has held that though the Income is primarily taxable in the hands of the AOP, in the event the income is subsequently held to be liable to be taxed in the hands of the assessee then the income on account of onshore supplies and services should also be considered as assessee's Income for the previous year .In this regard, the AO has estimated 5% of the total supplies as assessee's Income .

The assessee's arguments and the contention of the Assessing Officer has been examined. As Far as Taxability In hands of AOP, it is stated by assessee that ultimately no assessment in hands of AOP has been made in this case. Hence, the question of assessee and Seimens Limited constituting AOP is not gone into. The issue is being decided on the basis that addition in hands of assessee is on substantive basis."

Therefore, without prejudice of findings and analysis of existence of AOP as well as the Composite Contract as mentioned in the Para Supra ,the DRP has not given any findings in favour of the assessee and relied upon the conclusion of the Assessing Officer.

40. In rejoinder, ld. Counsel for the assessee submitted that in so far as reliance from the judgment of three Judges of the Hon'ble Supreme Court in the case of Vodafone International Holdings BV Netherlands vs. Union of India and another (supra) which has also been referred in AAr Ruling in the case of Linde AG, Linde Engineering Division, the same is not applicable in the fact of the present case and this has also been overruled by the Hon'ble Delhi High Court in the case of Linde AG, Linde Engineering Division (supra). Further, the Hon'ble Delhi High Court in the case of Nokia Networks OY [2012] 25 taxmann.com 225 which rejected the reliance placed by the Department on Vodafone International Holdings BV considering the same as not relevant and High Court relied on the Supreme Court in the case of Ishikawajima Harima Heavy Industries Ltd, (supra) and held that such contracts cannot be read as one by applying the "look at" approach as prescribed in the decision of the Supreme Court in the case of Vodafone International Holdings BV.

41. After considering the aforesaid submissions and the facts as discussed above including the judgment referred and relied upon by both the parties, we find that this case is squarely covered by the decision of the Hon'ble Delhi High Court in the case of Linde AG which has been discussed in detail in the foregoing paragraphs including the judgment of AAR. From the perusal of the MOU dated 11/09/2006, it is clear that the parties had come together only with a view to participate in the tender where the scope of the work to be executed by each of the parties is separate and independent. There is neither any joint management nor any joint execution of the work. Further, there is no sharing of profits and losses between the parties and each of the party is entitled to the gross consideration to be received by them for executing their separate part of the work. Lastly, it has been agreed that though both the parties are jointly and severally liable to DMRC in respect of the entire contract, they have agreed to indemnify each other for losses suffered on account of defaults committed by the other. Thus, in these circumstances, we find that the prerequisite condition for constitution of an AOP being has not been fulfilled.

42. Once there are separate obligations to be performed and there is no over lapping of work and both the parties have received monies payable under the contract independent of each other and Indian party is entitled to raise the bill separately for the work carried out by it and assessee had received consideration separately for the supply carried out by it through off-shore, it cannot be inferred that both the parties acted in

consort to perform the contract together for the project. The nature of work undertaken is being executed by each member separately which has been clearly defined in Clause 5 and 6 of MOU. Once there is a separate invoicing and payments in respect of separate claim of work, then where is the question of treating them as AOP, because each member does not act as an agent of the other. In so far reliance placed on the 'joint and several liability' towards the DMRC as referred in Clause 9.1 has been imposed by DMRC, this was only to safeguard itself by having a better hold over the parties for timely and successful completion of the project which provides between the members of the consortium, each Party shall indemnify and hold harmless the other Party to its MOU from all costs, claims, actions, expenses or liabilities incurred by or imposed upon the other Party as a result of or in connection with its failure, breach, delay or other default in the performance of its respective obligations.

43. Lastly, Clause 1.3 of the MoU is very clear that nothing in the contract agreement shall be deemed to constitute, create, give effect to or otherwise recognize a corporation, association, partnership, joint venture or formal or informal business entity of any kind and the insurance qua the contract has been taken by each member separately and not by the consortium. Thus, we agree with the Ld. Sr. Counsel for the assessee that on these facts it cannot be held that there constitutes of AOP between Siemens AG and Siemens Ltd. Thus, this issue is decided in favour of the assessee and against department.

44. Ground Nos. 9-11 in assessee's appeal relates to compensation for delayed receipt pursuant to arbitration award.

45. T he brief facts are that had entered into a contract with National Thermal Power Corporation Limited ('NTPC') for Gas Based Combined Cycle Power Project at Dadri, Uttar Pradesh on 6.12.1989. SAG had lodged claims against NTPC in accordance with Clause 22.2 of the contract for the extra expenses accrued due to delays in various activities caused by NTPC viz. failure to secure import licenses and letters of credit during the initial phases of the contract.

46. Before us the sequence of events of NTPC arbitration award was provided, which is as under:-

Event	**Date**
The assessee entered into a contract with NTPC for Gas Based Combined Cycle Power Project at Dadri, Uttar Pradesh	06.12.1989
Reference made to arbitration	20.08.2001
Issue decided by Tribunal (also referred as partial award) on the grounds of: a) Claims made by SAG were time barred; b) NTPC counter claims The partial award was appealed by NTPC in High Court	
The Delhi High Court upheld the order of the Tribunal which upheld the order of the Tribunal which was then appealed before the Supreme Court	24.05.2005
The Supreme Court passed a favorable order in favour of SAG and thus the Tribunal was free to decide the claim submitted by SAG as described in the statement of claims plus interest. These claims were set to arise under Clause 22.2 of the GCC, being extra	28.02.2007

cost claimed for failure of various activities delayed by NTPC's failure to obtain import license, letter of credit.	
The Tribunal (International Court of Arbitration) - directed NTPC to pay a) Claims C2 to C8 b) Claim 9 was fully rejected c) NTPC was directed to pay 17,158,557 Euro plus an interest of 7,604,296 Euros calculated at 6% interest from the period from the period 20.08.2001 to 6 January 2009 d) NTPC to also pay simple interest on 17,158,557 Euros from the date of award till the date of payment NTPC to bear the costs of the Arbitration fixed by the International Court of Arbitration at 877,000 USD.	06.01.2009
Delhi High Court rejected the appeal to stay of payment to be made by NTPC	07.11.2012
Supreme Court directed NTPC to pay the disputed amount along with interest within four weeks of passing of the order. Siemens permitted to withdraw the said amount on furnishing a bank guarantee	05.12.2012
NTPC also appealed in the Delhi High Court to release only the amount after deducting TDS for which TDS certificates were issued and interest on TDS. The Delhi High Court acceded to the said appeal.	01.02.2013
Pursuant to the Delhi High Court order amount of INR 2,037,274,902 was released to SAG in FY 2013-14	19.04.2013

47. The International Court of Arbitration directed NTPC to pay SAG a sum of Euros 1,71,58,557 on account of its claims C2 to C8 and Euro 76,04,296 being compensation for delayed payment

of such claims at the rate of 6% per annum till the date of payment of such claims. Relevant reference in respect of compensation of delayed receipt of the principal amount has been provided in the paper book from pages 661-668 and our attention was drawn to paras 137 to 155 of the arbitration award.

48. In so far as the taxability of principal amount of arbitration award, the same is not in dispute. However, while filing the income tax return, the assessee had not offered the interest in the arbitration award considering that interest from NTPC are in the nature of business receipts which are not taxable in absence of PE in India. The NTPC has withheld the taxes @10% of the interest component of the award in the current assessment year. The assessee received the payment of award including interest in A.Y.2014-15.

49. The issue before us is, whether the compensation for delayed receipt pursuant to the award would be taxable in India in absence of a PE.

50. The ld. AO did not accept assessee's position and taxed the interest of arbitration award in his draft assessment order concluding that interest of arbitration award would be taxable on accrual basis. The ld. DRP has already rejected the assessee's position that compensation in the nature of interest was the business receipt and no evidence was furnished in support of the same. Further, it would be taxable under income tax Act as well as India Germany DTAA. **However, the ld. DRP directed the ld. AO to tax the interest included in arbitration award on**

receipt basis and therefore, no addition was made in the final assessment order because the amount was received in A.Y.2014-15.

51. Before us, ld. Senior Counsel submitted that interest on arbitration award is not interest as understood in general parlance and it is not to be considered as an income. He submitted that there has to be debt claim prior to the passing of the arbitration award the compensation for delayed payment cannot be regarded in the nature of interest for the purposes of Article 11 of the Tax Treaty.

52. On the other hand, ld. DR relied upon the order of the ld. DRP.

53. After considering the relevant facts and submissions made by the parties, we find that it is not in dispute that international Court of Arbitration directed the NTPC to pay 17,158,557 Euro plus interest of 76,04,296 Euros at @ 6% interest from the period from the period 20.08.2001 to 6 January 2009 and NTPC was to also pay simple interest on 17,158,557 Euros from the date of award till the date of payment. Further, NTPC had to bear the costs of the Arbitration fixed by the International Court of Arbitration at 877,000 USD. Thus, the interest which is part of the arbitral award which was calculated @ 6% from the period 20/08/2001 to 06/01/2009 cannot be reckoned as interest in the form of a debt claim. The debt claim arises upon the issuance of the award by the International Court of Arbitration that is, from 06/01/2009 till date of payment. However, the

interest totaling to EURO 7,604,296 which was part of arbitration award cannot be treated as different from award and cannot be held to be income. Any interest due post date of award and till the final payment will fall in the nature of interest chargeable to tax not only under the Act but also under the Treaty, but in so far as the component of interest included in the arbitrary award till 06/01/2009 is part of a compensation only. This view was discussed by the Hon'ble High Court of Andhra Pradesh in the case of CIT vs. Visakhapatnam Port Trust (1983) 15 Taxman 72(AP) wherein it is held as under:-

"*.. 61. But where the interest is merely in name but constitutes part of the compensation or part of the damages, it is not 'interest' chargeable to income-tax. As an integral part of such compensation, it may be either slumped-up with the other elements in the gross sum or may be separately stated but treated as part of the gross sum - IRC* v. *Ballantine [1924] 8 TC 595. Mere description of the amount as interest which in fact is part of the compensation does not have the effect of altering the true character of the compensation Simpson v. Maurice's Executors [1929] 14 TC 580 (CA). That, in fact, is also the position with regard to unpaid purchase money coupled with a liability to pay interest along with each of the instalments. .*

.....

63.... The interest in such a case is received as part of the purchase price itself that is to say, as part of the consideration for sale of goods on deferred payment basis and not as a separate source - CIT v. Saurashtra Cement & Chemical Industries Ltd. [1975] 101 ITR 502 (Guj.) the mere nomenclature employed by the parties notwithstanding. When the payment of interest is a part and parcel of the agreement to pay the unpaid purchase money on a deferred payment basis there is no indebtedness-Chittela Venkata Subba Reddy v Jayanthi Audinarayana A.S. 446 of 1964

(AP) dated 2-8-1968 (Per Kondaiah, J., as he then was) affirmed in L.P.A. 267 of 1968 dated 14-3-1969.

64. Bearing these well settled principles in mind, it has to be seen whether interest payable on the agreed instalments of unpaid purchase money can be treated as a separate 'source' being interest on any form of 'indebtedness' contemplated in article VIII of the Agreement.

54. Thus, the interest amount partakes the same character of the principal amount.

55. In so far as taxability of principle of arbitration award, the same has not been disputed because the receipt is not chargeable to tax in absence of PE or said income being attributable to PE. Similarly, the interest of arbitration award from NTPC is also in the nature of claim made by the assessee on NTPC and was not the debt claim only the arbitration was awarded. Hence, we hold that interest on arbitration award do not represent income in the current year. This view is also supported by the decision of the Hon'ble Supreme Court in the case of **CIT vs. Govinda Choudhury & Sons [1993] 203 ITR 881 (SC)** where it was held that interest awarded as a result of an arbitration award following a dispute in relation to a work executed by the assessee was a revenue receipt and incidental to the business carried on by the assessee and thus assessable as a business income and not income from other sources.

56. Further, reference can be made on the decision of Hon'ble Bombay High Court in the case of Islamic Investment Co. v.

Union of India [2004] 265 ITR 254 (Bom.) an extract of which is as under:-

> *"However, as observed by the Supreme Court in All India Reporter Ltd. v. Ramchandra D. Datar AIR 1961 SC 943 when such amount becomes part of a judgment debt, it loses its original character and assumes the character of a judgment debt."*

57. Accordingly, this issue is decided in favour of the assessee holding that interest of arbitration award is not subject to tax in absence of PE in India.

58. In Ground Nos. 12-19 assessee has challenged the transfer pricing adjustment made by the ld. AO @10% of the value of international transaction declared by the assessee at Rs.12,49,83,884/-.

59. The brief facts are that during the year under consideration the assessee had received royalty for technical know-how and fees for technical assistance from Indian Associated Enterprises ('Indian AEs'). In this regard the Indian AE's have withheld tax at source at 10% for the payments made to the assessee under the provisions of India-Germany Tax Treaty ('Tax Treaty). The assessee filed its return of income and Form No. 3CEB on receipt / cash basis. In FAR analysis based on Rule 10B of Income Tax Rules and TP study report was submitted before the ld. AO. Assessee has mainly relied upon the transfer pricing documentation submitted by the Indian AE's in support of the transaction with the assessee. Relying upon the TP study report assessee submitted that the impugned transaction is complying

with the principle at arm's length. The India AEs earned Net Cost Plus mark-up ('NCP') / Net Profit Margin ('NPM') (after considering services availed from assessee) that are consistent with the margins earned by independent comparable companies. Accordingly, applying the Transactional Net Margin Method ('TNMM') and from the analysis as aforesaid, the services rendered by assessee are considered to be compliant with the arm's length principle.

60. Additionally, the assessee followed the Comparable Uncontrolled Price ('CUP') method to benchmark the transactions considering that the rates are approved by the Central Government / Reserve Bank of India / any regulatory authority which is considered to be compliant with the arm's length principle under CUP.

61. The TPO observed that the amount disclosed by the assessee and the amount having been considered by the group entities in their in their Form 3CEB, did not tally with one another. The summary of the differences was as under:-

Sr.No.	Name of the Associated Enterprises	Amount of international Amount transactions as Form respective AEs with the Assessee (in Rs.)	Amount of international transactions reported by the assessee (in Rs.)	Difference in the amount of international transactions (in Rs.)
1	Siemens Limited	19,180,521,092	1,042,184,030	18,138,337,062

2	Siemens Power Engineering Private Limited	832,559,120	28,320,352	804,238,768
3	Siemens Information Systems Limited	3,739,581,946	133,534,831	3,606,047,115
4	Siemens Corporate Finance Private Limited	99,763,387	2,897,190	96,866,197
5	Siemens Enterprise Communications Private Limited	10,523,828	10,503,550	20,278
6	Siemens Information Processing Services Private Limited	30,162,484	32,398,890	-2,236,406
	TOTAL:	23,893,111,857	1,249,838,843	22,643,273,014

62. Thus, the ld. TPO observed that assessee had disclosed the amounts received on account of Royalty and FTS, on receipt basis, the corresponding Form 3CEB submitted by the Indian AEs disclosed these amounts on accrual basis. Hence there was a mismatch in respect of these two amounts to the extent of Rs 2264 crores. Thus, he concluded that the TP study report in the case of the associated enterprises cannot be relied upon to benchmark the assessee's transactions. Accordingly, he added

10% on adhoc basis to the value of international transaction and made an adjustment of Rs. 12,49,83,884/-.

63. The ld. DRP confirmed the action of the ld. TPO on the same ground and stated that identical issue has been considered by the ld.DRP in the earlier years and it was held that to the extent the transactions remain unreconciled, the action of the TPO is upheld. During the present year also, the assessee has been unable to reconcile the value of transactions as disclosed by the AEs in their Form 3CEB with the value of transaction as disclosed by the assessee in its return of income. Therefore, it cannot be said that the impugned transactions are mirror transactions of the transactions disclosed by the AEs in their form 3CEB.

64. Before us ld. Sr. Counsel Shri P.J. Pardiwala submitted that assessee has carried out detailed functional analysis and also undertaken such process while undertaking the benchmarking in their TP study report. He further submitted that TP adjustment cannot be made merely on the basis of alleged discrepancy in the amount of transaction reported by the assessee and it's Indian AE. The ld. TPO is bound to determine the arm's length price of the international transaction within the framework of the transfer pricing regulations, by selecting a specific method prescribed in section 92C of the Act and as per the parameters laid down in the Rule 10B of the Rules.

65. He submitted that it is not the case of the TPO and there is not a whisper of allegation in the TP order of the assessee and

the Indian AE's that the services were not provided by the assessee or the royalty for use of technical know-how was not made available by the assessee. Despite being so satisfied, the TPO proceeded with an ad-hoc disallowance only on account of alleged discrepancies in the amount of transactions reported by the assessee and its Indian AE's. In support he relied upon the decision of Judgment of the Hon'ble Bombay High Court in the case of **CIT vs. Johnson and Johnson Limited** reported in **(2017) 80 taxmann.com 337,** wherein the Hon'ble High Court was dealing with a case of assessee who paid royalty at the rate of 2%. The TPO restricted the royalty to 1% without providing any reasoning. In said facts, the Hon'ble High Court held in favour of the Assessee by making the following important observations:

"….We find that the impugned order of the Tribunal upholding the order of the CIT(A) in the present facts cannot be found fault with. The TPO is mandated by law to determine the ALP by following one of the methods prescribed in Section 92C of the Act read with Rule 10B of the Income Tax Rules. However, the aforesaid exercise of determining the ALP in respect of the royalty payable for technical know-how has not been carried out as required under the Act. Further, as held by the CIT(A) and upheld by the impugned order of the Tribunal, the TPO has given no reasons justifying the technical know-how royalty paid by the Assessing Officer to its Associated Enterprise being restricted to 1% instead of 2%, as claimed by the respondent assessee. This determination of ALP of technical know-how royalty by the TPO was ad-hoc and arbitrary as held by the CIT(A) and the Tribunal In the above view, the question as proposed does not give rise to any substantial question of law. Thus, not entertained".

66. He also relied upon the following judgments on similar point.

- *CIT(A) v. Lever India Exports Limited [2017] 246 Taxman 133 (Bombay)*
- *CIT LTU v. SI Group-India Limited [2019] 265 Taxman 204 (Bombay)*
- *CIT v. Merck Ltd [2016] 389 ITR 70 (Bombay)*
- *CIT v. Kodak India (P.) Ltd. [2016] 288 CTR 46 (Bombay)*

67. Accordingly, he submitted that adhoc adjustment of 10% o the value of international transaction declared by the assessee is not justified.

68. In so far as relying on the TP study report of the Indian AEs to justify the arm's length nature of its international transaction, Ld. Sr. Counsel submitted that Indian AEs have benchmarked all the transactions after detailed FAR analysis entered into with the assessee. The Indian AEs have earned Net Cost Plus Margin / Net Profit Margin (after considering services availed from assessee) that are consistent with the margins earned by comparable independent companies. Accordingly, applying the TNMM method and based on the analysis of the Indian AEs, the services rendered by the assessee were considered at arm's length from the perspective of Indian transfer pricing regulations.

69. He further submitted that, the Indian AEs had demonstrated through their Transfer Pricing Study Reports which are also adopted by the assessee that these transactions meet the arm's length principle as prescribed by Indian Transfer Pricing Regulations. The copies of Transfer Pricing Study Reports of Indian AEs were also submitted to the TPO vide submission

dated 31/08/2012 during the course of TP assessment proceedings. Ld. Sr. Counsel further submitted that under the transfer pricing regulations the Indian AEs (being the recipient of the technical services) are required to document their compliance with the arm's length principle as a payer. And the Indian AEs have documented the same and determined the transaction to be consistent having regards to the arm's length principle.

70. In view of the above and having regard to the economic and commercial factors, the compliance by associated enterprise with the provisions of Sections 92, 92A to 92F of the Act is considered, then it has to be reckoned as sufficient compliance by the assessee for the arm's length standard prescribed by the Indian transfer pricing regulations. Without prejudice he submitted that during the transfer pricing assessment proceedings of the Indian AEs for the same year under consideration following upward adjustment have also been made to the taxable income of Indian AEs.

Sr. No.	**Name of the Associated Enterprise**	**Adjustment made for FY 2008-09 as per TPO**
1	Siemens Limited	85.93 crores
2	Siemens Information Systems Limited	47.04 crores
3	Siemens Corporate Finance Private Limited	0.64 Crores

71. Thus, in the case of the Indian AEs the same ld.TPO concluded that the Indian AEs have paid excess expense including royalty and fees to the assessee as said expense basis are different set of comparable used in his process. On the contrary, in the TP assessment, the ld. TPO while making the ad-hoc adjustment arrives at a result in which the assessee has under charged from the AE for the same transaction in question. Thus, ld. TPO has taken exact contrary positions for the same transaction which would only lead to double taxation and therefore, this ground also no further adjustment should be made. In support of its contention that once the ALP has been adjudicated by the ld. TPO in the hands of the AE, it is not open to adopt a different ALP in the hands of the assessee. He relied upon the decision of Mumbai ITAT in the case of Tecnimont SPA India Office 22] 145 taxmann.com 477 (Mumbai - Trib.) wherein the ITAT held as under:-

"14. Having heard both the parties and after perusal of the records, we note that ***the payments made by the assessee PE to its AE's i.e. assessee with TICB and EDTICB were held to be at Arm's Length by this Tribunal (supra); and since the same international transaction of the instant assessee's procurement cost (being subcontracting income for the AE's i.e. of assessee viz TICB and EDTJCB) has been accepted as Arm's Length for the AE 's and the same beins mirror transaction cannot be considered excessive in the hands of the assessee/appellant.*** *Therefore, on the same reasoning/ratio of the decision of the Tribunal (Banglore) in UE Development India Pvt. Ltd. (supra) which has been upheld by Hon 'ble High Court (supra),* ***we hold that where the Tribunal has accepted the international transaction***

to be at Arm's Lensth Price in the hands ofAE$_t$ then the international transaction that the assessee had with the AE's to be also at Arm's Lensth Price and therefore no adjustment was warranted in the facts and circumstances of the case. And *the revenue could not point out any change in facts/law in respect to the ratio-decidendi of Bangalore Tribunal/Karnataka High Court in the case of UE Development India Pvt. Ltd. (supra). So we allow the ground no. 6 of the assessee s appeal and direct deletion of Arm's Length Price made as per the impugned order."*

72. Reliance was also placed on the decision of Hon'ble Karnataka High Court in the case of ***CIT* v. *UE Development India (P.) Ltd. [IT Appeal Nos. 52 to 55 of 2014, dated 12- 7-2018]*** which was also subsequently followed by other Coutts and Tribunals as well, in which it was held that if the transaction is considered to be at arm's length price in the hands of the Indian AEs, then no transfer pricing adjustment should be made in the hands of the Assessee company with respect to the same transaction.

73. On the other hand ld. DR submitted that assessee should have done independent benchmarking instead of relying upon benchmarking activity carried out by the Indian AEs. The determination of arm's length price has to be done separately because what is required to be seen whether assessee payment received is at arm's length price independently. Apart from that, he submitted that the reason for making the TP adjustment was on account of difference in the amount reported by the assessee as well as Indian AE and therefore, the arm's length ALP determined in the case of assessee on this issue cannot be accepted on the transaction of royalty received by the assessee.

74. In rejoinder, ld. Sr. Counsel had explained reasons for differences reported by the assessee in its Indian AE in the following manner:-

-The assessee reports the amount on receipt basis whereas the Indian AEs report transaction on accrual basis. This is a consistent position followed by the assessee basis the provisions of the tax treaty. This position has also been upheld by the Bombay High Court in the assessee's own case. Therefore, amounts received by assessee and amounts recorded by Indian AE's would not be identical.
- The assessee reports only those transactions that are subject to tax in India e.g. fees for technical services, whereas Indian AEs report all the transactions like purchase / sale of goods, provision and availing of services, reimbursement / recovery of expenses whether income/expense. It is thus natural that these would be differences in the transactions reported by the assessee and the AE's.

75. Thus, he submitted that reconciling the amounts reported by itself and its Indian AEs was unfeasible due to the provision of manual TDS certificates issued by payers during the relevant period. This made it challenging to match individual invoices with TDS certificates which were issued at a consolidated level. Nonetheless, it has been able to achieve a substantial reconciliation of the transactions, which were placed on record during the TP proceedings before the TPO vide submission dated 31/08/2012 as well as 27/09/2012.

76. We have heard the rival submissions and perused the relevant finding given in the impugned orders. One of the reasons given by the ld. TPO and the ld. DRP is that assessee has been earning to reconcile the value of transaction disclosed by the Indian AEs in the Form 3CEB if the value disclosed by the assessee in its return of income. The assessee had explained that the difference is for the reason that assessee accounts the amount on receipt basis whereas the Indian AE's reports the transaction on accrual basis and this assessee has been doing in accordance with the provisions of the tax treaty. **It is important to note here that, this position has also been upheld by the Hon'ble Bombay High court in assessee's own case that it should be taxed on receipt basis.** It was for this reason amounts recorded by the Indian AE cannot be the same. Apart from that, the assessee reports only those transactions that are subject to tax in India, i.e., element of Fees for Technical Services only, whereas Indian AEs report all the transactions like purchase / sale of goods, provision and availing of services, reimbursement / recovery of expenses whether income/expense. It is thus quite natural that there would be differences in the transactions reported by the assessee and the AE's. Once this fact has been brought on records and assessee has given this explanation for reconciliation, then this cannot be the reason or the ground for making adhoc adjustment @10% by taking 10% mark-up on the value of international transaction. Such an exercise is completely against the concept of transfer pricing

revelation. The ld. TPO was bound to determine the ALP in accordance with the Rules after analyzing the nature of transaction and the arm's length price after applying method provided under the Rules. If in the case of the Indian AE, the same transaction has been benchmarked and has been accepted to the ALP, then, unless there are different factors which need to be analyzed on the same transaction, it cannot be held that the same ALP cannot be accepted in the case of recipient foreign company. In fact it has been informed that ld. TPO has made adjustment under various heads which also includes payment of royalty. Any further adjustment is not called for in the case of the assessee to adopt a different ALP. Though the true course would have been that ALP of FTS and royalty should have been benchmarked separately as per the Rules, however, when assessee had carried out and furnished TP study report and also relied upon the margins declared by the Indian AEs after carrying out different study report, then without finding any defect in such TP analysis and determination of ALP by the assessee, ld. TPO could not have resorted to adhoc mechanism for adding 10% mark-up on adhoc basis. Thus, in absence of any contrary inference drawn by the ld. TPO on the TP study report of the assessee and at the same time in the case of Indian AE, same transaction has been benchmarked and ALP has been determined then we do not find any reason for taking adhoc 10% mark-up. Accordingly, the same is deleted. In the result, grounds No.12-19 are allowed.

77. Ground No.1 of Revenue's appeal refers to direction of the ld. DRP to tax royalty in FTS on receipt basis which according to department shall be on accrual basis.

78. The assessee is a non-resident Company, incorporated in Germany, having taxable income in India. With regard to FTS and royalty is has shown income on receipt basis as per the India Germany DTAA. The issue before us is, whether the income of the assessee is to be taxed on receipt basis as against accrual basis. The ld. AO has relied upon the judgment of Hon'ble Madras High Court in the case of Standard Triumph Motors Ltd. (119 ITR 573) which has held that in case of non-resident, Section 5(2)(a) of the Income tax Act i.e., will have no application and taxability will be determined only under Section 5(2)(b) of the Income Tax Act, i.e., by accrual. Subsequently, the Supreme Court in the case of Standard Triumph Motor Co Ltd. v. CIT [1993] 201 ITR 391 (SC) held that in the particular case, the credit entry to the account of the assessee non-resident in the books of Indian company amounted to receipt by the non-resident. Further, in the case of the assessee this issue has been settled by the Tribunal right from A.Yrs.1990-91,1991-92,1994-95,1996-97,1997-98,2001-02,2002-03 and 2003-04. The ld. AO has not accepted the decision of the Tribunal stating that Revenue has preferred an appeal before the Hon'ble Bombay High Court.

79. The ld. DRP held that Hon'ble Bombay High Court in assessee's own case has accepted the contentions of the assessee in A.Y.1986-87 to 1992-93, 1996-97, 1997-98 and 2001-02

wherein the Hon'ble Bombay High Court has considered the various ITAT decisions in assessee's own case and the stand of the assessee has been upheld that the receipt is to be taxed on actual receipts. Therefore, the AO is directed not to bring tax the income on account of royalty and FTS on accrual basis but to tax the same on receipt basis. After considering the submissions and decisions of the Tribunal and the Hon'ble Bombay High Court in the case of the Tribunal, this issue is decided in favour of the assessee that income on account of Royalty and FTS can be taxed only on receipt basis.

80. Even otherwise Article-12 of India-German tax treaty used the word "*paid, payments of any kind received and payments of any amount*". The Article 12 of India-Germany Tax Treaty which has been reproduced below:-

"ARTICLE 12-Royalties and fees for technical services -

1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
2……
3. The tem "royalties' as used in this Article means ***payments of any kind received*** *as a consideration for the use……*
4. The term "fees for technical services" as used in this Article means payments of any amount inconsideration and so on
5….
6…..
7…..
(emphasis supplied)

81. Thus, as per the tax treaty, Royalty and fees for technical services income should be taxable only upon payment i.e. on receipt basis. If this position has been accepted by the Tribunal

in assessee's own case for the earlier years and also by the Hon'ble Bombay High Court, the details of which are as under:-

AY	**ITA No.**	**Date of Order**
2003-04	1183 of 2011	10.01.2013
2001-02	1458 of 2010	22.10.2012
1997-98	1033 of 2011	20.11.2012
1996-97	124 of 2010	22.10.2012
1986-87 to 1992-93	2356,2357,2384,2386, 2387, 2428, 2429 of 2011	07.03.2013

AY	**ITA No.**	**Date of Order**
2006-07	8094/Mum/2010	06.05.2014
2005-06	1174/ Mum/ 2010	30.05.2014
2004-05	4502/Mum/2009	18.05.2012
1 998-99 & 1999-00	6133/Mum/2002 7589/Mum/2003	07.12.2009
1994-95	1499/M/1998	27.06.2005
1990-91 and 1991-92	1499/M/1998	04.07.2005

82. Hence, we do not find any reason to take any different position. Before us the ld. DR had submitted that there is a reference in the case of Ampacet Cyprus Ltd. vs. DCIT reported in (2020) 119 Taxmann.com 277 (Mumbai Trib)

wherein the Tribunal has referred the matter to special Bench. In the context of the India-Cyprus Tax treaty where the issue is whether interest received should be taxed on receipt basis or on accrual basis. Since in assessee's own case this issue stands settled by the Tribunal and by the Hon'ble Bombay High Court which is binding on us and therefore, reliance placed by the ld. DR in the aforesaid matter to refer to the Special Bench is declined. Thus, this ground raised by the Revenue is dismissed.

83. In so far as the additional ground raised by the assessee regarding final assessment order is barred by limitation u/s.144C and u/s.153, it was agreed by the ld. Counsel for the assessee that if this issue is decided on merits and this additional ground should be kept open and to be treated 'academic', accordingly, we are not adjudicating the additional grounds and the same is kept open.

84. In the result, appeal of the assessee is allowed and appeal of the Revenue is dismissed.

Order pronounced on 07th June, 2024.

Sd/-	**Sd/-**
(B R BASKARAN)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 07/06/2024
KARUNA, *sr.ps*

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai