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

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER

AND

SHRI BRAJESH KUMAR SINGH, ACCOUNTANT MEMBER

ITA No.1881/DEL/2023
[Assessment Year: 2020-21]

GE Hydro France, A-18, 1st Floor, Okhla Industrial, Phase-II, Tehkhand, South East Delhi, Okhla Industrial Estate S.O. New Delhi-110020	Vs	Deputy Commissioner of Income Tax, Circle International Tax-1(3)(1), Civic Centre, New Delhi-110002
PAN-AAFCA1688N		
Assessee		Revenue

Assessee by	Shri Ajay Vohra, Sr. Adv. & Shri Aditya Vohra, Adv. & Shri Arpit Goyal, CA
Revenue by	Shri Vijay B. Vasanta, CIT-DR & Ms.Sabiha Rizvi, Sr. DR

Date of Hearing	**09.08.2024**
Date of Pronouncement	**06.11.2024**

ORDER

PER BRAJESH KUMAR SINGH, AM,

This appeal by the assessee is directed against the order of the Assessing Officer dated 28.04.2023 passed u/s 143(3)/144C(13) of the Income Tax Act, 1961 (hereinafter 'the Act') arising out of order of Dispute Resolution Panel dated 28.03.2023 pertaining to Assessment Year 2020-21.

2. The grounds of appeal reads as under:-

1. That on the facts and circumstances of the case and in law, the assessment order dated 28.04.2023 passed under section 143(3) read with section 144C(13) of the Income-tax Act,

1961 ("the Act) for assessment year 2020-21 assessing the total income of the Appellant at Rs.9,71,69,821 is bad in law, void-ab-initio and therefore, liable to be quashed and/or set aside.

2. That on the facts and circumstances of the case and in law, the assessment order passed under section 143(3)/ 144C(13) of the Act on 28.04.2023, being barred by limitation, is bad in law and void-ab-initio.

3. That on the facts and circumstances of the case and in law, the assessment order dated 28.04.2023 is invalid and shall be deemed to have never been issued, in absence of DIN mentioned in the body of the order/ directions dated 28.03.2023 passed by the DRP under section 144C(5) of the Act.

Re: Offshore supply receipts of Rs.86,76,13,943 from THDC

4. That the DRP/ assessing officer erred on facts and in law in holding that receipts of Rs.86,76,13,943 from offshore supplies to THDC India Ltd ("THDC") are taxable in India under the provisions of the Act.

5. That the assessing officer erred on facts in recording that the aforesaid receipts arose from offshore supplies to THDC and National Hydroelectric Power Corporation Ltd ("NHPC"), whereas, the said receipts only pertained to THDC, as also recorded by the DRP in order dated 28.03.2023.

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

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

8. That the DRP/ assessing officer erred on facts and in law in arbitrarily holding that there exists Dependent Agent Permanent Establishment ("PE") of the Appellant in India.

9. That the DRP/ assessing officer erred on facts and in law in arbitrarily holding that there exists Fixed Place PE of the Appellant in India.

10. That the DRP/ assessing officer erred on facts and in law in arbitrarily holding that the Appellant has Construction PE in India.

11. That the DRP/ assessing officer erred on facts and in law in arbitrarily holding that the Appellant has Service PE in India.

12. That the DRP/ assessing officer erred on facts and in law in arbitrarily holding that the Appellant has PE in India in the aforesaid forms, without bringing on record any evidence and without testing whether the threshold conditions for formation of each form of PE, as provided in Article 5 of the India-France Double Taxation Avoidance Agreement, stood satisfied for the assessment year under consideration.

13. That the DRP/ assessing officer erred on facts and in law in attributing entire alleged profits from offshore supplies made to THDC to the alleged business connection/ PE, without appreciating that no part of the activity relating to said offshore supplies was undertaken by the alleged PE in India.

14. Without prejudice, that the DRP/ assessing officer erred on facts and in law in drawing guidance from section 44BBB of the Act and thereby, applying 10% profit rate on offshore supply receipts, not appreciating that the assessee had incurred net loss during the relevant previous year and thus, no profits could be attributed to the alleged PE of the assessee in India.

Re: Offshore supply receipts of Rs.3,07,83,774 from GE Power India Ltd ("GEPIL")

15. That the DRP/ assessing officer erred on facts and in law in bringing to tax receipts amounting to Rs.3,07,83,774 received by the assessee from GEPIL in respect of offshore supplies made to it.

16. That the assessing officer erred on facts and in law in levying interest under 234B of the Act."

2. Brief facts of the case: The assessee is a foreign company incorporated in France and is a hydro-power equipment supplier. It is a tax resident of France and is entitled to claim benefits under the India France Double Taxation Avoidance Agreement ('India-France DTAA'). The assessee was earlier part of Alstom Group and after merger of the Alstom with GE Group the assessee is a company of the GE Group and known as GE Hydro France (earlier known as M/S Alstom Hydro France). The AO held the assessee to have a PE in India and treated income from the receipts from offshore supply of equipment to the extent attributable to the PE as taxable in India. The AO invoked Section 44BBB of the Income Tax Act 1961 to attribute 10 percent of the receipts from offshore supply of goods as attributable to the PE. The AO assessed total income of the assessee at Rs. 9,71,69,821 as against the return income of Rs. 73,30,050.

2.1 In framing the final assessment order as well as the draft assessment order, the AO had referred to the assessment in the case of the assessee company for AY 2018-2019 and noted that the

facts in the present year are also similar to the facts in the case of the assessee for AY 2018-2019. Further the AO also referred to the survey findings conducted in the case of the assessee company on 6-7th June 2019 as noted on page 42 of the assessment order wherein the sales and marketing functions were held to be the PE of GE Hydro France ('the assessee company') at the premises of GE Power India Limited ('GEPIL').

2.2 The AO noted in the draft assessment order that the assessee continued to carry out the work relating to the project which it had got by forming a consortium formed by the assessee, Hindustan Construction Company Ltd ("HCC") and GE Power India Ltd, by participating in bidding invited by THDC for "EPC execution and completion of Tehri Pumped Storage Plant (4 X 250MW)" and was awarded the contract. In this regard, an Agreement dated 23.07.2011 was entered into between THDC and the consortium formed by the assessee, HCC and GE Power India Ltd, which is hereinafter referred to as "THDC Overall Agreement". The Assessing Officer further noted that post-bidding even though the main single contract was artificially divided into five of sub-contracts by the assessee the entire scope of work was to be executed on a co-ordinated basis. The Assessing Officer noted that the assessee had not been able to establish that the contracts were not split artificially to prevent tax liability. Further, the AO held that the main single, composite and integrated contract agreement was artificially split and divided into sub-contracts by the assessee and execution was done by the assessee and its affiliate. The AO further noted that GEPIL executes all the onshore activities related to these groups and acts Service PE and all the receipts of the assessee are for consideration of turnkey projects and in assessments for earlier years, the assessee contention to treat MHPC and THDC receipts differently was not found tenable. The AO also held that in assessment for earlier years and in particular AY 2018-2019 and before it has been held that the assessee has a PE in the form of a fixed place and dependent agent PE (DAPE) at and through GE Power India Ltd. (GEPIL) and therefore the existence of the assessee's permanent establishment is an uncontested fact.

2.3 In view of these facts, the AO held that the untaxed receipts of Rs. 89,83,97,717 as income earned towards the supply of goods on an offshore basis has been identified and from the assessee's submissions these receipts had arisen from projects in Chamera (NHPC), Subansiri (NHPC) and Tehri (THDC).

2.4Against the draft assessment order passed under Section 144C(1) of the Act vide order dated 30.09.2022, the assessee filed objections before the DRP. The DRP agreeing with the findings of the AO gave directions vide order dated 28.03.2023. After considering the directions of the DRP, the Assessing Officer passed the final assessment order under Section 144C(13) of the Act on

28.04.2023. Aggrieved with the said order, the assessee has filed an appeal before us.

3. At the outset, we find that the assessee had not pressed ground nos. 1 and 2. The ld. AR before us made a statement from the Bar to the aforesaid effect and hence the aforesaid grounds are dismissed as not pressed.

4. Ground nos. 4 to 14 are against the action of the DRP/AO in holding that receipt of Rs.86,76,13,943 from offshore supplies to THDC India Ltd ("THDC") are taxable in India under the provisions of the Act.

4.1 During the course of hearing, the Ld. AR submitted that the issue is covered squarely in favour of the assessee company by an order dated 13.03.2024 in assessee's own case in ITA No.2085 & 2086/Del/2022 for Assessment Years 2018-19 and 2019-20.

4.2 On the other hand, the Ld. CIT DR relied upon the orders of the authorities below.

5. We have considered the rival submissions and perused the materials available on record. During the year, the assessee continued to carry out the work relating to the project which it had got by forming a consortium formed by the assessee, Hindustan Construction Company Ltd ("HCC") and GE Power India Ltd, by participating in bidding invited by THDC for "EPC execution and completion of Tehri Pumped Storage Plant (4 X 250MW)" and was awarded the contract. In this regard, an Agreement dated 23.07.2011 was entered into between THDC and the consortium formed by the assessee, HCC and GE Power India Ltd, which is hereinafter referred to as "THDC Overall Agreement". As per the THDC Overall Agreement, it was agreed that the project shall be executed on a coordinated basis, inter alia, through 5 separate contracts. The assessee was awarded Contract No.3, i.e., contract to supply electro-mechanical plant & machinery and hydro-mechanical plant & machinery (Offshore Component) of 4 x 250 MW Tehri Pumped Storage Plant. Under the said Contract No.3, the assessee received consideration from THDC for offshore supply of plant and equipment.

5.1 The facts and the reasons for making the addition of Rs.86,76,30,943/- received by the assessee from Offshore supply to THDC India Ltd. has been discussed as above, mainly, on the ground that the assessee had artificially split the composite contract to avoid establishment of the PE in India and tax payment in India and that the assessee has a PE in the form of a fixed place

and dependent agent PE (DAPE) at and through GE Power India Ltd. (GEPIL).

. The DRP after considering the submissions of the assessee as well as the draft assessment order dated 30.09.2022 noted that the issue involved are identical in the case of the assessee to that for AY 2019-20 and noted its findings for AY 2019-20 while adjudicating the issue of taxability of receipts from offshore supply of equipments as under:

"4.2.3 The panel notes that the issues involved are identical to that for A.Y. 2019-20. While adjudicating on the issue of taxability of receipts from offshore supply of equipments for A.Y. 2019-20, the panel held as under:

"…The assessee is the leader of the consortium with regard to its contract with THDC India Lid for erection, procurement, execution and commissioning of Tehri Pump Storage Plant on turnkey basis. As per the contract, the consortium has proposed that the project shall be executed on a coordinated basis through 5 separate contracts for execution of the project. The project comprises of planning, engineering, design, manufacturing, procurement and supply of all machines and equipment's civic construction, hydro machines equipment, installation and erection, testing and commissioning etc. Since, all members of the consortium are jointly and severally responsible for completion of the entire project under agreement with the Indian customer, failure on the part of a single member of the consortium fails the entire project. In the circumstances, a member of the consortium cannot take an isolated position that it is responsible only for a part of the contract separable from the rest of the contract. As has been rightly observed by the AO, entire project forma a part of the composite contract wherein out component of the contract cannot be seen in isolation. Thus, any entity involved in the chain of composite contract which includes supply of equipment by the assessee company, can be deemed to act as the agent of the other company. Since all activities in a composite contract are interrelated and inseparable, the DRP finds no infirmity in the conclusion of the AO at page 15 of the DAO that both supply and service contract were intrinsically linked and not severable representing a single composite turnkey work contract. It was not possible for buyer to assemble or erect plant from any other contractor without supervision of assessee. An element of continuity had been observed between the businesses of the assessee from supply to successful supervision as per the PGCIL, contract. The assessee has an admitted Fixed place PE in Indie w.r.t. PGCIL contract. Consequently, a part of the profits arising from the PGCIL contract from the offshore supply of equipment's need to be attributed to the FIXED PLACE PE of the assessee. In support her conclusion the AO has also placed reliance upon the decision of Hon'ble ITAT Delhi in the case of Voitch Paper GmbH (2020) in which the facts are similar to those in the case of the assessee. In view of the above,

the panel upholds the decision of the AO and the objections raised by the assessee in ground number 3 are rejected"

4.2.4 Since, there is no change in the factual matrix, the panel finds no ground to interfere with the conclusion of the AO as regards taxability of receipts from offshore sale of equipments.

4.2.5 As regards the attribution of income from offshore supply of equipments, the AO has observed that both offshore as well as onshore component of single composite project have to be taken into account in determining profit attributable to the PE as leaving one part would deviate from the arm's length profit. It is further observed that the assessee has admittedly maintained books of accounts for its supervisory PR in India, however income from offshore sales of equipments have not been included in the sale. The AO has further invoked provision of section 44888 to tax the profits from offshore supplies equipment 10% of total amount projected to be receive by the assessee during the relevant financial year and such profits are charged to tax @40% plus surcharge. The approach adopted by the Assessing Officer for attribution of profits, the panel following its decision in the AY 2019-20, finds no ground to interfere with the conclusion of the in this regard. Accordingly, the approach adopted by the AO for profit attribution to PE is upheld."

5.2 The directions of the Ld. DRP for AY 2018-19 and 2019-20 on this issue were challenged by the assessee before the Tribunal and the Co-ordinate Bench vide its order dated 15.03.2024 in ITA Nos. 2085 & 2086/Del/2022, cited supra, decided the matter in favour of the assessee. The relevant extracts of the said order are reproduced as under:

"*5. The assessee is a foreign company incorporated in France and tax resident of France. The assessee is a hydro power equipment supplier. During the year under consideration, the assessee earned following income from various Indian customers:*

S. No.	Customer	Nature of receipt	Amount received in AY 2018-19 (in Rs.)	Whether offered to tax in ITR
1.	THDC India Ltd. ("THDC")	Offshore supply of goods in relation to ongoing contract	38,46,36,867	Not offered to tax
2.	National Hydroele	Offshore activity by	3,10,31,524	Offered to

	ctric Power Corpn. Ltd. ("NHPC")	Project Office relating to contract with NHPC		tax
3.	CE Power India Ltd.	Income from Fees for Technical Service	96,45,476	Offered to tax
	TOTAL		**42,53,13,867**	

6. The assessee filed its original return of income for the AY 2018-19 on 30.11.2018 reporting total income of Rs. 1,19,97,750/-. The ld. AO passed draft assessment order dated 30.09.2021 under section 143(3) r.w.s. 144C of the Act for AY 2018-19, wherein following additions were proposed to be made to the returned income:-

S. No.	**Particulars**	
1.	Income from THDC	38,46,36,867
2.	Income from onshore activity from NHPC	3,10,31,524
3.	Income from fees for technical services from GEPIL	96,45,476
4.	Express for duty drawback claim written off	3,20,01,335
Total		**45,73,15,202**

7. The assessee thereafter filed objections against the aforesaid draft assessment order before the Learned Dispute Resolution Panel ("ld. DRP"), ITA No.2085 & 2086/Del/2022 GE Hydro France Page | 5 which were dismissed. Pursuant to the directions issued by the ld. DRP under section 144C(5) of the Act, the ld. AO passed final assessment order dated 29.07.2022 under section 143(3) r.w.s. 144C(13) of the Act, assessing the total income of the assessee at Rs.46,93,12,952/-.

8. The assessee filed application u/s 154 of the Act before the ld. AO on 04.08.2022 for rectification of certain mistakes apparent

from record. The said rectification application was disposed of vide order dated 24.12.2022 wherein assessed income was recomputed at Rs.9,53,13,511/-. The computation of total income after rectification is as under:

S. No.	**Particulars**	**Amount (In Rs.)**	**Whether addition in dispute before the Tribunal**
1.	10% of receipts from THDC for offshore supply	3,84,63,687	Yes – Ground Nos. 3 to 9
2.	Income from onshore activity from NHPC.	3,10,53,628	No – Offered to tax in the ITR itself
3.	Income from fees for technical services from GEPIL	96,45,476	No – Offered to tax in the ITR itself
4.	**Add**: Disallowance of expenses for duty drawback claim written off	3,20,01,335	Yes – Ground No. 12
5.	**Less**: Set-off of brought forward loses	(1,58,50,615)	No
	Total	**9,53,13,511**	

9. We have heard the rival submissions and perused the materials available on record. A consortium formed by the assessee, Hindustan Construction Company Ltd ("HCC") and GE Power India Ltd, participated in bidding invited by THDC for "EPC execution and completion of Tehri Pumped Storage Plant (4 X 250MW)" and was awarded the contract. Agreement dated 23.07.2011 was entered into between THDC and the consortium formed by the assessee, HCC and GE Power India Ltd, which is hereinafter referred to as "THDC Overall Agreement". As per the THDC Overall Agreement, it was agreed that the project shall be executed on a coordinated basis, inter alia, through 5 separate contracts. The assessee was awarded Contract No.3, i.e., contract to supply electro-mechanical plant & machinery and hydro-mechanical plant & machinery (Offshore Component) of 4 x

250 MW Tehri Pumped Storage Plant. Under the said Contract No.3, the assessee received consideration from THDC for offshore supply of plant and equipment. Along with HCC, the assessee was also awarded Contract No.1. However, no amount has been received by the assessee under the said Contract No.1 in the subject assessment years and the same is not subject matter of dispute before us.

9.1. The details of five contracts entered into by THDC with the consortium formed by the assessee, HCC and GE Power India Ltd, as mentioned in Annexure-3 of THDC Overall Agreement are tabulated hereunder:-

Contract No.	**Particulars**	**Contractor**
1.	Planning, Design and Engineering of 4x250 MW Tehri Pumped Storage Plant	Hindustan Construction Company Ltd. and Alstom Hydro France
2.	Civil Works of 4 x 250 MW Tehri Pumped Storage Plant	Hindustan Construction Company Ltd.
3.	**Supply of Electro Mechanical plant & machinery and Hydro-Mechanical Plant & machinery (offshore Company) of 4 x 250 MW Tehri Pumped Storage Plant**	**Alstom Project France (i.e., the Appellant)**
4.	Supply of Electro Mechanical plant & machinery and Hydro-Mechanical Plant & machinery (onshore Component) of 4 x 250 MW Tehri Pumped Storage Plant	Alstom Project India Limited
5.	Transportation, Insurance, Custom clearance, Storage, Erection, Testing and Commissioning of the Electro-Mechanical Plant & machinery and Hydro Mechanical Plant & mechanical (onshore Services) of 4 x 250 MW Tehri Pumped	Alstom Project India Limited

	Storage Plant	

9.2. As is evident from the above, under the THDC Agreement, the assessee is executing Contract No.3, i.e., supply of electro-mechanical plant & machinery and hydro-mechanical plant & machinery (Offshore Component). The said Contract No.3 is hereinafter referred to as "THDC Contract No.3 for Offshore Supply". As per the said THDC Contract No.3 for Offshore Supply read with Particular Conditions of Contract, the transfer of ownership, for the plants and ITA No.2085 & 2086/Del/2022 GE Hydro France Page | 7 equipment (including spares) supplied from foreign country, was done on "FOB" basis. The relevant clause is reproduced hereunder:- "Sub-Clause 7.7 Ownership of Plant and Material "The Ownership of imported material will be transfer on "FOB" basis. The ownership of indigenous material will transfer on "Ex. Work" basis"

9.3. As per the THDC Overall Agreement, the consortium members are jointly and severally responsible and liable to THDC. Separate roles and responsibilities of consortium members emanate under the aforesaid THDC Overall Agreement, which are separate and independent of each other, and separate consideration was agreed between the parties for each independent scope of work defined in the 5 different contracts entered into between THDC and the consortium formed by the assessee. For the work relating to offshore supply of plant and equipment, the assessee was to receive consideration in foreign currency, as is evident from perusal of Clause 1 of THDC Contract No.3 for Offshore Supply.

9.4. The ld. AO observed that THDC contracts executed by the Consortium formed by the assessee were single composite contracts awarded on turnkey basis which were deliberately split into 5 contracts by the parties for tax purposes. Firstly, in terms of the THDC Overall Agreement, the consortium of the assessee and THDC agreed that the Tehri Project shall be executed through separate five contracts, as tabulated supra.

X X X

9.5. Based on the Overall Agreement with THDC, it was submitted that Joint and Several responsibility of the Consortium is provided and according the ld. AO alleging that assessee bears all the responsibilities and liabilities for execution of the contracts under THDC Overall Agreement has no basis. Rather assessee is jointly and severally liable along with the other consortium members under all the Agreements. It was submitted that assessee acted as a leader of the consortium for the purposes of

ensuring coordination of the inter-related tasks between the members of the consortium undertaking the project but did not assume responsibility and liability (other than to THDC) for work to be performed by the independent contractors being consortium members, responsible for undertaking onshore work under separate and independent contracts with THDC. We find that the Hon''ble Jurisdictional High Court in the case of Linde AG, Linde Engineering Division vs DDIT reported in 365 ITR 1 (Del) had held that that the fact that contractual obligations of one of the consortium members were not limited merely supplying equipment, but were for performance of the entire contract, would not necessarily imply that entire income relatable to the contract could be deemed to accrue or arise in India; only that portion of income which is reasonably attributable to operations carried on in India would fall within the tax net in India. The Hon'ble Delhi High Court further held that since the consortium arrangement was for limited purpose of presenting a common face and complying with conditions laid down by the employee therein, with no intention to form an Association of Persons (AOP), work to be performed by both members was separate, definite and divisible, no member had any role to play with respect to scope of work allocated to other member, payments to be made for separate items of work were specified in the respective contract and consideration was to be paid directly to the concerned members in accordance with separate invoices raised by them, the members neither shared costs nor risks and also managed their own deliverables, it could not be said that the members formed an AOP for being assessed to tax as such. Thereafter, CBDT issued Circular No.7/2016 with a view to avoiding tax disputes and providing consistency in approach while handling cases where consortium is formed to implement large infrastructure projects, particularly EPC contracts and Turnkey ITA No.2085 & 2086/Del/2022 GE Hydro France Page | 14 contracts, wherein certain attributes were enumerated for deciding whether a consortium arrangement would be treated as AOP or not. In view of the said Circular, Special Leave Petition (SLP) filed by the Department against the aforesaid decision in the case of Linde AG, was dismissed by the Hon''ble Supreme Court which is reported in 242 Taxman 371 (SC).

9.6. Further we find that the Hon''ble Supreme Court in the case of IshikawajmaHarima Heavy Industries Ltd vs DIT reported in 288 ITR 408 (SC), it was observed that even in the case of a composite turnkey contract, the taxability of the different components has to be individually seen. The pertinent observations of the Hon''ble Supreme Court in this regard are as under:

> *"17..... The fact that it has been fashioned as a turnkey contract by itself may not be of much significance. The project is a turnkey project. The contract may also be a*

turnkey contract, but the same by itself would not mean that even for the purpose of taxability the entire contract must be considered to be an integrated one so as to make the appellant to pay tax in India. The taxable events in execution of a contract may arise at several stages in several years. The liability of the parties may also arise at several stages. Obligations under the contract are distinct ones. Supply obligation is distinct and separate from service obligation. Price for each of the component of the contract is separate. Similarly offshore supply and offshore services have separately been dealt with. Prices in each of the segment are also different. 18. The very fact that in the contract, the supply segment and service segment have been specified in different parts of the contract is a pointer to show that the liability of the appellant thereunder would also be different. ..... 70. We would in the aforementioned context consider the question of division of taxable income of offshore services. Parties were ad idem that there existed a distinction between onshore supply and offshore supply. The intention of the parties, thus, must be judged from different types of services, different types of prices, as also different currencies in which the prices are to be paid. ..... 76. In construing a contract, the terms and conditions thereof are to be read as a whole. A contract must be construed keeping in view the intention of the parties. No doubt, the applicability of the tax laws would depend upon the nature of the contract, but the same should not be construed keeping in view the taxing provisions. (emphasis supplied)"

9.7. The ld. AO had observed that Base Erosion and Profit Shifting (BEPS) Action Plan 7 addresses and prohibits splitting up of contracts by parties for artificial avoidance of PE status, which has now been included in Article 13 - Artificial Avoidance of Permanent Establishment Status through the Specific Activity Exemptions of the Multilateral Instrument ("MLI"), and therefore, the arrangement of the assessee to split the otherwise single contract into various contracts with a view to avoid PE status is not permissible. In this regard, we find that the application of BEPS Action Plan 7 read with Article 13 Multilateral Instrument is an issue which was in the air and was in nascent stage as the OECD members had not come into consensus for the same so as to make it applicable for the years under consideration. Accordingly, the same cannot be applied for the AY under consideration.

9.8. We find that the ld. AO had made the addition towards offshore supplies by observing that there is a business connection of the assessee in India u/s 9(1)(i) of the Act. We are

unable to comprehend ourselves to accept to this proposition in as much as title transfer in respect of equipment supplied by the assessee to THDC on an offshore basis happened outside India. Payments are made in foreign currency and that too are received by the assessee outside India. The law is very well settled by the decision of Hon"ble Supreme Court in the case of Ishikawajma-Harima Heavy Industries Ltd vs DIT reported in 288 ITR 408 (SC) and Hon"ble Jurisdictional High Court and other Hon"ble High Courts that if the sale is concluded outside India and the property in goods is passed outside India; the payment of consideration is received outside India; no activity in relation to such offshore supply is conducted in India, then income from such offshore supplies cannot be made liable to tax in India as assessee does not constitute „Business Connection" in India. It is also pertinent to note that under the Contract No.3 which is in dispute before us, Offshore Supply under THDC Contract, supply of plant and equipment was to take place on "FOB" basis. At the cost of reiteration, we hold that title to and property in the goods shipped by the assessee stood transferred at the port of shipment and the event of sale ITA No.2085 & 2086/Del/2022 GE Hydro France Page | 16 clearly took place outside the territory of India. In these facts, the income arising out of such sale cannot be said to have accrued or arisen in India. The accrual of income derived from offshore supplies cannot be attributed to any operation in India and therefore, no income can be deemed to accrue or arise in India.

9.9. The ld. AO had further alleged that there is a Fixed Place PE of the assessee in India. The assessee had stated that it does not have PE in India apart from the project office which is set up for rendering services in connection with the contract with NHPC project and the income earned by such Project Office is already offered to tax by the assessee in the return filed in India. We find that the ld. AO had concluded that there exists a Fixed Place PE of the assessee in India without bringing on record any evidence to demonstrate that the assessee has a fixed place available at its disposal in India which was used for purposes of undertaking core business activities of the assessee in India. It was submitted that even prima facie, the „disposal test" is not satisfied in the instant case i.e. the fixed place must be available to the assessee for its use without any hindrance and further that such fixed place must be used for carrying on the core business of the assessee in India. Infact we find that the ld. AO had merely reproduced the observations made in the assessment order of some other assessee with respect to PGCIL contract without appreciating the fact that the receipts were earned by the assessee herein from THDC and NHPC project during the year under consideration. There was no contract undertaken by the assessee with PGCIL and no amounts were received from PGCIL by the assessee. This clearly proves the complete non-application of mind on the part of the ld. AO. Either way, it is trite law that

onus is on the revenue to establish that there exists a PE of the foreign entity in India, which has not been discharged by the revenue in the instant case. Reliance in this regard is placed on the decision of Hon"ble Supreme Court in the case of CIT vs eFunds IT Solution reported in 399 ITR 34 (SC) ; DIT vs Samsung Heavy Industries Co Ltd reported in 117 taxmann.com 870 (SC) ; decision of Hon"ble Jurisdictional High Court in the case of DIT vs Mitsui & Co. Ltd reported in 399 ITR 505 (Del); ITA No.2085 & 2086/Del/2022 GE Hydro France Page | 17 decision of Hon"ble Jurisdictional High Court in the case of National Petroleum Construction Co vs DCIT reported in 421 ITR 24 (Del). Hence we have no hesitation to hold that the assessee does not have a Fixed Place PE in India and accordingly no income earned by the assessee from operations and activities undertaken outside India could be brought to tax in India in terms of Article 7 of India-France DTAA.

9.10. The ld. AO had further alleged that there is a Construction PE of the assessee in India under the provisions of Article 5(2) of India –France DTAA. It was submitted that this conclusion has been reached by the ld. AO without discharging the primary onus of bringing on record any document, evidence or information based on which such conclusion has been reached by him. As stated earlier, in the instant case before us, in respect of offshore supplies made by the assessee, the title to the goods as per the contract had been transferred outside India, sales concluded outside India and no part of the profit with respect to the same could be attributed to the alleged PE in India. It was specifically submitted by the ld.AR before us that the ld. AO had stated in his order that this is a legacy issue and it is already covered in favour of the revenue by the decision of the Delhi Tribunal in GE Group company cases for Asst Year 2001-02. But it is pertinent to note that assessee herein became part of GE group only in the year 2015 which is also admitted by the ld. AO in his order. Hence all the findings of Delhi Tribunal in GE Group company cases relied upon by the ld. AO cannot be made applicable to the facts of the assessee herein. It is also relevant to understand that Contract No. 03 between THDC and assessee is in dispute before us with regard to offshore supply. Admittedly THDC is a Government of India Undertaking, which had split the contracts. Splitting of contracts is not done at the behest of the assessee. The case laws relied upon hereinabove for non-existence of Fixed Place PE in India would apply for nonexistence of Construction PE also. Hence we have no hesitation to hold that the assessee does not have a Construction PE in India and accordingly no income ITA No.2085 & 2086/Del/2022 GE Hydro France Page | 18 earned by the assessee from operations and activities undertaken outside India could be brought to tax in India in terms of Article 5(2) of India-France DTAA.

9.11. We hold that there cannot be attribution of Business Connection u/s 9(1)(i) of the Act, alleged PE (both Fixed Place and Construction PE) and applicability of provisions of section 44BBB of the Act in respect of receipts for offshore supplies in the instant case. We find that the ld. AO had computed the taxability of the assessee in India by applying the provisions of section 44BBB of the Act which provide that 10% of the amount paid or payable in or outside India to a foreign company or any person on its behalf, on account of civil construction or the business of erection of plant or machinery or testing or commissioning thereof, in connection with a turnkey power project approved by the Central Government, shall be deemed to be the income chargeable to tax under the head „Profits and gains from business or profession". We find that since the amount under consideration pertain to offshore supply of plant and equipment, for which sale was completed outside India and title to the goods was transferred outside India without any role of the alleged PE in India, the provisions of section 44BBB of the Act per se cannot be made applicable in the instant case. We find that reliance in this regard was placed on the co-ordinate bench of Delhi Tribunal in the case of DDIT vs Mitsui & Co Ltd reported in 118 taxmann.com 379. Even otherwise, we have already held that that there is no PE of the assessee in India and hence as per Article 7 read with Protocol thereon of India UK DTAA, income earned out of offshore supplies cannot be brought to tax in India in the hands of the assessee. Here the treaty provisions are also beneficial to the assessee herein and hence on this count also, there cannot be taxability of income in respect of offshore receipts in the hands of the assessee.

9.12. Since we have already held that there is no PE of the assessee in India, the other argument advanced by the ld. AR that there would be no attribution profits in view of operational or net loss at global level, need not be gone into as adjudication of the same would become merely academic in nature.

X X X

10. To sum up, we hold that assessee was engaged in offshore supply of plant and equipment pursuant to contract with THDC and that the said contract was not artificially split for gaining any tax advantage as alleged by the revenue; there is no business connection of the assessee in India; there does not exist Fixed Place PE or Construction PE of the assessee in India and provisions of section 44BBB of the Act are not applicable in the instant case. Hence we hold that the addition made by the ld. AO by bringing to tax receipts from offshore supply is hereby directed to be deleted."

6. As noted above, the assessee has continued to carry out the project vide agreement dated 23.07.2011 against which the receipts of Rs.86,76,13,943/- from Offshore supply to THDC India Ltd. has been received as the amount of Rs.38,46,36,867/- was received by the assessee from Offshore supply to THDC India Ltd. during AY 2018-19. Similarly, the AO relying upon the reasons for Assessment Year 2018-19 held that the receipts of Rs.86,76,13,943/- from Offshore supply to THDC India Ltd. was taxable in the present Assessment Year also by holding that the assessee had a business connection in India and a PE in India at and through GE Power India Ltd. (GEPIL) and, therefore, the assessee was liable to be taxed under Section 44BBB of the Act in respect of the said receipts. Again, the Ld. DRP agreeing with the Assessing Officer and relying upon its directions for Assessment Year 2018-19 had reiterated the same direction for the present Assessment Year also in consequence of which the final assessment order under Section 144C(13) of the Act dated 28.04.2023 was passed for the present Assessment Year in the case of the assessee company. On similar facts, the Co-ordinate Bench in the case of the assessee company vide the above order for Assessment Years 2018-19 and 2019-20 had held that there is no business connection of the assessee in India and also there does not exist fixed place PE or construction PE of the assessee in India and provisions of Section 44BBB of the Act are not applicable in its case and had deleted the said addition. Following the same, the addition made by the ld. AO by bringing to tax receipts amounting to Rs. 86,76,13,943/- from offshore supply is hereby directed to be deleted. Ground nos. 4 to 13 of the appeal is allowed.

7. Following the decision of the Co-ordinate Bench, since we have held that there is no PE of the assessee in India, the other argument advanced by the ld. AR that there would be no attribution of profits in view of operational or net loss at global level in ground no.14 , need not be gone into as adjudication of the same would become merely academic in nature.

8. Ground no.15 is against the DRP/assessing officer in bringing to tax receipts amounting to Rs.3,07,83,774 received by the assessee from GEPIL in respect of offshore supplies made to it.

8.1 The Assessing Officer has brought to tax the above amount amounting to Rs.3,07,83,774/- received by the assessee from GE Power India Ltd. (GEPIL) in respect of supplies made to it by the common discussion/reasoning as for treating the receipts of Rs.86,76,13,943/- from offshore supply to THDC India Ltd. The Ld. DRP confirmed the above action of the Assessing Officer on the ground that it had confirmed the action of the Assessing Officer in the draft assessment order for Assessment Year 2018-19 and in earlier years by holding that the assessee has a PE in the form of a fixed place and dependent agent PE (DAPE) through GEPIL. The relevant discussion made by the Ld. DRP is reproduced as under:

> *"4.2.6 In ground number 2(ix) it is submitted that of the total receipts from offshore supplies Rs. 3.07,83,774/- pertains to the receipts from M/s GEPII, in respect of offshore supplies made to it. It is submitted that receipts amounting to Rs.3,07,83,774/ received by the assessee from GEPIL for offshore supplies made to it, the allegation in the assessment order that GEPIL served as PE of the assessee is unsustainable and is not supported by any facts. It is submitted that in such a scenario, the end customer of the assessee was GEPIL itself, i.e., the Indian entity which is alleged to also be the PE of the assessee. It is submitted that the end customer cannot constitute PE of the non-resident enterprise in respect of the same transaction. Therefore, without prejudice to the aforesaid, the amounts of receipts from GEPIL for offshore supply made to it by the assessee shall be excluded from the scope of assessment. The panel has considered the submissions. As observed by the AO at page 119 of the DAO, in the Assessment for AY 2018-19 an earlier year, the applicant has a PE in the form of a fixed place and*

dependent agent PE through GEPIL. The same has also been upheld by the DRP. However, the AO is directed to examine the profit element in the supply of equipment to GEPIL held as dependent agent PE of the assessee, separately and pass a speaking order in this regard."

8.2 As we have seen that the Co-ordinate Bench of the Tribunal in para 10 of its order dated 13.03.2024 for Assessment Years 2018-19 and 2019-20 in the case of the assessee and as discussed above, had held that there is no business connection of the assessee in India and also there does not exist fixed place PE or construction PE of the assessee in India and provisions of Section 44BBB of the Act are not applicable in its case. Therefore, respectfully relying upon the same, we hold that amount amounting to Rs.3,07,83,774/- received by the assessee from GE Power India Ltd. (GEPIL) is not taxable in India. Ground no.15 of the appeal is allowed.

9. Ground no.16 is against the action of the Assessing Officer in levying interest under 234B of the Act. This ground is consequential in nature. The Assessing Officer is directed to levy interest under Section 234B of the Act as per law and keeping in view the order of the Co-ordinate Bench in assessee's own case for Assessment Years 2018-19 and 2019-20 as adjudicated in respect of ground no.18 of the appeal filed by the assessee. Ground no.16 of the appeal is partly allowed.

10. In the result, the appeal is partly allowed.

Order pronounced in the open court on 06.11.2024.

Sd/- VIKAS AWASTHY]	**Sd/-[BRAJESH KUMAR SINGH]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated 06.11.2024.
Mohan Lal

Copy forwarded to:

1. Assessee
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

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