0IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI

Before Dr. B. R. R. Kumar, Accountant Member,

Sh. Anubhav Sharma, Judicial Member

ITA No. 350/Del/2023 : Asstt. Year: 2020-21

&

SA No. 186/Del/2023 : Asstt. Year: 2020-21

Jiangsu Zhongtian Technology Ltd., C/o Unit No. 309, B, C, D, 3rd Floor, Magnum Tower-I, Sectgor-58, Gurgaon-122011	Vs	ACIT, Circle-2(1)(2), International Taxation, New Delhi-110002
(APPELLANT)		(RESPONDENT)
PAN No. AADCJ5786A		

Assessee by : Sh. Kamal Sawhney, Adv. &
Sh. Arun Bhaduria, Adv.
Revenue by : Sh. Vizay B. Vasanta, CIT-DR

Date of Hearing: 08.04.2024		**Date of Pronouncement: 27.06.2024**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 16.12.2022 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

"1. That on the facts and circumstances of the case and in law, Ld. AO, has grossly erred in determining the taxable income of the Appellant for the subject assessment year at INR 7,32,81,530/- as against nil returned income and, accordingly, the assessment order passed by the Ld. AO is bad in law and void ab-initio.

"Ground 1: That on the facts and circumstances of the case, the Ld. AO is not justified in passing the Assessment Order assessing the total income of the Appellant at INR 15,85,27,228 (Rupees Fifteen crores Eighty-Five Lakh Twenty-

Seven Thousand Two Hundred and Twenty-Eight only) against the income of INR 28,560 (Rupees Twenty-Eight Thousand Five Hundred and Sixty only) shown in the return.

Ground 2: That on the facts and the circumstances of the case and in law, the Ld. AO has grossly erred in alleging that the amount received from Indian PSUs against offshore supply of equipment's is taxable in India without appreciating that all work related to supply of equipment's is performed outside India and title in the equipment has been transferred outside India.

Ground 2.1: That on the facts and the circumstances of the case and in law, the Ld. AO has grossly erred in alleging that the amount received against offshore supply is taxable in India as 'Business Income of the Assessee without appreciating the fact that Assessee does not have Permanent Establishment (PE) in India as per DTAA between India and China.

Ground 2.3: That on the facts and circumstances of the case and in law, the Ld. AO has grossly erred in holding that the three contracts entered into by the Joint Venture [i.e., the Assessee and Steel Products Ltd. ("SPL")) are in fact a single composite contract and not separate contracts.

Ground 3.1: That on the facts and circumstances of the case and in law, the Ld. AO has grossly erred in holding that the assessee is responsible not only for offshore supplies but also for execution of onshore services and maintenance contract where the consideration for the same is received by and duly taxed in the hands of SPL

Ground 3.2: That on the facts and circumstances of the case and in law, the Ld. AO has grossly erred in holding that the contract includes a portion of Fees for Technical Services ("FTS") while alleging that the contract was maintenance contract (page 12 of the assessment order), however, on page 6 of the order, the Ld. AO has said that dominant intent is cabling. This order is based on wrong assumptions which are contradictory.

Ground 3.3: That on the facts and the circumstances of the case and in law, the Ld. AO has grossly erred in bifurcating the receipts from offshore supply of equipment's on ad-hoc basis into 60:40 ratio where 60% of the receipts were for Equipment Supply and 40% of the receipts were for onshore services and maintenance/Fees for Technical Services ('FTS').

Ground 3.7: Without prejudice to the above that receipt from offshore supply of equipment's is not taxable in India,

attribution rate of 25% applied by the Ld. AO on the receipts bifurcated as Equipment Supply is very high and unreasonable.

Ground 3.4: That on the facts and circumstances of the case, the Ld. AO erred in rejecting the global profit ratio as per the global balance sheet (i.e. 5.13%) and applying hypothetical rate of 25%

Ground 3.5: That on the facts and circumstances of the case, the Ld. AD/DRP erred in holding that global balance sheet which includes worldwide sales of the entity does not include supplies made to Indian customers.

Ground 4: That on the facts and circumstances of the case, the Ld. AO/DRP has erred in stating that the Appellant is responsible for successful execution and completion of all the work under the parts of three contract by relying upon the "cross-fall breach" clause of the contract.

Ground 5: That on the fact and circumstances of the case, the Ld. AO has erred in levying interest under section 234A, 234B & 234C of the Income Tax Act, 1961.

Ground 5.1: That on the fact and circumstances of the case, the Ld. AO has erred in not granting the credit of TDS for the subject assessment year.

Ground 6: That on the facts and in the circumstances of the case, the Ld. AO/DRP is not justified in initiating penalty proceedings under section 270A of the Act against the Appellant."

3. At the outset, both the parties fairly submitted that all the grounds taken up in this appeal stands adjudicated in the case of Jiangdong Fittings Equipments Vs. ACIT in ITA Nos. 2290 & 2291/Del/2022, order dated 29.11.2023. For the sake of ready reference, the said order of the Tribunal is reproduced as under:

"Captioned appeals by the assessee are against final assessment orders passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 pertaining to assessment years 2018-19 and 2019-20, in pursuance to directions of learned Dispute Resolution Panel (DRP).

2. The core issue arising in both the appeals relates to taxability of certain amounts received by the assessee towards offshore supplies of goods and equipment. Of course, there are ancillary issues relating to existence or otherwise of permanent establishment (PE) and attribution of profits to the PE.

3. Briefly, the facts are, the assessee is a non-resident corporate entity incorporated in China and a tax resident of China. The assessee had entered into three contracts with Power Grid Corporation of India Ltd. (PGCIL) and its two subsidiaries, viz., M/s. Power Grid Jabalpur Transmission Ltd. (PGJTL) and M/s. Power Grid Parli Transmission Ltd. (PGPTL). In terms with the contracts, the assessee manufactured the goods and equipments in China and supplied them to PGCIL and its subsidiaries in India on CIF (cost, insurance, freight) sale basis.

4. Before the Assessing Officer, the assessee pleaded that in terms with the contracts, it was only involved in offshore supply of goods/equipments to the Indian contractees. It was submitted, since title over the goods/equipments were transferred to contractees outside India and sale was completed outside India, the receipts from sale of such goods and equipments are not taxable in India. It was further submitted by the assessee that since it was not involved in any onshore activities in India and the onshore activities were carried out by its Indian subsidiary, viz., ZTT India Private Limited and income from such activities was offered to tax in India by M/s. ZTT India Private Limited, the assessee is not taxable in India in respect of PE.

5. While examining assessee's claim in the context of facts and materials on record, the Assessing Officer observed that as per terms of the contract, in addition to supply of goods and equipments, the assessee was required to provide technical knowledge, experience, skill, knowhow or processes, managerial or consultancy services. He submitted, the terms of all the contracts are more or less identical. He observed that asessee's Indian subsidiary, M/s. ZTT India Private Limited is fully controlled by the assessee and the said subsidiary is engaged in the business of

manufacture, selling, importing or exporting of optical fibres, optical fibre cables, electrical wires, power cables, conductors and other relevant materials and accessories, active devices, passive devices and other photo electronic devices, communication equipments etc. Thus, he observed that Indian subsidiary is engaged in the same nature of business, as the assessee is. He further observed that the employees of Indian subsidiary were working under direct control and directions of the assessee, which is evident from the power of attorney given to employees in India. Thus, he observed that M/s. ZTT India Private Limited can be considered as a PE of the assessee in India. Having come to such a conclusion, the Assessing Officer held that out of the total receipts from offshore supply of equipments, 40% can be apportioned towards FTS and 60% can be apportioned towards supply of equipments/goods. Thus, out 40% Revenue allocated towards supply of equipments, the Assessing Officer attributed 25% as profit of the PE. So far as 60% allocated towards FTS, the Assessing Officer treated the entire amount as income of the assessee. Thus, he made an aggregate addition of Rs.14,81,50,820/- while proposing the draft assessment order.

6. Against the draft assessment order, the assessee raised objections before learned DRP. However, learned DRP did not find merit in the objections of the assessee and accordingly sustained the additions made by the Assessing Officer. In terms with the directions of learned DRP, impugned assessment orders were passed.

7. Drawing our attention to various terms and conditions in the contracts with PGCIL and its subsidiaries, learned counsel appearing for the assessee submitted that they clearly demonstrate that the title over goods have passed outside the territory of India. Therefore, he submitted, the receipts cannot be taxed in India. In support, he relied upon the decision of coordinate Bench in case of DDIT vs. Mitsui & Co. (2020) 118 taxmann.com 379 (Delhi). He submitted, the terms of contracts and nature of transaction in case of the assessee and in case of Mitsui & Co. (supra) are identical. He submitted, PGPTL, which is a public sector undertaking, has clarified in the bid data sheet that Income-tax is not payable in India

on sale of goods, as the title over the goods passes outside India in terms of the offshore contract. In this context, he drew our attention to the relevant clauses of the contract. He submitted, when the contract between the parties are for CIF sale, which is an incoterm used in the contract to transfer the goods at the port of origin, which in this case is China, then it demonstrates that transfer of goods has taken place outside India at the port of origin in China. In support of such contention, the assessee relied upon the decision of coordinate Bench in case of Schindler China Elevator Company Ltd. (2023) 103 ITR (Trib) 567. He submitted, the allegation of the departmental authorities that offshore and onshore contracts are composite is merely based on cross-fall breach clause in the offshore contract, which suggests that any breach of terms in offshore contract leads to violation of onshore contract and vice versa. Thus, the assessee was responsible for overall execution of both onshore and offshore contracts. He submitted, for buttressing such allegation, the departmental authorities have introduced theory of ZTT India Private Ltd., being a PE of the assessee in India. He submitted, the observations of the departmental authorities on the face of it are erroneous, as they are in the teeth of the ratio laid down by Hon'ble Supreme Court in case of Ishikawajma Harima Heavy Industries v. DIT (2007) 288 ITR 408, the decision of Hon'ble Delhi High court in case of DIT v. Ericsson AB (ITA No. 397/2007) and the decision of Tribunal in case of DIT vs. LG Cable (2011) 237 CTR 438 and DDIT vs. Mitsui & Co. (2020) 118 taxxmann.com 379 (Delhi). He submitted, in case of the assessee, admittedly, the contracts for offshore and onshore activities are separate. He submitted, even assuming for the arguments' sake that ZTT India is the PE, there is not a single evidence on record to suggest that ZTT India Private Limited had any role to play in supply of goods from outside India. Thus, he submitted, when the PE had no role to play in offshore supply, no part of such income can be attributed to the PE.

8. Without prejudice, he submitted, there is no rational basis, on which, the Assessing Officer attributed 60% of the offshore revenue towards FTS. He submitted, it is fairly well settled that when the activities relating to design and manufacturing of goods, testing of goods etc. are incidental to

the supply of goods, the same cannot be considered as FTS. Drawing our attention to the bid details under the contract, he submitted, in case of a foreign contractor, both offshore and onshore contracts are separate with separate consideration. He submitted that in view of the factual position on record, it cannot be alleged by the Revenue that these are composite contracts. Thus, he submitted, there is no reasonable basis for splitting up the receipts between business income and FTS. In this context, he relied upon the decision of coordinate Bench in case of Tata Steel Limited vs. ITO (ITA No. 1086/Mum/2017. Thus, he submitted, the receipts under no circumstance can be taxed in India.

9. Learned Departmental Representative submitted, in course of assessment proceedings, neither did the assessee appear nor furnished any information/details in response to various queries raised by the Assessing Officer. Therefore, he submitted, the Assessing Officer proceeded to complete the assessment to the best of his judgment by invoking the provision of section 144 of the Act. Drawing our attention to the contract executed with PGPTL placed in the paper book, learned Departmental Representative submitted that the assessee is responsible for end to end completion of project and assessee's responsibilities do not cease on supply of goods and equipments. He submitted, this is evident from the fact that final 10% of the payment to be made towards supply of goods is to be cleared on receipt of goods at site and on submission of invoice supported by the material acceptance certificate issued by purchaser's representative. He submitted, the contract also provides that payment towards port clearance, port handling, insurance etc. shall be initially borne by M/s. ZTT India Private Limited on behalf of the assessee and subsequently, such expenses are reimbursed by the contractee directly to ZTT India Pvt. Ltd. based on the authorisation letter issued by the assessee to the purchaser. Thus, he submitted, assessee's responsibilities do not end merely with establishment of supply of goods from port at China, but also existence of various other activities in India. He submitted, the assessee is ultimately liable for breach in any of the terms of either of the contracts. Thus, he submitted, these facts clearly indicate that both offshore supplies and onshore activities are part of a composite contract.

Learned Departmental Representative submitted, the fact that ZTT India Private Limited has discharged various activities relating to supply of goods in India, for which, it has not only been reimbursed the actual expenses, but even received commission @ 0.01% of total CIF price from the assessee, reveals that both the assessee and ZTT India Private Limited have a principal-agent relationship. Therefore, ZTT India Private Limited can be treated as a dependent agent of the assessee, hence, will constitute a PE in India. Thus, he submitted, the Assessing Officer was justified in taxing the income in India.

10. In rejoinder, learned counsel for the assessee submitted that from the fact that the revenue earned from onshore activities have been taxed at the hands of ZTT India Private Limited, clearly demonstrates that offshore and onshore activities are under separate contracts, hence, independent of each other. Therefore, it cannot be treated as part of a composite contract.

11. We have considered rival submissions in the light of decisions relied upon and perused materials on record. The first issue, which requires to be decided, is regarding the taxability of amounts received by the assessee towards supply of goods and equipments. As discussed earlier, the assessee has entered into three separate contracts with three Indian public sector undertakings. The nomenclature of contract with PGPTL is 'Offshore Contract Agreement', a copy of which is placed at page 1 of the paper book. On going through the terms of the contract, it is observed that the contract is for design, manufacture, testing and CIF supply of composite insulators associated with certain power project. It is observed that the contract is signed by the Chief Representative of the assessee. On going through the contract as a whole, it is observed that the goods/equipments are to be supplied on CIF sale basis from a port at China. 90% of the CIF price shall be paid progressively through irrevocable letter of credit in favour of the assessee after dispatch of goods and on submission of the documents, such as bill of lading, invoices, insurance policy, guarantee certificate, material inspection clearance certificate, testing certificate, certificate of origin etc., balance of the CIF price shall

be paid to the assessee on receipt of goods at site after a acceptance certificate by the purchaser's representative. This, in our view, is only for ensuring that the goods/equipments are free from any defect. It is also a fact that though the responsibility of inland transportation, insurance and other services to be performed in India, such as clearance, handling at port etc. shall be on ZTT India Private Limited, however, the entire cost is reimbursed by the contractee. The other contracts are also couched in similar terms and conditions.

12. Thus, the terms of the contracts clearly demonstrate that the transfer of title over the goods have not only taken place outside India with all associate risks and liabilities, but the payments have also been made outside India. In fact, as per the specific terms of the contract and understanding between the parties, the ownership over the goods to be imported to India shall be transferred to the purchaser upon loading on to the mode of transport to be used to convey the goods from the country of origin and upon endorsement of the dispatch documents in favour of the purchaser. In the bid data details forming part of the contract, it has been clearly mentioned that as per purchaser's understanding and as per the extant provisions, Indian Income Tax is not payable on sale of goods, if the contract is on principal to principal basis and the title of the goods passes to the purchaser outside India.

13. Thus, the terms of the contract clearly establish that title over the goods, for which the assessee has received the payment, was transferred outside India and the sale was completed outside India. By relying upon certain clauses of the contract in isolation and out of context, the departmental authorities have held that the amount received by the assessee towards supply of goods, being related to the activities of the PE, is taxable in India. In our view, the departmental authorities have arrived at such conclusion without any rational basis and backed by evidence. Merely because the assessee has a subsidiary/related entity in India, which has performed some onshore activities under a distinct and separate contract with the very same contractee, that by itself, would not make the offshore and onshore contracts composite. Though, it may be a fact that

assessee's group entity in India has received commission from the assessee for doing certain work related to the supply of goods, such as payments towards port clearance, port handling, inland transportation, insurance etc, which was subsequently reimbursed by the contractee and has received commission from the assessee on certain percentage at CIF price, that does not make ZTT India Private Limited a dependent agent PE of the assessee. This is so because, there is no material on record to even remotely indicate that ZTT India Private Limited is involved in any manner in the work of design, manufacture, testing and supply of goods on CIF basis from China. Merely because, there is cross-fall breach clause in the contract to ensure seamless execution of the contract, it cannot be said that two different and distinct contracts are composite in nature.

14. In case of Ishikawajma Harima Heavy Industries vs. DIT (supra), Hon'ble Supreme Court has laid down the ratio that where the sale of goods has taken place overseas, no taxable event happens in India. The same view was expressed by Hon'ble jurisdictional High Court in case of DIT vs. Ericsson AB (supra). In case of DDIT vs. Mitsui & Co. (supra), wherein, facts involved are more or less similar to assessee's case, the coordinate Bench after examining various clauses of the contract has held as under:

"30. An analysis of the various clauses of the contract between the assessee and WBSEB and NHPC and in the case of LG Cables Ltd., show that the same are similar. We find, in the case of LG Cables Ltd., it has entered into a contract with Power Grid Corporation of India Ltd. And has entered into two contracts. One was for offshore supplies and services and the second one was for onshore services. This contract was entered into on 26th February, 2001 and PGCIL was under Ministry of Power as is the case of the assessee where NHPC is also under Ministry of Power and the contract was entered into on 6th December, 2001. The terms of the contracts are similar as these contracts are drafted and vetted by the Ministry of Law, Government of India. The issue raised in the assessment order by the AO were also the issues in the case of LG Cables which is evident from the table in the order passed by the Hon'ble High Court

comprising the two contracts entered into by the LG Cables with PGCIL. A perusal of the decision of the Hon'ble High Court shows that in this contract of LG Cables with PGCIL, the contractor was overall responsible to ensure the execution of the two contracts to achieve successful completion. There was a cross fall breach clause in the contract also. In para 11 of the decision, the court has taken note of the arguments of the ld. counsel that property in equipment passed to the buyer only in India and this property did not pass till equipment was erected and yielded satisfactory performance in India. In para 18, the Hon'ble High Court has categorically held that none of the stipulations of the on shore contract could postpone the transfer of property supplied under the offshore contract.

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39. In the present case, a perusal of clause 31.1 and 31.2 clearly shows that the property in goods will pass when it is loaded on to the mode of transport in the country of origin. Thus, there is no ambiguity and this clause will clearly be applicable. We find the Hon'ble Delhi High Court on this very issue at para 18 of the order has observed as under:-

> *"18. Furthermore, as noticed above, the scope of work under the onshore contract was under a separate agreement and for separate consideration. There is, therefore, in our opinion no justification to mix the consideration for the offshore and onshore contracts. None of the stipulations of the onshore contract could conceivably postpone the transfer of property of the equipments supplied under the offshore contract, which, in accordance with the agreement, had been unconditionally appropriated at the time of delivery, at the port of shipment. When the equipment was transferred outside India, necessarily the taxable income also accrued outside India, and hence no portion of such income was taxable in India."*

40. So far as the decision of the Hon'ble Andhra Pradesh High Court in the case of L&T Ltd. (supra), relied on by the ld. DR is concerned, it has been noted that risk, prima facie, passes with the property unless otherwise

agreed. Thus, it is the agreement between the parties which determines the passing of the title, therefore, the said decision, in our opinion, is not applicable. So far as the decision of the Tribunal in the case of Baker Hughes Asia Pacific Ltd. (supra) is concerned, a perusal of para 155 of the order of the Tribunal shows that it has taken note that "it is not correct to say that risk and title pass simultaneously. There may be agreement for passing of risk before passing of title per se. as per section 19 of the Sale of Goods Act, it is primarily the intention of the parties when the title to the goods is to pass." Thus, this judgment also endorses the settled law that ownership shall pass as per the intention of the parties. Thus, it is the intention of the agreement and in the present case in clause 31.1 and 31.2 of the agreement, it is clearly stipulated that ownership passes upon loading on to the mode of transport from the country of origin i.e., Japan. Therefore, there cannot be any dispute about the transfer of ownership having taken place in Japan.

41. So far as the decision in the case of Mahavir Commercial Co. Ltd. Vs. CIT, reported in 86 ITR 417 (SC) is concerned, we find the Hon'ble Supreme Court in the said decision has held that: "intention of the parties is, therefore, one of the important elements in determining the situs where the property passes to the buyer in pursuance of the contract." Thus, in this judgment it is clear that it is the intention of the parties which will determine the situs where the property will pass on. In the present case clause 31.3 shows that the property will pass on in Japan. This is an agreement entered into between the parties which reflect their intention and there is no dispute about such intention between the parties.

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46. In view of the above discussion, we are of the considered opinion that the ld.CIT(A) is correct in holding that the income from offshore supplies is not liable to tax in India both u/s 44BBB as well as under the provisions of Article 7 r.w. para 6 of DTAA between India and Japan. Accordingly, grounds No.1 and 2 raised by the Revenue are dismissed."

15. In case of Schindler China Elevator Company Ltd. (supra), while dealing with an identical issue, the coordinate Bench has held as under:

13.....We find that in a case, wherein the assessee made an offshore supply of equipment on a CIF basis at an Indian port, the coordinate bench of the Tribunal in JCIT vs Siemens Aktiengesellschaft, [2009] 34 SOT 16 (Mumbai) observed as under:

> *"12. From the above clause of the contract it is patent that BPL acquired the absolute right in the property when it was delivered to the carrier at the port of shipment i.e., in Germany. The reference of the learned D.R. to the invoice for depicting that it was on CIF basis at Bombay and hence the right of the buyer in the property should be construed as getting vested in Bombay, is not acceptable. The INCO Terms, 1990 explains various relevant terms. Page 755 of it mentions that :—*
>
> > *"Cost, Insurance and Freight' means that the seller has the same obligation as under CFR but with the addition that he has to procure marine insurance against the buyer's risk of loss of or damage to the goods during the carriage. The seller contracts for insurance and pays the insurance premium.*
> >
> > *The buyer should note that under the CIF term the seller is only required to obtain insurance on minimum coverage. The CIF term requires the seller to clear the goods for export. CFR, in turn, has been explained as "Cost and Freight" means that the seller must pay the cost and freight necessary to bring the goods to the named port of destination but the risk of losses of or damage to the goods, as well as any additional costs due to events occurring after the time the goods have been delivered on board the vessel, is transferred from the seller to the buyer when the goods pass the ship's rail in the port of shipment. It has further been explained that in the case of CIF the seller must 'deliver the goods on board the vessel at the port of shipment on the date or within the period stipulated'. Clause A.5 also states that "Subject to the provisions of clause B.5, bear all risks of*

loss of or damage to the goods until such time as they have passed the ship's rail at the port of shipment." Clause B.5 in turn states that the buyer must 'bear all risks of loss of or damage to the goods from the time they have passed the ship's rail at the named port of shipment'."

14. As of the above it follows that in the case of CIF, the property in goods passes on to the buyer at the port of shipment. Though the Cost, Insurance and Freight etc. is met by the seller but the property in the goods gets transferred to the buyer at the port of shipment. The buyer incurs all risks of loss of or damage to the goods from the port of shipment. Therefore, it can be precisely seen that when the assessee made offshore supply of equipment to BPL on CIF Bombay basis against the stated consideration, the property in the equipment passed on to BPL on the port of Germany itself. It is trite law that income accrues at the place where the title to goods passes to the buyers on the payment of price. Our view is fortified by the judgment of the Hon'ble Supreme Court in Seth Pushalal Mansighka (P.) Ltd. v. CIT [1967] 66 ITR 159. As it is the case of offshore supply of equipment, it is axiomatic that this transaction got completed outside India. Thus no income accrued to the assessee in India towards this transaction."

16. In case of LG Cables (supra), Hon'ble jurisdictional High Court has held as under:

14. A look now at the relevant provisions of the offshore agreement entered into on 26th February, 2001, which have been reproduced by the Tribunal as under: -

"Article 6 on which revenue has laid lot of emphasis specifically states that notwithstanding award of work under two separate contracts, the contractor shall be overall responsible to ensure the execution of both the two contracts to achieve successful completion and taking over of the project by POWERGRID. It further provides that "any default or breach under the „Second Contract" shall automatically be deemed as a default or breach of this „First contract" and also vice-versa.

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19. The contention of the learned counsel for the Revenue during the course of arguments that offshore supplies are not taxable only in the case of sale of goods simpliciter, and that the contract is a turnkey contract split/divided into offshore and onshore supplies at the instance of the respondent-assessee, in our considered opinion, is not sustainable in view of the authoritative pronouncement of the Supreme Court in the case of Ishikawajma (supra) wherein it has been held that offshore supplies are not taxable even in the case of a turnkey contracts as long as the title passes outside the country and payments are made in foreign exchange. The Supreme Court in this regard observed as follows: -

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

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27. Applying the aforesaid law enunciated by the Supreme Court in the case of Ishikawajma (supra), there can be no manner of doubt that the offshore supplies in the instant case are not chargeable to tax in India. The instant case, in fact, in our view stands on a better footing as two separate contracts have been entered into between the parties, albeit on the same day, one for the offshore supply and the other for the onshore services, but even assuming that both these contracts need to be read together as a composite contract, the issue in controversy is nevertheless

squarely covered by the decision of the Supreme Court in Ishikawajma (supra).....

28. As regards the payment for the performance of the activities within India, the contract price aggregating to INR 59982,160 plus US Dollars 88,400/- was specifically and separately fixed by Article (2) of the contract titled "Contract price in terms of payment". This consideration was separate from the consideration for the supply of equipment and there appears to be no justification to intermingle the two. The consideration for the offshore supply of equipment, it is repeated at the risk of repetition, accrued when the goods were sold. The performance of duties as envisaged in the second contract, viz., the Erection Contract, by no stretch of imagination can be conceived to postpone the transfer of property under paragraph 31.2 of the agreement, which property passed on to the buyer simultaneously with the "loading on to the mode of transport to be used to convey the plant and equipment from the country of origin to the country of import." Although the entire consideration was not paid on shipment of equipment, but nonpayment of a part of the price could not prevent the transfer of equipment. The passing of the property to the purchaser, as rightly held by the Tribunal had, nothing to do with the payment of the entire price of the equipment to the seller."

17. In case of DIT vs. Ericsson AB (supra), Hon'ble jurisdictional High Court has held as under:

> *"44. The aforesaid analysis will bring forth the legal position that the place of negotiation, the place of signing of agreement, or formal acceptance thereof or overall responsibility of the assessee are irrelevant circumstances. Since the transaction relates to the sale of goods, the relevant factor and determinative factor would be as to where the property in the goods passes. In the present case, the finding is that property passed on the high seas. Concededly, in the present case, the goods were manufactured outside India and even the sale has taken place outside India. Once that fact is established, even in those cases, where it is one composite contract (though it is not*

found to be so in the present case) supply has to be segregated from the installation and only then would question of apportionment arise having regard to the expressed language of section 9(1)(i), which makes the income taxable in India to the extent it arises in India."

18. Thus, if we carefully analyse the ratio laid down in the aforesaid decisions, it would become clear that merely because there is crossfall breach clause in some of the contracts, it will not tantamount to making distinct and separate contracts composite contract and to tax the income accruing outside India taxable in India. When, there is no dispute over the fact that transfer of title over the goods have passed outside India, which in fact has passed, the receipts certainly cannot be taxed in India.

19. One more aspect, which needs mention is, the mode and manner in which the receipts from offshore supplies are brought to tax. As discussed earlier, the Assessing Officer has attributed 60% of the receipts towards FTS and 40% towards price of goods/materials. This, in our view, is totally irrational and perfunctory. On what basis, the Assessing Officer has bifurcated the receipts between FTS and business income is unknown. When the price payable by the contractee is for design, manufacture, testing and CIF supply and is a consolidated price, the basis for allocation of 60% towards FTS is not understood. In fact, the Assessing Officer has not given any reason for quantifying 60% of the receipts towards FTS, as no such bifurcation has been provided in the contract documents. In any case of the matter, the price paid by the contractee for supply of goods and equipments, design and testing etc. is certainly part of the manufacturing activities and cannot be considered de hors such activity. Thus, in our view, the artificial segregation of receipts between supply of goods and FTS is without any basis, hence, unacceptable. Though, the Assessing Officer has made an attempt to link the supply of goods to the alleged PE in the form of ZTT India Private Limited, however, such inference drawn by the Assessing Officer is not based on any evidence at all. There is nothing on record to suggest that ZTT India Private Limited has undertaken or was in any way involved with the design, manufacturing and testing of supplied goods. Thus, even assuming that ZTT India Private

Limited constitutes a PE, however, in our view, it is in no way involved with the supply of goods and equipments from China.

20. It will be relevant to observe, in so far as the receipts from onshore contracts are concerned, there is no dispute that they have been taxed in India at the hands of ZTT India Private Limited. Thus, in our considered opinion, the sale incident in respect of supply of goods having completed outside India and the transfer of title over the goods, having passed from the assessee to the contractees outside India in terms with the contract, the receipts from such supply of goods and equipments cannot be made taxable in India. Accordingly, we direct the Assessing Officer to delete the additions."

4. Since, the matter stands covered by the order of the Co-ordinate Bench of Tribunal in the case of Jiangdong Fittings Equipments Co. (supra) and the issue is *pari material*, in the absence of any change in the factual matrix and legal proposition, the appeal of the assessee is hereby allowed.

5. Since, the appeal of the assessee is allowed, the Stay Application filed by the assessee is dismissed as infructuous.

6. In the result, the appeal of the assessee is allowed and the Stay Application of the assessee is dismissed.

Order Pronounced in the Open Court on 27/06/2024.

Sd/-

(Anubhav Sharma)
Judicial Member

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member

Dated: 27/06/2024
Subodh Kumar, Sr. PS