IN THE INCOME TAX APPELLATE TRIBUNAL

MUMBAI BENCH "I", MUMBAI

BEFORE MS. PADMAVATHY S., ACCOUNTANT MEMBER

AND

SHRI. RAJ KUMAR CHAUHAN, JUDICIAL MEMBER

ITA NO. 4661/MUM/2023 (A.Y: 2021-22)

Schindler China Elevator Company Limited C/o. Bansi S. Mehta & Co. Merchant Chamber, 3rd Floor, 41, New Marine Lines, Mumbai – 400020. **PAN: AASCS8166L** **(Appellant)**	*Vs.*	**The Assistant Commissioner of Income Tax, Int Tax Circle 4(2)(1), Mumbai** Room No. 1708, 17th Floor, Air India Building, Nariman Point, Mumbai – 400021. **(Respondent)**

Assessee Represented by	**:**	**Shri. Yogesh Thar/Sakshi Dande**
Department Represented by	**:**	**Shri. Anil Sant (Sr. DR)**
Date of conclusion of Hearing	**:**	**30.08.2024**
Date of Pronouncement	**:**	**26.11.2024**

O R D E R

PER RAJ KUMAR CHAUHAN (J.M.):

1. The appeal is directed against the assessment order dated 23.10.2023 passed by the Income Tax Circle 4(2)(1), Mumbai [hereinafter referred to as the "*AO*"] in pursuance to directions issued by the Dispute Resolution

Panel (DRP) u/s. 144C(5) of the Act vide order dated 22.09.2023 for A.Y. 2021-22.

2. The brief facts as culled out from the proceedings before the lower authorities are that the assessee is a non-resident company incorporated in China and is engaged in the business of supply of elevators and escalators, which includes design and manufacturing. The assessee is a part of Schindler Group of Companies. For the year under consideration, the assessee filed its return of income on 14.03.2022 with returned income of Rs. 78,62,310/-. The return was selected for scrutiny under CASS. Notice u/s. 143(2) of the Act was issued on 27.06.2022. Further, notices under section 142(1) of the Act was also issued alongwith detailed questionnaire which was duly served on the assessee. During the year under consideration, the assessee Schindler (China) Elevator Pvt Ltd ('SCE' or the assessee) has raised invoices amounting to Rs. 26,55,11,031/- against Maharashtra Metro Rail Corporation Ltd (MMRCL) and Rs. 23,84,27,868/- against Delhi Metro Rail Corporation Limited (DMRCL). Both the receipts have been considered as non-taxable by the assessee. Vide notice u/s. 142(1) dated 23.08.2022, & 11.10.2022 the assessee was specifically asked to justify its claim as to why these receipts are not

taxable in India. The assessee has replied that during the year under consideration, it supplied escalators to Delhi Metro Rail Corporation Limited ('DMRCL") and Maharashtra Metro Rail Corporation Limited ('MMRCL"). Therefore, the payment made by the DMRCL and MMRCL to the Assessee will be regarded as 'supply of goods' and will accordingly be taxable as business income under Article 7 of the Indo-China DTAA ('the DTAA"). It was also explained that according to Article 7 of the DTAA, only those profits which are attributable to Permanent Establishment of the enterprise in India are chargeable to tax in India. Therefore, in the absence of Permanent Establishment, no profits can be said to be chargeable to tax in India. The assessee claimed that it does not have any permanent establishment in India and therefore, no part of income earned by Assessee can be taxed in India by virtue of the provisions of Article 7 of the DTAA.

3. The Assessing Officer vide draft assessment order dated 23.12.2022 did not agree with the submissions of the assessee and after considering the agreements entered into with DMRCL and MMRCL held that the income of the assessee from the offshore supply of elevators and escalators is taxable in India in terms of section 9(1)(i) of the Act. The Assessing Officer

further held that the assessee entered into an arrangement with its Indian associated enterprise, Schindler India Private Limited ('SIPL') for the fulfilment of its obligation under the contract. It was also held that the income of the assessee earned from India in respect of a composite contract has significant onshore elements also. The Assessing Officer treated the consortium of the assessee and SIPL as an Association of Persons ("AOP") within the meaning of section 2(31) of the Act and held that the contract with DMRCL and MMRCL was composite and indivisible and could not be split up into supply and commissioning parts as sought to be done by the assessee. The Assessing Officer also held that the consortium is liable to be assessed as an AOP and the income from the transaction was chargeable to tax in India, as no benefit of India–China DTAA could be afforded to the association. It was also held that the offshore supplies have been made by the assessee on the Indian port on disembarkation basis and the delivery of the goods is to be taken as having been made in India. Therefore, the profits from supplies made by the assessee on CIF basis are liable to be taxed in India on the ground that the sale is completed in India. Accordingly, the Assessing Officer proceeded to tax 5% of the total receipts of Rs.50,39,38,899/- as income from composite contract liable for taxation in India.

4. The assessee has filed objection to the draft assessment order before the Ld. DRP and has raised primarily 2 grounds of objections.

"Ground of Objection 1: Addition of receipt emanating from offshore supplies of escalators and elevators to the total income of the assessee:

He failed to appreciate and ought to have held that:

a. designing and manufacture of the escalators/elevators has been done outside India i.e., in China, therefore, the receipts being in the nature of gross consideration towards offshore supply is not chargeable to tax in India;

b. as per provisions of section 9(1)(i), only income which is arising from operations carried out in India are chargeable to tax in India and in absence of any business operations of the Assessee being carried out in India, no income is deemed to accrue or arise in India u/s 9 of the Act;

c. the transaction was not taxable in India on account of the Indo-China DTAA;

d. work to be performed by each party is separate and independent of each other along with specific demarcation in the risks and responsibilities, therefore, the contract is divisible contract;

e. no activity in relation to supply of escalators and elevators to DMRCL and MMRCL is carried out in India, neither any activity is pointed out in the draft assessment order which is being carried out by the Assessee in India, therefore, in absence of any activity being carried out in India, no receipts accruing thereof can be taxed in India;

f. entire consideration received by the Assessee is towards design and manufacture and the supply of escalators/elevators which is performed outside India;

g. The Assessee does not have any permanent establishment or business connection in India.

Ground of Objection 2: Non-consideration of net loss incurred by the assessee on offshore supply of escalators and elevators to MMRCL/DMRCL:

On the facts and circumstances of the case and in law, the Ld. AO erred in proposing to add 5% (50% of the alleged estimated Net Profit Ratio of 10%) of total receipts amounting to Rs. 2,51,86,845/- to the total income of the Assessee in India by invoking provisions of Rule 10 of Income-tax Rules, 1962.

He failed to appreciate and ought to have held that:

a. the Assessee has specifically requested for additional time to submit India specific Audited Profitability Statement, according to which the Assessee has incurred total net loss of 2.38% on supply of escalators and elevators o DMRCL and MMRCL in India;

b. provisions of Rule 10 cannot be invoked when the separate Audited Profitability Statement for FY 2019-20is maintained and provided in respect of supply made to DMRCL and MMRCL in India;

c. the non-consideration of profitability statement for FY 2020-21, merely based on the presumption that expense claimed by the Assessee includes expenses made to sister concerns (specifically to SIPL) is baseless and not correct;

d. the presumptions made by the Ld. AO did not emanate from any material or evidence;

e. global profit of the parent company includes profit from both manufacture, design, supply as well as installation, maintenance and commissioning of escalators and elevators, and therefore cannot be taken as base to compute the taxable income of the Assessee in India, especially when the Assessee was only involved in the process of design, manufacture and supply of escalators/elevators;

f. the estimated net profit ratio of 10% considered by the Ld. AO is arbitrary and based on no valid material;

g. the Assessee was only involved in the design, manufacture and supply of escalators and elevators to DMRCL & MMRCL which involve huge costs in comparison to servicing & maintenance activity.

5. However, the Ld. DRP vide order dated 22.09.2023 rejected the grounds of objection to the draft assessment order on the basis of following facts and inferences are drawn:

(i) The actual taxable entity in this case is an AOP comprising of the Applicant, Schindler (China) Elevator Company Limited, China("SCE") and its Indian sister concern, Schindler India Private Limited and is a resident of India. Accordingly, no benefit of India-China DTAA could be afforded to the association.

(ii) The off-shore supplies have been made by the applicant on Indian port of disembarkation basis and the delivery of the goods are to be taken as having been made in India. Therefore, the profit or supplies made by the applicant on CIF basis is liable to be taxed in India on the ground that the sale is completed in India.

(iii) A single, indivisible, composite contract for transmission line project has been artificially segregated to make it appear as two independent contracts, solely with a purpose of avoiding taxed in India. The two parts of the instant contract contain inter-linked cross-fall breach clause specifying that breach of one Contract constitutes breach of the other Contract(s). Hence, it is clear that essentially the contract is a single individual one, which has been artificially dissected into 2 inter-linked parts. This is further

evident from reading key documents such as General conditions of contract, the consortium is jointly referred as the contractor for task-fulfilments and the project completion is a joint responsibility of the consortium.

(iv) The arrangement with Schindler India Private Limited (India) as consortium associate for assignment of part of the composite contract has been made with a view to avoid faxes since in case of sub-contract lo any unrelated third-party would have resulted in some taxable margin/profits in the hands of the applicant foreign company, Schindler (China)Elevator Company Limited. The contract has been artificially divided into 2 parts so as to avoid formation of a Permanent Establishment in India and avoid taxability.

v) The Permanent Establishment of the Consortium, Schindler India Private Limited (India), is directly involved in the relevant transaction as a consortium associate.

vi) As regards the AOP, the learned DRP held that the Assessing Officer has only raised a prima facie finding and no assessment in hands of AOP has been made in this case.

vii) It was further held that these are matters of fact, which have to be inquired into by the Assessing Officer having jurisdiction over the AOP and it would be premature for the panel to issue any directions at this stage. Accordingly, the learned DRP proceeded to decide the issue on the basis that addition in hands of the assessee is on a substantive basis. The learned DRP upheld the findings of the Assessing Officer that the contracts are completely composite contracts, which cannot have any other interpretation in terms of dividing the same into separate segments.

viii) In conformity with the directions issued by the learned DRP, the Assessing Officer passed the impugned final assessment order dated 23.10.2023.

ix) Being aggrieved, the assessee is in appeal before us and has raised following grounds of appeal:

"Ground No. 1: Addition of receipt emanating from offshore supplies of escalators and elevators to the total income of the Appellant:

1. *On the facts and circumstances of the case and in law, the Ld. AO erred in adding a sum of Rs. 2,51,96,945/- out of receipts emanating from offshore supply of escalators and elevators to the total income of the Appellant.*

2. *The AO further inter alia erred in observing or commenting that the Appellant and SIPL constitute an AOP.*

3. *In the absence of Permanent Establishment in India, under Article 7 of the India-China Double Taxation Avoidance Agreement ("DTAA") and in the absence of any business connection as envisaged u/s.9(1)(i) of the Act. the Appellant prays that the addition made by AO on aforesaid offshore supplies be deleted.*

Ground No. 2: Non-consideration of Net Loss incurred by the Appellant on offshore supply of escalators and elevators to DMRCL and MMRCL:

1. *On the facts and circumstances of the case and in law, the Ld. AO erred in making an addition of Rs. 2.51,96,945/- to the total income of the Appellant in India ignoring the act that the Appellant had incurred net loss on the offshore supply of escalators and elevators to DMRCL and MMRCL.*

2. *The Appellant prays that the Ld. AO be directed to delete the addition of Rs. 2,51,96,945/- or appropriately reduce the same, after considering the facts and loss, if any, incurred by the Appellant in respect of the above transaction.*

Without Prejudice to Ground No 1 & 2 above,

Ground No. 3: Taxing receipts emanating from offshore supplies of escalators and elevators in the hands of the Appellant on substantive basis:

1. *"On the facts and in the circumstances of the case and in law, the Ld. AO erred in adding the entire sum of Rs 2,51.96.945/- to the total income of the Appellant on substantive basis while treating it as taxable in the hands of the purported AOP on protective basis.*

2. *The Appellant prays that in-the absence of any finding on share of the Appellant in the purported AOP, the entire amount of Rs. 2,51,96,945/- could not be taxed in the hands of the Appellant."*

6. We have heard the Ld. AR on behalf of the assessee and Ld. DR on behalf of the revenue. Both the parties have also filed the written submissions. We have considered the same and examined the record. The only question before us for consideration in this appeal is whether the invoices amounting to Rs. 26,55,11,031/- against MMRCL and Rs. 23,84,27,868/- against DMRCL by the assessee and the receipts therein are to be considered as taxable in India or not?

7. The Ld. DR has supported the judgment of the Ld. AO and has argued that:

   a. The income of the assessee is being earned from India in respect of a composite contract having significant onshore element and the

receipts therefore are taxable in India in terms of Section 9(1)(i) of the Act.

b. The assessee has given written unequivocal consent to SIPL to work as an independent contractor from the terms offered jointly by SIPL and SCE.

c. The contract execution involves a composite contract having elements of onshore as well as offshore supplies and onshore services.

d. On considerations of contract in question, it is clear that the income thereunder has arisen to the assessee in India in a composite manner.

e. Since the import was made on C.I.F. basis and not on F.O.B. basis and in the C.I.F. the risks are assumed by the seller till the delivery of shipment, therefore, the consortium partners are jointly and severally liable for the breach of clause of the contract and therefore it is an indivisible contract and the same cannot be split.

f. As per recent order of 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 (as is the case of the assessee) cannot be split so as to exempt the profits from offshore supply of goods.

g. The contract has been deliberately split through an artificial arrangement for avoiding formation of a permanent establishment in India in order to avoid taxability in India.

h. The assessee and its sister concern SIPL has formed an Association of Person (AOP), which is obvious from the contract of installation and commissioning of elevator and escalator system and its delivery to MMRCL and DMRCL. Therefore, the assessee along with other members who formed an AOP are liable to be taxed in India as AOP.

8. It is therefore argued on behalf of the revenue that the assessment order is perfectly right and assessee is taxable in India.

9. The Ld. AR on behalf of assessee, at the very outset submitted that:

a. Issues in this appeal stands covered by the Hon'ble Income Tax Appellate Tribunal (ITAT) orders for the last three assessment years i.e., 2018-19, 2019-20 and 2020-21.

b. The Ld. DRP, in its Directions dated September 22, 2023 has also submitted on page no. 60 (Para 5.6.4) that the issue stands covered by the orders of the Hon'ble ITAT but since the Department does not have right of appeal against the DRP directions, it held that, "*with utmost respect to the Hon'ble Income Tax Appellate Tribunal and bowing before it, in order to keep issue legally alive, the matter is decided accordingly*".

c. Even if a contract is composite as argued by Ld. DR, the same can be broken up in case separate consideration are mentioned for the separate parts of the same contract. The reliance has been placed upon the judgment of the Hon'ble Supreme Court reported as *1958 AIR 560/1959 SCR 379, The State of Madras Vs. Gannon Dunkerley & Co. (Madras) Ltd., order dated 01.04.1958,* where it is held that *"It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for*

services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment."

d. The invoices raised by the assessee in view of the query made by the bench during hearing, the assessee has filed the invoices and relevant bills already as Annexure 2 and 3 for reference of the bench.

e. Schindler India Private Limited ('SIPL') is an Indian company incorporated under the provisions of Companies Act, 1956 on 26.12.1997 and is not permanent establishment of assessee. The attention of the bench is drawn to para 7 of "Article 5 that permanent establishment" of the India-China DTAA which states that merely the fact that a company which is a resident of a contracting state controls, or is controlled by company which is a resident of other contracting state, or which carried on business in that other state, (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent

establishment of the other. Indeed, this paragraph clarifies that merely because the two companies are related, one cannot be regarded as a permanent establishment (PE) of another merely because of the relationship.

f. A comparative chart at page no. 170 of the paperbook is showing yearly turnover of SIPL based on its audited accounts vis-a-vis the value of the two contracts under consideration. It would be observed that the receipts under these contract forms an insignificant portion of the annual turnover of SIPL. Therefore, there is no possibility of even the SIPL being a "Dependent Agent" of the appellant so as to constituting its permanent establishment.

10. It is therefore vehemently argued that since the issue already stands decided in favour of the appellant/assessee for the 3 previous years by the Hon'ble Mumbai Tribunal in ITA No. 1617 & 2483/Mum/2022 for the A.Y. 2018-19 & 2019-20 and ITA No. 3355/Mum/2023 for A.Y. 2020-21 and it has been fairly submitted by the Ld. DR that no appeal has been filed by the department against the Hon'ble Tribunal orders in the appellant's own case and this information has been submitted on the perusal of Hon'ble Bombay High Court's website. The assessee/appellant

therefore submitted that the impugned order is liable to be set aside and the addition be deleted as assessee is not taxable in India for the relevant two receipts.

11. We have considered the rival submissions. In view of the submissions of Ld. DR that as per their knowledge, no appeal has been filed against the order of the ITAT in assessee's own case for previous 3 years, the question arises whether the Ld. AO or the revenue authorities were bound by the order of the ITAT in assessee's own case for subsequent year/relevant year in this appeal or not? In that regard the judgment of the Hon'ble Allahabad High Court in *K. N. Agarwal Vs. Commissioner of Income Tax, order dated 11.01.1991, [1991] 189 ITR 769B (ALL)* is relevant which says, "*Indeed, the orders of the Tribunal and the High Court are binding upon the Assessing Officer and since he acts in a quasi-judicial capacity, the discipline of such functioning demands that he should follow the decision of the Tribunal or the High Court, as the case may be. He cannot ignore it merely on the ground that the Tribunal's order is the subject-matter of revision in the High Court or that the High Court's decision is under appeal before the Supreme Court. Permitting him to take such a view*

would introduce judicial indiscipline, which is not called for even in such cases."

12. In view of the judgment of the Hon'ble Allahabad High Court (supra) and the fact that the orders of the Ld. Coordinate Bench has not been challenged, therefore, unless and until the said orders are challenged and set aside, the Ld. AO and the revenue are bound to follow the said judgments of ITAT in assessee's own case for previous assessment years as mentioned (supra).

13. In view of these facts and circumstances, we have gone through the judgment of Ld. Coordinate Bench in ITA No. 1679 & 2483/Mum/2022, for the A.Y. 2018-19 and 2019-20, order dated 30.01.2023 which has also been followed for the A.Y. 2020-21 by the Ld. Coordinate Bench in ITA No. 3355/Mum/2023. The relevant concerned operating part of the judgement is as under:

> *"10. We have considered the rival submissions and perused the material available on record. The assessee is a tax resident of China. The assessee along with SIPL formed a consortium for purpose of bidding to the tender floated by DMRCL for the design, manufacturing, supply, installation, testing, and commissioning of escalators for Noida-Greater Noida MRTS project.*
>
> *Similarly, the aforesaid consortium bid for the tender floated by MMRCL for the design, manufacturing, supply, installation, testing,*

and commissioning of heavy-duty machine room less elevators and escalators for NMRCL Project. The bids were accepted by the DMRCL and MMRCL and letters of acceptance were issued. Subsequently, separate contract agreements were signed between the consortium and DMRCL, and the consortium and MMRCL. It is pertinent to note that the MOU entered into between the assessee and SIPL was made part of both the aforesaid contract agreements. From the perusal of the contract agreements, forming part of the paper book, we find that the consortium agreed to perform efficiently and faithfully all of the work under the agreement. It was also agreed that the consortium shall be jointly and severally liable for undertaking the contracts. Responsibility of each member of the consortium in respect of the contract is provided in the MOU entered between the assessee and SIPL. From the perusal of the MOU in respect of DMRCL, we find that the parties jointly bid for the project as a consortium with each party responsible for its own scope of work. It was further agreed that both parties shall be jointly and severally responsible for completing the project. As per Article 3 of the MOU, the assessee agreed to undertake the design, manufacturing, and supply of escalators, while SIPL"s scope of work included clearance of material after reaching at port and transportation to the site as per contract conditions, installation, testing, commissioning and maintenance of escalators. We find similar terms in MOU in respect of contract with MMRCL. Firstly, from the above, it is evident that the scope of work of each of the parties in the consortium is separately defined and since the MOU forms part of the contract agreement, it cannot be denied that the same was not known to the DMRCL/MMRCL. Secondly, the work of SIPL can only start after the goods reach the port of destination. In Article 2 of the MOU, the parties specify the percentage of effort and time that is expected to be spent by them on the project. In this Article, it has been clarified that the said percentage does not, in any way, imply the share of profit or losses, and each party will bear its own losses and retain its own profits separately based on the contract price and invoices raised. In the MOU, it is also mentioned that separate invoices would be raised by each party on the DMRCL for the work performed by them under the contract and the consideration shall be paid by the DMRCL as per the terms of the contract and quoted price in respective currency to the concerned consortium member raising such an invoice. From clause 4 of the contract agreement entered with DMRCL, we find that the same mentions contract price of Rs.15,38,93,850.16 and USD 37,60,376.

As per the assessee, the consideration in Indian currency was payable to SIPL and the consideration in USD was payable to the assessee.

11. *In big projects, it is a common practice that two or more companies with different expertise come together to form a consortium to bid for the project and jointly agree to undertake the project. In such a case, it cannot be said that the roles and responsibilities of one of the members can be performed by the other member. The purpose of the consortium is only to jointly bid for the project and win the mandate to perform the contract. Thereafter, each party is responsible for its own scope of work as agreed amongst them by way of MOU. The joint agreement can at best be for the purpose of completion of the contract for which the joint bid was made by the consortium. Due to the different expertise of the consortium members, the roles and responsibilities are also clearly demarcated, at the outset, at the time of bidding for the contract. Since multiple parties form part of the consortium, the members may choose a lead member amongst them for the purpose of representing the parties in such a contract and the same is only for administrative convenience and coordination. Therefore, for the purpose of taxation, it is relevant to take into consideration the roles/functions performed by each member of the consortium.*

12. *As per the assessee, the consideration received by SIPL in respect of its scope of work, i.e., clearance of material after reaching at port and transportation to the site as per contract conditions, installation, testing, commissioning, and maintenance of escalators, has already been offered for taxation in India. The Revenue has not brought any material to controvert the aforesaid submission of the assessee. In the present case, the consideration received from DMRCL and MMRCL was claimed as not taxable by the assessee on the basis that the same is in respect of the offshore supply of elevators and escalators. The distinct scope of work and separate responsibility of each member of the consortium, in the present case, was also accepted by DMRCL and MMRCL. The same is evident from the fact that the MOU forms part of the contract agreement and DMRCL/MMRCL also agreed to pay separate considerations and also in different currencies to both parties. As per the Revenue, since the contract with DMRCL/MMRCL is a composite contract with part of the contract being performed in India, therefore, the consideration received by the assessee is taxable in India. Though, the Assessing*

Officer vide draft assessment order treated the consortium as an AOP under the Act, however, proceeded to make the addition only in the hands of the assessee. The learned DRP did not go into the question of AOP and upheld the addition in the hands of the assessee on a substantive basis. On one hand, the Revenue treated the agreement with DMRCL and MMRCL as a composite contract, while on the other hand, it is an admitted fact that no separate assessment has been made in the hands of the consortium as an AOP. In coming to the aforesaid conclusion, the Revenue has placed heavy reliance on the scope of the contract, which is „design, manufacturing, supply, installing, testing, commissioning". However, we are of the considered view that the Revenue did not consider the other parts of the contract agreement with DMRCL and MMRCL, which clearly demarcates the description of work, the consideration, and the currency in which the same is to be paid to each of the consortium members. In Arosan Enterprises Ltd. v. UOI: (1999) 9 SCC 449, the Hon"ble Supreme Court held that the Agreement must be read as a whole with corresponding obligations of the parties so as to ascertain the true intent of the parties.

13. *As per the assessee, the title in the goods i.e. escalators and elevators was transferred to DRMCL and MMRPL outside India and payment thereof was also received outside India, therefore the transaction cannot be taxed in India. It is the plea of the assessee that the goods were transferred on a CIF basis. In this regard, reference was made to the copy of sample invoices forming part of the paper book from pages no.239-243. From the perusal of the aforesaid invoices, it is evident that the same are in the name of DMRCL and MMRCL and the transaction is on a CIF basis. In the draft assessment order, it has been held that since the offshore supplies have been made by the assessee on an Indian port of disembarkation basis, therefore the delivery of the goods is to be taken as having been made in India. Thus, it has been held that the profit made by the assessee on a CIF basis is liable to be taxed in India on the basis that the sale is completed in India. 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."

15. *Therefore, 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., are 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, the title in property in the goods shipped by the assessee in the foreign port was transferred at the port of shipment itself. In Ishikawajma-Harima Heavy Industries Ltd. vs DIT, [2007] 288 ITR 408 (SC), the Hon'ble Supreme Court held that only such part of the income, as is attributable to the operations carried out in India can be taxed in India. It was further held that since all parts of the transactions in question, i.e. the transfer of property in goods as well as the payment, were carried out outside the Indian soil, the transaction cannot be taxed in India. Since, in the present case, the assessee did not carry out any operations in India in respect of its scope of work, therefore, we are of the considered opinion that the income earned by the assessee from the offshore supply of escalators and elevators to DMRCL and MMRCL is not taxable in India. Accordingly, we direct the Assessing Officer to delete the addition made in the hands of the assessee. As a result, ground No. 1 raised in assessee"s appeal is allowed.*

16. *In view of aforesaid findings, ground No. 2, raised in assessee"s appeal on without prejudice basis is rendered academic and therefore, is dismissed as infructuous.*

17. In the result, the appeal by the assessee is partly allowed.

ITA NO.2483/Mum./2022

Assessee's Appeal – A.Y. 2019–20

18. In its appeal, the assessee has raised following grounds:–

Ground No. 1: Addition of receipt emanating from offshore supplies of escalators and elevators to the total income of the Appellant:
1. On the facts and circumstances of the case and in law, the Ld. AO erred in adding a sum of Rs 1,69,76,405/- out of receipts emanating from offshore supply of escalators and elevators to the total income of the Appellant.

2. The AO further inter-alia erred in observing or commenting that Appellant and SIPL constitute an AOP.

3. In absence of Permanent Establishment in India, under Article 7 of the IndiaChina Double Taxation Avoidance Agreement ("DTAA") and absence of any business connection as envisaged u/s.9(1)(i) of the Act, the Appellant prays that the addition made by AO on aforesaid offshore supplies be deleted.

Without Prejudice to above,
Ground No. 2: Non-consideration of Net Loss incurred by the Appellant on offshore supply of escalators and elevators to DMRCL/MMRCL:
1. On the facts and circumstances of the case and in law, the Ld. AO erred in making an addition of Rs. 1,69,76,405/- to the total income of the Appellant in India.

2. The Appellant prays that the Ld. AO be directed to delete the addition of Rs 1,69,76,405/-or appropriately reduce the same, after considering the facts and loss, if any, incurred by the Appellant in respect of above transaction.

General: 1.
The appellant craves leave to add, to amend, to alter and / or to delete all or any of the above grounds of appeal."

19. During the hearing, both parties agreed that the facts for the year under consideration are similar to the preceding assessment year. Since similar issues have been decided in assessee"s appeal being ITA No. 1679/Mum./2022, for the assessment year 2018–19, therefore, our findings/conclusion rendered in the said appeal shall

apply mutatis mutandis. As a result, ground No. 1 raised in assessee"s appeal is allowed. While grounds no.2 raised on without prejudice basis is dismissed as infructuous.

20. In the result, the appeal by the assessee is partly allowed.

21. To sum up, both appeals by the assessee are partly allowed."

14. With regard to the arguments of the revenue that the assessee is liable to be taxed as Association of Person (AOP) and also because there is joint and similar liability of the AOP, therefore, the Ld. AO has rightly taxed the assessee in India, the Ld. AR on behalf of the assessee and has argued that if the revenue was of the view that the receipt has to be taxed in this case as Association of Persons, why the Ld. AO has not proceeded to tax the assessee as Association of Person? The assessee has been taxed individually not and as Association of Person (AOP) with its consortium partner.

15. The arguments of the Ld. AR advanced on behalf of the assessee are cogent and convincing to show that the SIPL is not the permanent establishment of the assessee and nothing has been brought on record by the revenue which may controvert the argument advanced and the material relied by the assessee in that regard.

16. On the basis of the above discussion, we are of the considered opinion that the issue raised before the Tribunal in this relevant year is similar to the

issue for A.Ys. 2018-19, 2019-20 and 2020-21. Since the identical issue has been decided by the Ld. Coordinate Bench in earlier years in favour of the assessee as referred (supra) in the assessee's own case, therefore, respectfully following the decision of the ITAT in ITA No. 1679 & 2483/Mum/2022, for the A.Y. 2018-19 and 2019-20, order dated 30.01.2023, we direct the Ld. AO to delete the impugned additions for the A.Y. 2021-22 also.

17. Accordingly, the ground no. 1 raised in this appeal is allowed. In view of the finding on the ground no. 1, the ground no. 2 and 3 are dismissed as having become infructuous.

18. In the result, the appeal filed by the assessee is partly allowed in above terms.

Order pronounced on 26.11.2024

Sd/-	**Sd/-**
(PADMAVATHY S.)	**(RAJ KUMAR CHAUHAN)**
(ACCOUNTANT MEMBER)	**(JUDICIAL MEMBER)**

Mumbai / Dated 26.11.2024
Karishma J. Pawar, (Stenographer)

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