IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D': NEW DELHI
BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT
and
SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.1915/DEL/2014
(Assessment Year : 2005-06)

DDIT, Circle 2 (2), New Delhi.	vs.	SMS Siemag AG, C/o Mohinder Puri & Co., 1A-1D, Vandhna, 11, Tolstoy Marg, New Delhi – 110 01. **(AADCS1173J)**

ITA No.1073/DEL/2014
(Assessment Year : 2005-06)

SMS Siemag AG, C/o Mohinder Puri & Co., 1A-1D, Vandhna, 11, Tolstoy Marg, New Delhi – 110 01. **(AADCS1173J)**	vs.	DDIT, Circle 2 (2), New Delhi.

ITA No.2695/DEL/2018
(Assessment Year : 2014-15)

ITA No.3071/DEL/2019
(Assessment Year : 2015-16)

ITA No.1443/DEL/2022
(Assessment Year : 2016-17)

ITA No.1444/DEL/2022
(Assessment Year : 2017-18)

SMS Concast AG, C/o Mohinder Puri & Co., 1A-1D, Vandhna, 11, Tolstoy Marg, New Delhi – 110 01. **(AADCC2848Q)** **(APPELLANT)**	vs.	ACIT, International Taxation, Circle 3(1)(2), New Delhi. **(RESPONDENT)**

ASSESSEE BY : Shri Percy Pardiwalla, Sr. Advocate
Shri C.S. Mathur, CA
Ms. Richa Agarwal, CA
REVENUE BY : Shri Vijay B Vasanta, CIT DR

Date of Hearing : 10.10.2024
Date of Order : 06.01.2025

ORDER

PER S.RIFAUR RAHMAN,AM:

1. The assessee, SMS Siemag AG, and the Revenue has filed cross appeals against the order of ld. Commissioner of Income-tax (Appeals)-XXIX, New Delhi (hereinafter referred to 'Ld. CIT (A)') dated 02.01.2014 for Assessment Year 2005-06.

2. The assessee, SMS Concast AG, has filed four appeals against the separate orders of ld. Commissioner of Income-tax (Appeals)-43, New Delhi (hereinafter referred to 'Ld. CIT (A)') dated 31.01.2018, 16.01.2019, 21.04.2022 & 21.04.2022 for Assessment Year 2014-15, 2015-16, 2016-17 & 2017-18 respectively.

3. Since the issues are common and the appeals are connected, hence the same are heard together and being disposed off by this common order. We take up the assessee's appeal being ITA No.1073/Del/2014 for AY 2005-06 as lead case to adjudicate the issues under consideration.

4. The relevant facts of the case are, assessee filed its return of income on

29.11.2006 declaring income at Rs.8,11,98,063/-. The return was processed under section 143(1) of the Income-tax Act, 1961 (for short 'the Act') on returned income. Subsequently, the case was selected for reassessment and notices u/s 148 of the Act was issued and served on the assessee. In response, assessee filed its return of income at Rs.78,44,243/-. Notices u/s 142(1) was issued and served on the assessee. In response, ld. AR for the assessee attended the proceedings and filed the relevant information as called for.

5. Assessee is a company incorporated under the laws of Germany. It is engaged in the business of supply of plant, equipment, drawings and rendering of technical services to customers in the metallurgical sector in various parts of the world. During the year under consideration, assessee has entered into various contracts with Indian clients for supply of plant and equipment in Germany, supply of drawings and designs in relation to the plant from the Germany and rendering of technical services. The assessee recognized the receipts from drawings and designs and technical services to the following entities :-

(i)	Tata Iron Steel Co. Ltd.	Rs.7,69,20,032/-
(ii)	ISPAT Industries Ltd.	Rs. 3,96,701/-
(iii)	SMS Demag Pvt. Ltd.	Rs. 38,81,330/-
		Rs.8,11,98,063/-

6. The assessee has recognized the above revenue and offered to tax as 'Fee for technical services' @ 10% as per the DTAA between India and Germany.

7. During the course of assessment proceedings, the AO observed that the receipts from Jindal Steel and Power Limited amounting to Euro 12,15,200 (Rs.6,94,96,347/-) was shown as exempt in the return of income originally filed. The said Indian company had not deducted/paid any income-tax on the said consideration on the ground that the same is not liable to tax in India. Accordingly, a claim of exemption was made in the return of income filed by the assessee. However, the AO observed that the nature of receipts is same as that made from other Indian company in relation to supply of drawings and designs, the same have been offered for taxation @ 10%, therefore, consideration received in relation to drawings and designs from Jindal Steel and Power Limited should also be taxed @ 10% on the gross amount. Accordingly, he made addition of Rs.6,94,96,347/- to the income of the assessee.

8. Aggrieved with the above order, assessee preferred an appeal before the ld. CIT(A)-XXIV, New Delhi. Before ld. CIT (A), assessee has raised various grounds including jurisdictional issues for initiating reassessment proceedings in the case of the assessee and also on merit, assessee has

submitted before the ld. CIT (A) as under:-

> *"9.3 It would be observed that amount of Rs. 6,94,96,347/- which has been added to the income comprises of the following receipts from Jindal Steel & Power Limited.*
>
> *(a) Offshore sale of drawing and design Rs.1,67,32,800*
> *(b) Offshore supply of equipment Rs.5,27,63,546*
> *Rs.6,94,96,346*
>
> *The learned AO in the reassessment order as made, has erroneously treated the whole of the amount including that for the supply of equipment as "Fees for Technical Services". He has failed to consider that consideration for supply of equipment in any case is not liable to tax in India, which position he has himself accepted in respect of other supplies. As such an amount of Rs. 5,27,63,546/- included relating to supply of equipment is in any case not liable to tax under Art 12 of the DTA as erroneously referred to by the AO.*
>
> *9.4 Regarding non-taxability of consideration for sale of drawings and designs, it was submitted to the AO that the said claim was based on the following:-*
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> *(a) Terms of contract;*
>
> *(b) Decisions of ITAT in the case of the assessee where such receipts for the sale of drawing and designs were not held to be taxable in various Assessment Years*
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> *(c) Decisions of Hon'ble Madras High Court in the case of CIT Vs. Neyveli Lignite Corporation Ltd (Neyveli), 243 ITR 459.*
>
> *(d) Decision of Hon'ble High Court of Delhi in the case of Mitsui Engineering & Ship Building 259 ITR 248.*
>
> *9.5 Pursuant to the contractual terms, consideration for sale of drawings and designs is not liable to tax in India as the same does not accrue or arise in India. Even under the provisions of DTAA between India and Germany, the same is not liable to tax in the absence of P.E. of the assessee in India, in the relevant year. Reference may be made to following clauses of the agreement with Jindal Steel & Power Ltd."*

9. After considering the submissions of the assessee, ld. CIT (A) rejected the plea of the assessee on the jurisdictional issue and with regard to

merits, ld. CIT (A) partly allowed the grounds raised by the assessee with the following observations :-

> *"10.1 I have gone through various submissions made by the appellant and other material placed on record. At the outset, it is seen that the appellant has filed return in response to notice u/s 148 wherein certain incomes have been claimed as non-taxable which were offered to tax in original and revised returns. This action of the appellant is not as per law on the issue as Hon'ble Supreme Court has long ago in its decision in case of CIT v Sun Engineering Works Pvt. Ltd. 198 ITR 297 has laid down that reassessment jurisdiction is available only to the AO and not to the assessee and the assessee in reassessment proceedings cannot claim that certain incomes originally declared as taxable are not taxable. Therefore, the AO has rightly considered the income returned in the revised return as starting point and not the income returned in response to notice u/s 147 of the Act.*
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> *10.2 I have also gone through copies of invoices pertaining to receipts from Jindal Steel and Power Ltd. and it is seen that receipt of 949,600 Euro (Rs. 5,27,63,546) pertains to supply of equipment for an Electric Arc Furnace. The other two receipts of 235,000 and 30,600 Euros amounting to Rs. 1,67,32,800 are regarding drawing and designs. The AO in his assessment order has not alleged that there existed any PE in India for the AY under consideration. Therefore, in view of Article 7(1) of Indo-Germany DTAA, business income from sale of equipment is not taxable in India. Similar treatment has been given by the AO to business receipts in AY 2007-08 also, as is seen from assessment order for AY 2007-08 a copy of which has been furnished by the appellant. Regarding receipts for drawings and designs from Jindal Steel and Power Ltd., the appellant has not explained how these receipts are different from similar receipts from other clients. Receipts for drawings and designs are in nature of fee for technical services (FTS) both u/s 9(1)(vii) of the act and Article 12 of Indo-Germany DTAA. It is pertinent to note that for taxation of FTS under Article 12 of DTAA, existence of PE in India is not required. Accordingly, I find no infirmity in action of the AO in bringing this sum to tax as FTS taxable on gross basis @ 10% as per DTAA. Accordingly, the AO is*

directed to give relief regarding Rs. 5,27,63,546 as discussed supra. The ground of appeal is partly allowed."

10. Aggrieved with the above order, assessee is in appeal before us raising following grounds of appeal :-

"1. That the order of learned Commissioner of Income-tax (Appeals) [CIT (A)) is bad both in law and on facts of the case.

2. That the Ld. CIT (A) has erred in holding that the reassessment proceedings Initiated by Ld. A.O. are valid.

3. (a) That the learned CIT (A) has erred in law and on facts in holding that consideration received for supply of drawings and designs forming integral part of the supply of equipment, received under various contracts is taxable as "Fees for Technical Services".

(b) That the learned CIT (A) has failed to appreciate that on the facts and material on record, the receipts constituted "Business Profits" not accruing, arising or received in India or deemed to accrue or arise or received in India.

(c) That the learned CIT (A) has erred in not accepting that supply of drawings and designs was inextricably linked to sale of plant and equipment and represented consideration of the nature of 'Business Profits' not liable to tax in India, as per the provisions of DTA between India and Germany read with Indian Income-tax Act.

(d) That the learned CIT (A) has grossly erred in law in ignoring and not following the ratio of jurisdictional High Court of Delhi in the case of Mitsui Engineering and Shipbuilding [174 CTR 66(Delhi)] and other decisions as relied upon by the assessee.

4. That the learned CIT(A) has erred in ignoring the decision of Hon'ble High Court of Delhi in the case of DIT Vs

Jacabs Civil Inc and other High Courts and upholding the chargeability of interest under section 234B, not attracted on facts of the case.

5. That the assessee may be allowed to add, supplement, revise, amend grounds as raised hereinabove."

11. At the time of hearing, ld. AR for the assessee brought to our notice relevant facts on record and he brought to our notice page 9 of the factual paper book which is the original return of income filed by the assessee wherein assessee has clearly disclosed that three invoices raised to Jindal Steel and Power Limited which assessee has not offered to tax and further he brought to our notice page 11 of the paper book which is the revised computation of total income filed for the purpose of revised return of income. He submitted that the assessee has not changed the declaration made with regard to transaction with Jindal Steel and Power Limited and assessee has declared the same as exempt and at the same time, he submitted that first two invoices of Euro 2,35,000 and 30,600 are relating to drawings and designs and with regard to third invoice of Euro 9,49,600 pertains to supply of machineries. He brought to our notice page 12 of the paper book which is a letter submitted before the AO dated 23.03.2006 in which the assessee has clearly disclosed the fact that two invoices referred in the return of income are relating to supply of designs and engineering for electrical ARC and the other invoice is relating to

supply of equipment for electronic ARC. Further he brought to our notice page 15 of the paper book which is issued by the AO u/s 148 dated 28.03.2011 alongwith the reasons for reopening. The AO has mentioned the sum involved therein. He submitted that the sum mentioned in the reasons are Rs.31,11,699/- and he also brought to our notice page 19 of the paper book which is the annexure of the reasons to believe. The amount mentioned in page 19 and reasons to believe recorded are wrong and factually incorrect. He submitted that basis of reasons are factually incorrect. Accordingly, he brought to our notice page 25 of the paper book which is the decision of ITAT, Vishakhapatnam for AY 1992-93 wherein ITAT considered the facts on record and held by referring to the case of CIT v. Klayman Porcelains Ltd. (1988) 229 ITR 735 (AP) wherein Hon'ble Andhra Pradesh High Court held that the design and documentation fees cannot be considered as royalty but is only to be considered as part of plant supplied from abroad. Further he brought to our notice pages 30 to 38 of the paper book wherein ITAT, Vishakhapatnam gave relief to the assessee on the similar ground.

12. Ld. AR for the assessee brought to our notice page 67 of the paper book which is the letter submitted by the assessee raising preliminary objections and brought to our notice relevant submissions made along

with reliance of the decision of ITAT, Vishakhapatnam objecting to the reasons recorded for reopening the assessment. Further, he referred to page 1 of supplementary paper book, which are the submissions made before the ld. CIT (A) dated 19.11.2013 and he also brought to our notice page 2 of the assessment order and page 20 of the paper book which is the return of income filed in response to notice u/s 148 of the Act. He submitted that the assessee has rightly computed taxable income. He brought to our notice page 5 of the first appellate order and submitted that ld. CIT (A) has rejected the plea of the assessee wherein AO has made a reasoned observation that receipts for drawings and designs received from some clients is taxable then similar receipts from Jindal Steel and Power Limited should also be taxable and the assessee has wrongly taken these receipts as non-taxable. It was submitted that even if the AO has treated these receipts as FTS in reassessment order instead of treating them as business receipts as mentioned in the reasons recorded. However, ld. CIT (A) observed that it does not vitiate the reassessment proceedings because some receipts as mentioned in the reasons recorded has been brought to tax in the reassessment order though after characterizing them differently.

13. With regard to merits, ld. AR for the assessee brought to our notice the

findings at page 8 of the appellate order and submitted that ld. CIT (A) even though gave partial relief on supply of equipment but he sustained the supply of designs and engineering drawings as taxable overlooking the fact that the issue under considered is settled as far as assessee is concerned and the ITAT, Vizag has already decided the issue that it will not fall under the term royalties. He submitted that findings of ld. CIT (A) is not as per precedent.

14. On the other hand, ld. DR for the Revenue relied on the findings of the lower authorities with regard to reopening as well as on merits.

15. Considered the rival submissions and material placed on record. We observed that the assessment for the current assessment year was processed u/s 143(1) of the Act and the AO while processing the assessment records observed that the assessee has not offered to tax certain receipts from Jindal Steel and Power Limited and he was of the opinion that the income escaped in this assessment year. He was of the view that assessee has offered to tax receipts from other parties whereas it has not offered to tax the receipts from Jindal Steel and Power Limited. Accordingly, he proceeded to reopen the assessment by recording the relevant reasons on record. Assessee before us raised the issue that the AO has wrongly recorded the reasons with the wrong sum of money and

with the factually incorrect observation. After considering the facts on record, we observed that as per the information on record, the AO was of the opinion that there is substantial receipts not offered to tax by the assessee and accordingly, he reopened the assessment. Even though there is a small factual error, however the gross amount in terms of rupees mentioned in the reasons supplied to the assessee and the additions made in the assessment order are same. Therefore, we are not inclined to proceed with the objections raised by the assessee for reopening of the assessment.

16. Coming to the issue on merits, we observed that the assessee has declared three invoices in its return of income as exempt from tax however when the case was reopened it has filed its return of income by bringing on record facts clearly and it was submitted before the AO as well as ld. CIT (A) that two invoices of Euro 2,35,000 and 30,500 relates to supply of drawings and designs to Jindal Steel and Power Limited and which is exempt from tax on the basis of ITAT, Vishakhapatnam decision which is in favour of the assessee (it is decided in the case of M/s. SMS Schloemann Siemag AG Germany vs. DCIT which is the sister concern of the assessee). With regard to third invoice of Euro 9,49,600, it was submitted before the ld. CIT (A) that it is relating to supply of equipment.

We observed that ld. CIT (A) appreciated the above facts on record and deleted the addition made by the AO relating to supply of equipments. However, he did not consider the decision of ITAT, Vishakhapatnam relating to supply of drawings and designs as royalty/FTS and he proceeded to sustain the addition on the two invoices which assessee has not declared in their return of income. After considering the factual matrix on record, we observed that the ITAT, Vizag has considered the similar issue on record and decided the issue of supply of drawings and designs in favour of the assessee even though as royalties. However, the provisions of royalties and FTS are similar in nature, therefore, we are inclined to accept the submissions of the assessee and we direct the AO to delete the additions proposed in this case.

17. In the result, the grounds raised by the assessee on merits are allowed and other grounds are dismissed. Accordingly, the appeal filed by the assessee being ITA No.1073/Del/2014 is partly allowed.

18. The Revenue in the cross appeal for AY 2005-06 has taken various issues with regard to the deletion of addition of Rs.5,27,63,546/- out of total addition of Rs.6,94,96,346/- made by the Assessing Officer on account of consideration received by the assessee from M/s. Jindal Steel & Power Ltd. for supply of drawings and designs. This issue is decided by us in

the assessee's appeal for AY 2005-06 as above which relates to supply of equipment, this can never form part of 'FTS' and the same is decided in favour of the assessee. Accordingly, the grounds taken in the Revenue's appeal are rejected and the appeal filed by the Revenue is dismissed.

19. Now we take ITA No.2695/Del/2018 for AY 2014-15. The assessee has taken the following grounds of appeal in Assessment Year 2014-15 :-

> *"1. That the order of learned Commissioner of Income-tax (Appeals) 43, New Delhi("CIT (A)") is bad both in law and on facts of the case.*
>
> *2. That the Ld. CIT(A) has wrongly mentioned the of the Appellant as name SMS Concast UK Limited (PAN: AAMCS7193M) instead of SMS Concast AG (PAN: AADCC2848Q)*
>
> *3.1. That the Ld. CIT(A) has erred in upholding the amount received for drawings and designs supplied to the Indian customer amounting to Rs. 55,37,502/-/- as taxable in India as "Fee for Technical Services" ("FTS") under the Income Tax Act, 1961 ("the Act") and in terms of Article 12 of the DTAA between India and Switzerland ("the DTAA");*
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> *3.2. That the Ld. CIT (A) erred in rejecting the argument of the appellant that the receipts of Rs, 55,37,502/- towards drawings and designs constitute "Business Profits" and is not taxable in terms of the provisions of Article 7 of the DTAA;*
>
> *3.3. That the Ld. CIT (A) erred in holding that the drawings and designs relevant to said amount supplied by the appellant are not inextricably linked to the main equipment supplied from outside India and as such, the receipts there of is taxable in India as FTS;*

3.4. That without prejudice to the aforesaid grounds, the Ld. CIT(A) has erred in not appreciating that the designs and drawings being outright sale of property from outside India are not taxable in India under the Act as well as the DTAA,

4.1. That having regard to the facts of the case and in law, the Ld. CIT(A) has erred in characterizing revenue from supervisory activities, for a period exceeding the threshold provided under the DTAA, as FTS in terms of Article 12 of the DTAA, instead of 'Business Profits' under Article 7, taxable in India on net basis,

4.2. That while making the impugned addition, as the Ld. CIT(A) grossly erred holding that supervisory activities rendered for the project NINL does not constitute Permanent Establishment ('PE') in India in terms of Article 5(2)(1) of the DTAA;

4.3. That while making the impugned addition, the Ld. CIT(A) misdirected himself by observing that the supervisory activities undertaken by the Appellant were not effectively connected with PE and as such not taxable as 'Business Profits' under Article 7 of the DTAA;

4.4. That the Ld. CIT(A) erred in making enhancement amounting to Rs. 1,76,98,960/- to income by holding supervisory receipts liable to tax as FTS, which are not liable to tax in the relevant year, as per system of accounting followed by the assessee and always accepted.

5.1. That the Ld. CIT(A) has erred in upholding the taxability of consideration of Rs. 2,46,57,298/- for supervisory services, rendered for a period of less than six months, as FTS under the Act and DTAA;

5.2. That the Ld. CIT(A) has erred in rejecting the claim of the appellant to treat the proceeds towards such supervisory services as non-taxable business profits in the absence of Permanent Establishment ("PE") in India for relevant contracts in terms of Article 7 of the DTAA;

6. That impugned order of the Ld. CIT(A) is founded on misplaced reliance on judicial precedents, wrongful appreciation of facts and erroneous interpretation of law and hence, the said order is bad in law;

7. That the Ld. CIT(A) has erred in not disposing off the ground taken by the appellant in relation to the erroneous computation of taxable income, tax payable, charging of interest under section 234A/234B/234C and levy of penalty under section 271(1)(c).”

20. Grounds No.1, 2 & 6 are general in nature, hence does not require any adjudication.

21. Ground No.3 is with regard to drawings and designs, this ground is already decided by us in Ground No.4 in AY 2005-06 above. Since the facts are exactly similar to AY 2005-06 our above findings in AY 2005-06 are applicable *mutatis mutandis* in AY 2014-15. Accordingly, Ground No.3 is allowed for statistical purposes with the same direction.

22. Ground No.5 is covered by Para No.21 in ITA No.1361/Del/2012 for AY 2008-09 in assessee’s own case and the ITAT decided the same against the assessee. For the sake of clarity, Para 21 of the aforesaid order is reproduced below :-

“21. We have considered rival submissions and perused the materials on record. From the facts on record, it is observed, the assessee had entered into a contract for supply of electromagnetic stirrer. As per the scope of the contract, the assessee shall engineer, manufacture and deliver the plant and equipment. The scope of contract also included supervision, erection and commissioning of plant and equipment. As per assessee’s

own admission, technical personnel were deputed to supervise the erection and commissioning of the plant and equipment. Thus, it is quite clear, in course of such supervisory activity, the qualified technical personnel deputed by the assessee must have imparted technical services for erection and commissioning of the plant and equipment. Therefore, in our considered opinion, the amount received clearly falls within the definition of FTS, both under the domestic law as well as under the treaty provision. Once the receipts fall within the definition of FTS under Article 12(4) of the DTAA as well as the domestic law, it becomes immaterial whether the assessee has a PE in India or not. Therefore, in our view, the amount in dispute having qualified as FTS, has rightly been brought to tax at the hands of the assessee. This ground is dismissed."

23. Respectfully following the aforesaid coordinate Bench order, ground no.5 is dismissed.

24. Ground No.7 is consequential and premature, hence the same is dismissed.

25. With regard to Ground No.4, brief facts relating to this ground are, during the appellate proceedings, ld. CIT (A) while adjudicating the issue of supervisory services provided by the assessee for erection and commissioning of plant as supplied to Rathi Super Steel for a consideration of Rs.50,32,430/- and Jindal Steel and Power Limited for a consideration of Rs.1,96,28,868/-. No doubt, he dismissed the ground and decided against the assessee. However, the issue raised by the AO on such supervisory services rendered by the assessee for more than six months in India. He rightly held that the consideration for supervisory services is taxable in India as FTS and the abovesaid issue is against the

assessee as we adjudicated the same in ground no.5 raised by the assessee which is against the assessee.

26. At the time of adjudication of the above issue, ld. CIT (A) observed that the assessee has shown receipts from other supervisory charges for the work related to supervision of the installation and commission in India for which it was seen that the assessee had accepted a supervisory PE in India in respect of supervision carried out by it. The income for this receipt was computed in accordance with the provisions of section 44DA of the Act and offered to tax on a net basis. He observed that the receipts in AY 2014-15 of Rs.1,76,98,960/- were considered as advance from the customers. It was submitted before him that receipts are offered in the year in which project is completed. In order to verify the correctness of the contention of the assessee, where a PE is existed for supervision making the assessee eligible for the chargeability under the Article 7 and section 44DA, the number of days of the supervisory activity were sought to be submitted by the assessee. In this regard, assessee submitted that the yearwise details of the days on which supervisory activities were carried out. He observed that the period of activity was only 30 days in the FY 2013-14. Therefore, the supervision activity did not last above the period of six months as required under the Treaty with Switzerland. The

assessee was asked to submit on the abovesaid receipts not to be charged as royalty or FTS since a deemed PE did not come into being in accordance with Article 5 of the India-Switzerland Treaty for the current assessment year.

27. In this regard, assessee submitted that supervisory activity was to be seen from the date of commencing of the installation to the date conclusion of the commissioning. Further assessee submitted that six months referred to in the Treaty could extend over more than one financial year and the activity which resulted in the deemed PE has to be judged in totality spanning over a number of financial year.

28. Further assessee also made another argument that the activity was to be seen from the commencement of the project to the date of conclusion of the project and the actual number of days of the activity was not relevant. After considering the submissions of the assessee, ld. CIT (A) observed that the liability of tax is by virtue of status of the assessee and the said status has to be taken for a specific previous year. The rule of consistency is determined on the basis of stay in India as defined in the Act has to be greater than six months. In consistency with the principles of residency in the Treaties with various countries, the duration test for a PE has been placed at six months only. Similarly, a deeming PE is a PE

would exist in a case where the presence in India for six months within a 12 month period. By referring to the US Treaty, he was of the view that the basic principle of taxation requires the taxability of the status to be determined within a financial year. He observed that the supervisory activity undertaken by the assessee is far less than six months for the project. By referring on the decision of ITAT in the case of Sumitomo Corporation vs. DCIT (2014) 31 ITR (Trib.) 310 and other decisions, he came to the conclusion that assessee does not have installation site, therefore, a fixed placed PE created by installation are building site is not there in this case. Therefore, the decision of Sumitomo Corporation (supra) and other similar decisions are applicable in this case. He observed that absence of a deemed supervisory PE is further reinforced by the fact that duration test during the current assessment year has not been fulfilled and the assessee has not been able to show that there was a duration of more than six month for all the projects separately. Therefore, a deemed supervisory PE as claimed by the assessee has not been found to be in existence. In the absence of a supervisory PE, assessee is bound to offer his income from supervision charges of Rs.176,98,960/- on a gross basis @ 10%. Accordingly, he enhanced the addition.

29. Aggrieved with the above order, assessee is in appeal before us raising ground no.4.

30. At the time of hearing, ld. AR for the assessee submitted that assessee follows contract completion method and receives charges on advance basis. Whatever expenditure incurred by the assessee on the specific contract are incurred or treated as work-in-progress. In this regard, he brought to our notice page 95 of the paper book which is a Balance Sheet of the assessee and he highlighted that the same are disclosed as inventories. He also brought to our notice relevant accounting policies disclosed by the assessee in its Notes to Financial Statements placed at page 97 of the paper book. For the sake of clarity, it is reproduced below:-

> *"2. SIGNIFICANT ACCOUNTING POLICIES*
>
> *a) Basis of Preparation*
>
> *The accounts have been prepared for the supervision activities carried on in India under the contracts with Indian customers where the Company has deemed Permanent Establishments (P.E.) as per the respective contracts under the Double Taxation Avoidance Agreement between India and Switzerland Under the contracts, the Company is entitled to receive consideration for services to be rendered, over the periods of respective contracts.*
>
> *b) Basis of Preparation of financial statements*
>
> *Revenues and costs are recognized on cash basis on the basis of*

the completed contract method

i Profit from service activity is recognized on completion of each of the supervision contract based on the receipts from the customers.

ii. Amounts received from customers till the completion of the respective contracts by the company are shown as "Advances from Customers".

iii. Expenditure incurred on the ongoing contracts are shown as "Work in progress" and is charged off as expense on the completion of each of the project.

c) Basis of presentation and disclosures of financial statements

The Revised Schedule VI notified under Companies Act, 1956 is followed for presentation and preparation of its financial statements.

d) Use of Estimates

The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect the reported amounts of assets & liabilities and disclosure of contingent liabilities at the date of the financial statements and the results of operations during the reporting period. Although these estimates are based upon management's best knowledge of current events and actions, actual results could differ from these estimates.

e) Inventories

Work in Progress is valued at cost and includes all the expenses/costs incurred in respect of the ongoing contracts which are not completed as on 31 March, 2014."

31. Further he brought to our notice page 113 of the paper book which is the Balance Sheet of the assessee for the period ending 31st March, 2015 and also brought to our notice page 130 of the paper book which is the Balance Sheet for year ending 31.03.2016. He brought to our notice that assessee has declared the total contract revenue in the FY 2015-16 as income since the contract was completed. Further he brought to our notice page 146 of the paper book which is the assessment order for AY 2016-17, wherein it was submitted before AO that assessee is having PE as per Article 5 of the DTAA on account of three projects, namely, SMS Group Gmbh (NINL), SMS India Pvt. Ltd. (Kamenini Project) and Jindal Steel & Power Ltd.. It was further submitted that two projects were completed and recognized during the year. The net result for NINL project is loss of Rs.9,44,001/-. Therefore, he submitted that the assessee has already brought to the notice of the authorities that assessee is having three projects in India and the same was accepted by the AO. Further he brought to our notice page 181 of the paper book which is the last page of the assessment order wherein he has accepted the submissions of the assessee.

32. Further he brought to our notice page 382 of the paper book which is the Switzerland Treaty and brought to our notice Article 5 Clause J and

submitted that as per the definition, "a building site or construction, installation or assembly project or supervisory activity in connection therewith". Further he brought to our notice Clause L as per which, furnishing of technical services other than services as defined in Article 12, within a contracting state by an enterprise through employees or other personnel but only if more than 90 days within any 12 months period. He submitted that the abovesaid provision is special provision mentioned in Switzerland Treaty, therefore, any contract exceeding 90 days then only it is PE. In this regard, he relied on the decision of coordinate Bench in the case of Andritz AG vs. DDIT in ITA No.5991/Del2015 & Ors. dated 27.06.2024 and brought to our notice para 20 of the order and the relevant finding is reproduced as under :-

> *"20. Having held so, now we will deal with other aspect of the issue. It is the case of the assessee that the revenue from onshore supervisory services, is recognized based on project completion method followed year by year. It is the specific case of the assessee that since the project in respect of which it has received the supervisory charges were completed in financial year 201314, relevant to assessment year 2014-15, the assessee has offered the entire receipts in assessment year 2014-15 on net basis in terms of Article 7 of the treaty. In this context, learned counsel appearing for the assessee had drawn our attention to the return of income filed for assessment year 2014-15, the details of amount received towards supervisory services, copies of invoices etc. We have already discussed earlier that as per Article 7(5) of the treaty, the business profits of the PE has to be determined by the same method year by year, unless there is good and sufficient reasons to depart from*

the said method."

33. He submitted that the coordinate Bench set aside the matter to the file of AO to factually verify, whether the receipts in dispute were offered to tax by the assessee in AY 2014-15 i.e. year of completion of project, in case it is found to be so, no further addition can be made in the impugned assessment year. Therefore, the ratio of the above decision is that once assessee offers an income in the year of completion of project, no further addition can be made in the year under consideration.

34. On the other hand, ld. DR for the Revenue submitted that it is a fact on record that assessee is having PE and it is held that supervisory is connected to installation of plant and machinery and the issue of more than six months is already decided in favour of the Revenue and with regard to less than six months, the issue under consideration he relied on the decision of ld. CIT (A). With regard to submission of the ld. AR for the assessee that in AY 2016-17, assessee has declared status of the project before the AO which AO has accepted, in this regard he submitted that assessee has declared financial loss in this project and the same was accepted by the AO i.e. AO has accepted only the loss. He further relied on the decision relied by ld. CIT (A), he filed the relevant case laws relating to CIT vs. Vishkapatnam Port Trust (1983) 15 Taxman 72 (AP)

and GFA Anlagenbau Gmbh vs. DCIT (2014) 47 taxmann.com 313 (Hyderabad-Trib.).

35. In the rejoinder, ld. AR for the assessee submitted that as per the definition of PE, the supervisory services means, the provider of services does not own the project site. In this regard, he brought to our notice the decision of GFA Anlagenbau Gmbh (supra) relied by the ld. DR. He submitted that the Revenue itself insisted that it will fall under Article 7. He brought to our notice that AO itself necessitated that the relevant transaction be charged to tax as per Article 7 and he stated that similar issue was submitted by the Revenue in the case of Vishkhapatnam Port Trust (supra) also.

36. Considered the rival submissions and material placed on record. We observed that the issue under consideration in which ld. CIT (A) has enhanced the addition on the other supervisory services provided by the assessee in the new project for a period of 30 days. It is fact on record that both sides accepted that the supervision services were provided for a period less than six months and assessee followed the method of accounting on the basis of contract completion method and accordingly it has also offered the same in the year of completion i.e. in AY 2016-17. Considering the facts on record, we observed that the issue under

consideration is exactly similar to the facts in Andritz AG (supra) wherein coordinate Bench has remitted the issue back to the file of AO to verify whether receipts in dispute were offered to tax by the assessee in the order of completion of the project. In that case, it was AY 2014-15. Therefore, in the present case also, the ld. CIT (A) has enhanced the addition with the observation that the project in which the assessee has provided supervisory services for a period of less than six months still he treated the assessee as a deemed PE and proceeded to enhance the addition. As per the facts on record, assessee has followed contract completion method and accordingly, offered to tax in AY 2016-17 and assessee has submitted the relevant Balance Sheet in its paper book. For the sake of verification, we deem it fit and proper to remit the issue back to the file of AO whether the assessee has offered the relevant revenue based on the method followed by it i.e. contract completion method in the AY 2016-17. In case, it is found that assessee has offered the same in the year of completion, no further addition can be made in the present assessment year. Accordingly, ground no.4 is remitted back to the file of AO with the limited purpose to verify the above aspect after giving opportunity of being heard to the assessee. Hence, ground no.4 is allowed for statistical purposes.

37. In the result, the appeal for AY 2014-15 is partly allowed for statistical purposes.

38. With regard to AYs 2015-16, 2016-17 & 2017-18, the assessee has taken common grounds of appeal and for the sake of brevity, grounds of appeal for AY 2015-16 are reproduced below :-

> *"l. That the order of learned Commissioner of Income-tax (Appeals) 43, New Delhi ("CIT (A)") is bad both in law and on facts of the case.*
>
> *2. (a) That having regard to the facts of the case and in law, the Ld. CIT(A) has erred in characterizing revenue from supervisory activities, for a period exceeding the threshold provided under the DTAA between India and Switzerland ('DTAA'), as Fee for Technical Services ('FTS') in terms of Article 12 of the DTAA, instead of 'Business Profits' under Article 7, taxable in India on net basis.*
>
> *(b) That while making the impugned addition, the Ld. CIT(A) grossly erred holding that supervisory activities rendered for all the projects does not constitute Permanent Establishment ('PE') in India in terms of Article 5(2)(j) of the DTAA.*
>
> *(c) That while making the impugned addition, the Ld. CIT(A) misdirected himself by observing that the supervisory activities undertaken by the Appellant were not effectively connected with PE and as such not taxable as 'Business Profits' under Article 7 of the DTAA.*
>
> *(d) That the Ld. CIT(A) erred in making enhancement amounting to Rs.41,23,586/- to income by holding supervisory receipts liable to tax as FTS, which are not liable to tax in the relevant year, as per system of accounting followed by the assessee and always accepted.*
>
> *3. (a) That the Ld. CIT(A) has erred in upholding the taxability of consideration of Rs.42,07,915/- for supervisory services, rendered for a period less than six months, as FTS under the Act and DTAA.*
>
> *(b) That the Ld. CIT(A) has erred in rejecting the claim of the appellant to treat the proceeds towards such supervisory services as non-taxable business profits in the absence of Permanent Establishment ("PE") in India for relevant contracts in terms of Article 7 of the DTAA.*

4. That that impugned order of the Ld. CIT(A) is founded on misplaced reliance on judicial precedents, wrongful appreciation of facts and erroneous interpretation of law and hence, the said order is bad in law.

5. That the Ld. CIT(A) has erred in not disposing off the ground taken by the appellant in relation to the erroneous computation of taxable income, tax payable, charging of interest under section 234A/234B/234C and levy of penalty under section 271(l)(c).

39. Grounds No.1 & 4 of AYs 2015-16, 2016-17 & 2017-18 are general in nature, hence does not require any adjudication.

40. Ground No.7 of AYs 2015-16, 2016-17 & 2017-18 is consequential and premature, hence the same is dismissed.

41. Ground No.2 of AYs 2015-16, 2016-17 & 2017-18 is covered against the assessee as decided by us in Ground No.5 of AY 2014-15 vide Paras 21 & 22. Hence, following our decision as aforesaid, ground no.2 is dismissed.

42. Ground No.3 of AYs 2015-16, 2016-17 & 2017-18 is decided by us in Ground No.4 of AY 2014-15 vide Paras 24 to 35. Since the facts are exactly similar to AY 2014-15 our above findings in AY 2014-15 are applicable *mutatis mutandis* in AYs 2015-16, 2016-17 & 2017-18. Accordingly, Ground No.3 of AYs 2015-16, 2016-17 & 2017-18 is allowed for statistical purposes.

43. In the result, all the three appeals of AYs 2015-16, 2016-17 & 2017-18

are partly allowed for statistical purposes.

44. To sum up : assessee's appeal for AY 2005-06 being ITA No.1073/Del/2014 is partly allowed and assessee's appeals for AYs 2015-16, 2016-17 & 2017-18 are allowed for statistical purposes. The appeal filed by the Revenue for AY 2005-06 is dismissed.

Order pronounced in the open court on 06.01.2025.

Sd/-	**sd/-**
(SAKTIJIT DEY)	**(S.RIFAUR RAHMAN)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Dated: 06.01.2025
TS

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI