

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

**BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER**

ITA No.746/Del/2022
Assessment Year: 2017-18

Shenhzhen Information Co. Ltd., C/o- Tass Advisors LLP, 62, Lower Ground Floor, Pocket 2, Jasola, New Delhi	SDG	Vs.	Commissioner of Income Tax, International Taxation-3, New Delhi
PAN: AAVCS7426C			
(Appellant)			(Respondent)

Assessee by	Sh. Divyanshu Agrawal, Adv. Sh. Anubhav Rastogi, Adv.
Department by	Sh. Vijay B Vasanta, CIT(DR)

Date of hearing	10.03.2025
Date of pronouncement	05.06.2025

ORDER

PER SATBEER SINGH GODARA, JM

This assessee's appeal for assessment year 2017-18, arises against the CIT(IT), Delhi-3's DIN and order no. ITBA/COM/F/17/2021-22/1041465293(1), dated 24.03.2022 involving proceedings under section 263 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

2. Heard both the parties. Case file perused.

3. This assessee's appeal raises the following substantive grounds:

1. *That on the facts and circumstances of the case and in law, the Ld. Commissioner of Income tax (International Taxation -3) (hereinafter referred to as 'Ld CIT') erred in wrongfully invoking the provisions of section 263 of the Income tax Act 1961 (hereinafter referred to as 'the Act');*
2. *That on the facts and circumstances of the case and in law, the order passed by the Ld. CIT u/s 263 is bad in law in as much it does not fulfill the jurisdictional conditions envisaged by section 263 of the Act or Explanations appended thereto;*
3. *That on the facts and circumstances of the case and in law, the order passed by the Ld. CIT u/s 263 is against the settled legal dictum in as much that the Ld. CIT erred in not appreciating that:*
 - (a) *It was not a case where no enquiry was made by the Ld. Assessing Officer, on the contrary, was a case where assessment order was passed after making detailed enquiries*
 - (b) *That 263 proceedings cannot be initiated on a mere change of opinion*
 - (c) *That where two views are possible and Assessing Officer has adopted one of the views, 263 does not lie*
 - (d) *If two reasonable constructions of a taxing provision are possible, the construction that favours the assessee has to be adopted*
 - (e) *Section 263 of the Income tax Act 1961 cannot be invoked for making fishing and roving enquiries or for reverification.*
4. *That the Ld. CIT has not considered the reply of the Appellant before passing the impugned order dated 24.03.2022 u/s 263 of the Act and has thus violated the principle of natural justice.*
5. *That on the facts and circumstances of the case and in law, the Ld. CIT erred in not appreciating that the revenues from the offshore supply of equipment would not be taxable in India.*
6. *That on the facts and circumstances of the case and in law, the Ld. CIT has wrongly invoked the provisions of section 44BBB of the Income tax Act 1961 whilst determining the taxable income of the*

Appellant to be Rs. 6,43,77,612 i.e 10% of gross receipts of Rs. 64,37,76,118.

- 7 That the order passed by the Ld. CIT is on the basis of presumptions, conjectures and surmises and is unsustainable in law.*
- 8 That on the facts and circumstances of the case, the Ld. CIT has erred in not appreciating the nature and stipulations of the contract(s) entered into by the Appellant.*
- 9 That on the facts and circumstances of the case, the Ld. CIT has wrongly observed that the Appellant has been awarded a single turnkey project by Power Grid Corporation Ltd despite also observing that the contract for offshore supply of equipment was distinct and separate from the contract for onshore supply of services*
- 10 That on the facts and circumstances of the case and in law, the Ld. CIT has erred in not appreciating that the activities of the Appellant did not construe a Permanent Establishment in India in terms of Agreement for Avoidance of Double Taxation between India and China and that nothing could be taxed in India.*
- 11 That on the facts and circumstances of the case, the Ld. CIT has wrongly invoked the provisions contained in Article 3 of the Agreement for Avoidance of Double Taxation between India and China while holding that the Appellant has a Permanent Establishment in India*
- 12 That on the facts and circumstances of the case and in law, the L.d. CIT has grossly erred in holding that the Appellant has a Business connection in India.*
- 13 That the order passed by the Ld. CIT defies the Principle of Binding Precedents.*

That the Appellant reserves its right and prays to the Hon'ble Tribunal to permit the Appellant to add, alter, amend, vary or substitute any of the aforesaid ground(s) of Appeal before or at the time of hearing of the present appeal.

4. We next note that the learned CIT(IT)'s section 263 revision direction holding the Assessing Officer's assessment dated 30.12.2019; as erroneous one causing prejudice to the interest of the Revenue; reads as under:

“5. Issues:

The issues are primarily two-fold. First, whether the assessment order passed by the AO without calling for relevant details and making necessary verification/inquiry would require revision under section 263 of the Act being erroneous and prejudicial to the interest of revenue.

Second, whether the income from offshore supplies are taxable in India under the provisions of Income-tax Act.

Third, whether the income component of offshore supplies and services would not be taxable in India under Article 7 of the India-China DTAA based on functional analysis.

Fourth, profit of the assessee company in India being engaged in turnkey power project contract is required to be determined as per special taxation regime under Section 44BBB of Income-tax Act.

Fifth, whether there is an artificial splitting up of a single composite contract into offshore and onshore for obtaining tax benefits.

Sixth, whether tax base for the purposes of section 44BBB of the Act would constitute all revenues earned irrespective of offshore supplies and services and onshore supplies and services.

Decision:

6. Validity of proceeding under section 263 of the Act:

6.1 Section 263 of the Income-tax Act empowers the Jurisdictional Commissioner to revise any order passed by the lower authorities provided that the order so passed is erroneous and prejudicial to the interest of the revenue. The Explanation (2) in clause (a) and (b) makes it clear that where the order is passed without enquiry or relief is granted without inquiring the claim would deem to be an order that is erroneous and prejudicial to the interest or revenue. Relevant portion is reproduced is under:

"Explanation 2.-For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal 69 [Chief Commissioner or Chief Commissioner or Principal] Commissioner or Commissioner,-

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

6.2 The provision was inserted in the statute by Finance Act, 2015 w.e.f 01.06.2015. Therefore, even the decision of Malabar Industries of Hon'ble Supreme court (243 ITR 83) would not be helpful as the decision was prior to the said amendment. In the instant case, as stated in aforesaid paragraphs, the order was passed without conducting inquiry to gather relevant facts necessary to ascertain the taxability of the income. Therefore, the said order is erroneous being pre-judicial to the interest of revenue as per the express provisions of section 263 of the Act.

6.3 "Change of opinion" argument cannot also be taken as aground to invalidate the proceeding under section 263 of the Act in the instant case. The exercise of establishing the fact that there is a change in opinion is basically a two-fold process. There should an opinion by the AO at the first place with regard to taxability of income. In order to make this opinion, the AO need to gather all the relevant facts leading to assessment of the income. As discussed in aforesaid paragraphs, the AO has failed to call for relevant material facts and made necessary investigations/enquiry to ascertain their veracity during the course of assessment proceeding. Therefore, there could not be any opinion in this case. Accordingly, the change of opinion argument would not survive. Second, the change of opinion argument is only restricted to facts and does not extend to application of law position. This has been decided by several courts. Reliance may be placed on the decisions in the case of Vijay Kiran Hotels (P) Ltd. Vs CIT (P&H) reported in 196 ITR 336, Simran Farms Ltd. Vs CIT (MP) 300 ITR 270, Intellinet Technologies India Pvt. Ltd Vs ITO 5 ITR 96 (Bangalore, ITAT). The courts have held that the argument about two views are possible at the time of passing the assessment order, will hold good only in respect of facts. Apparently, in the instant case the AO has completely overlooked the legal position dealing with taxation of income in the hands of the non-resident assessee under the provisions of Income-tax Act and that under relevant DTAA.

6.4 The essence of an assessment order is to arrive at the right amount of taxable income on the basis of relevant facts and legal

positions. Relevant facts are gathered on the basis of details/documents filed by the assessee, further inquiries/investigations made by the AO to ascertain veracity of the claim or to bring additional facts to ascertain the right amount of taxable income based on the correct legal position. It is needless to say that any order that is passed without gathering relevant facts including necessary enquiries/investigation is erroneous. The courts have unanimously held this view in several cases. For instance in the cases of *Ramapriya Devi Saraogi Vs CIT(SC) 67 ITR 84*, *Malabar Industries Co. Ltd Vs CIT(SC) 243 ITR 83*, *Gee VEE Enterprises Vs Addl. CIT (del) 99 ITR 375* etc, the courts have held that unlike civil court which is neutral to give a decision on the basis of evidence produced before it, an Assessing Officer is not only an adjudicator but is also an investigator. He cannot remain passive on the facts of a return which is apparently in order but calls for further enquiry. It is his duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such to provoke inquiry. If there is a failure to make such inquiry, order is erroneous and prejudicial to revenue.

6.5 An order is erroneous Assessing Officer's failure to make inquiries. In *Tara Devi Aggarwal v CIT*, 88 ITR 323(SC) the Supreme Court observed that where an income has not been earned, it is not assessable merely because the assessee wants it to be assessed in his/her hands in order to assist someone else who would have been assessed to a larger amount and rate of tax and the assessment so made will be erroneous and prejudicial to the interests of the revenue and that the Commissioner of Income-tax has jurisdiction to cancel that assessment and direct the Assessing Officer to make the assessments afresh according to law after making proper enquiries. An assessment order which is erroneous and prejudicial to the revenue can be revised by the Commissioner. It has been held that the Commissioner of Income-tax can also regards an assessment order to the erroneous where, on the circumstances of the case, he finds that it has been made in undue haste and without proper enquiry. It is incumbent on the Assessing Officer to investigate the facts stated I a return particularly when the circumstances suggest that the enquiry would have been necessary or prudent. Hence the word "erroneous" would also include a failure to make such an enquiry. Thus, assessment of private company without inquiring into genuineness and creditworthiness of shareholders would attract revision by the Commissioner. In such a case the order is erroneous, not because there is anything wrong with it if all facts stated in it are assumed to be correct but because it has been passed without making an enquiry or investigation which should have been made. Even where facts are disclosed by the assessee, the order of assessment can be revised if the correct provisions of law are not examined. The

Mumbai Tribunal in the case of Arvee International Vs. Addl. CIT reported in 101 ITD 495 held that an order is erroneous if it is based on an incorrect facts or an incorrect application of law or non-application of mind or based on no or insufficient material.

6.6 The second aspect is whether the order passed by the AO is prejudicial to the interest of revenue. The issue had been decided by several courts In the case of Venkatakrishna Rice Co. Vs CIT 163 ITR 129(Mad), the Hon'ble Madras High Court had held that "Prejudice to Revenue" Means prejudice to Revenue administration and does not mean orders unfavorable to Department. The scope of the power of interference under this section is not merely to set aside unfavorable orders and bring some more money to the Treasury nor is it meant to get at sheer escapement of revenue. The prejudice must be prejudice to the revenue administration. It is an extraordinary revisional power to be employed not as a jurisdictional corrective or as a review of a subordinate's order in exercise of supervisory power. It is to be invoked and employed only for the purpose of setting right distortions and prejudices to the revenue. Admittedly, in the instant case by not resorting to collection of relevant material facts or conducting further inquiry and applying correct legal positions, the Assessment Order passed by the AO had caused prejudice to revenue administration. In another case of TTK LIG VS ACIT, 51 DTR 228(Mad), the Hon'ble High Court had gone one step further to decide that once the order is found to be erroneous, no specific finding is required to show that the same is prejudicial to interest of revenue.

6.7 Accordingly, initiation of proceeding under section 263 of the Act is in accordance with the legal positions.

7. Taxability of consideration in the hands of the assessee company

Basic Facts:

7.1 Assessee, a tax resident of China has entered into a composite contract with Power Grid Corporation of India Ltd relating to Turnkey power project in State of Jharkhand. As per the bid document/contract agreement, the scope of the contract work included planning, design, engineering, supply, supervision of erection/installation of OPGW cable & associated items. However, the income relating to offshore supplies and services were not offered to tax. Global Invitation for Bids (GIFB) was issued by M/s Power Grid Corporation of India Limited on 07.08.2014 for Fibre Optic Cabling Package (Package-1c) for Jharkhand Consultancy. The scope of work as per the point no.3.1 of the bid document is reproduced as under:

"3.1 The scope of work covered under the Fibre Optic Cabling Package Package- IC shall include in following parts: The scope of this part shall include planning, design, engineering, supply, supervision of erection/installation of OPGW cable& associated items and documentation of:

(a) 24 fibre OPGW cable:

(b) 48 fibre OPGW cable

(c) All associated hardware, fittings and accessories (Tension assembly. Suspension assembly, Vibration dampers, Reinforcing rods, Earthing clamps, Downlead clamps etc.) required for installation of OPGW cable.

(d) Supply of Joint box for above OPGW cable

(e) Fibre Optic approach cable including associated installation material

(f) Fibre Optic Distribution Panels (FODP)

For existing transmission lines, the Contractor has to carry out the detailed survey and collect the required data for preparation of drum schedule.

The drum schedule shall be finalised based upon tower schedule / survey reports provided by POWERGRID. In case tower schedule is not available, standard drum schedule shall be used.

Contractor may visit the site for design of OPGW cable. All associated works/items described in the technical specifications for a viable and fully functional fibre optic link shall be provided by POWERGRID.

The various Sections of this specification define the survey, design, performance, test and implementation requirements for OPGW Cable system.

The above scope of work is indicative and the detailed scope of work is given in the Technical Specification (Volume-II) of the Bidding Documents"

7.2 Therefore, as per the scope of work defined in the bid document, the contract is a single and composite contract and is related to turnkey power project. The scope of the contract includes planning,

design, engineering, supply, supervision of erection/installation of OPGW cable.

7.3 Subsequently, two Agreements were executed between M/s Power Grid Corporation of India Limited & M/s Shenzhen SDG Information Co Ltd on 14.05.2015. One is Offshore supplies Contract and second is Onshore service Contract. The scope of work of Offshore Contract is reproduced as under:

"WHEREAS the Purchaser desires to engage the Supplier for all works to be performed in countries outside India covering, inter-alia, the design, engineering, testing and CIF supply of OPGW cable & associated items and documentation of:

(a) 24 fibre OPGW cable

(b) 48 fibre OPGW cable

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(c) All associated hardware, fittings and accessories (Tension assembly, Suspension assembly, Vibration dampers, Reinforcing rods, Earthing clamps, Downlead clamps etc.) required for installation of OPGW cable.

(d) Supply of Joint box for above OPGW cable

(e) Fibre Optic approach cable including associated installation material

(f) Fibre Optic Distribution Panels (FODP)"

7.4 Further, the scope of work of Onshore Contract reads as under:

"Article 5.

The Contract Agreement Nos, CC-CS/397-ERI/OPGW-2640/3/G4/R/CA-11/5349 between the Purchaser and the Supplier has also been made on the 14.05.2015 for On-Shore Services Contract (also referred to as the "Second Contract").

The scope of 'Second Contract' interalia includes performance of all other activities, as set forth in the Bidding Documents, viz. port handling and custom clearance of supplies from abroad, inland transit insurance, loading and transportation to site of all the goods

and any other services specified in the Contract documents for port handling and custom clearance of supplies from abroad, inland transit insurance, loading and transportation to site, Supervision of Installation of all the goods and any other services specified in the Bidding Documents for Fibre Optic Cabling Package (Package-1C) associated with Jharkhand consultancy.

7.5 Therefore, it can be seen that the single composite contract is artificially segregated into two components: onshore and offshore. The artificial splitting is clear from the following paragraph from the contract:

"Notwithstanding the award of work under two separate Contracts in the aforesaid manner, the Supplier shall be overall responsible to ensure the execution of both the Contracts to achieve successful completion and taking over of the Goods by the Purchaser as per the requirements stipulated in the respective Contract Documents. It is expressly understood and agreed by the Supplier that any default or breach under the Second Contract' shall automatically be deemed as a default or breach of this 'First Contract' also and vice-versa, and any such default or breach or occurrence giving the Purchaser a right to terminate the 'Second Contract', either in full or in part, and/or recover damages under that contract, shall give the Purchaser an absolute right to terminate this Contract, at Supplier's risk, cost and responsibility, either in full or in part and/or recover damages under this 'First Contract' as well. However, such default or breach or occurrence in the Second Contract', shall not automatically relieve the Supplier of any of its obligations under this 'First Contract'. It is also expressly understood and agreed by the Supplier that the goods supplied by the Supplier under this 'First Contract', when supplied at site shall give satisfactory performance in accordance with the provisions of the Contract."

The contract put all the responsibilities on the assessee company even though there are two agreements. It says that the assessee shall be overall responsible to ensure the execution of both the Contracts to achieve successful completion. Further, any default or breach under the Second Contract shall automatically be deemed as a default or breach of this 'First Contract'. In case of a breach, Power grid Corporation Ltd shall give an absolute right to terminate this Contract, at Supplier's risk, cost and responsibility. These clauses clearly indicate that the contract is a single and composite one. Had this been separate contracts, one's default or breach would not affect the contract of the other party.

7.6 Final Contract Price as per the composite contract is as under:

"D2.0 Final Contract Price:

Net Bid Price of M/s. SDGI, the purpose of award, works out to USD 16,72,096.89 + INR 30,24,400/- (US Dollar Sixteen Lacs Seventy Two Thousand Ninety Six point Eighty Nine plus Indian Rupees Thirty Lacs Twenty four Thousand Four Hundred Only), as per the following break-up:

First Contract i.e. CIF Contract		
CIF Price component (including IAC*)	USD	16,72,096.89
Total CIF Contract Price	USD	16,72,096.89
Second Contract i.e. Services Contract		
Local Transportation, Insurance and Other Incidental Services (Including Port Clearance)	INR	30,21,400
Supervision of Installation Charges	INR	3,000
Total Services Contract Price	INR	30,24,400
Total Contract Price	USD	16,72,096.89
	INR	30,24,400

*As discussed at para 1.2 of Attachment-D (PBD), the Indian Agent Commission (IAC) is USD1.0

The above contract price of SDGI is exclusive of Custom Duty and inclusive of all MA.COM FIT

other Taxes & Duties except Octroi/Entry Tax. Taxes and Duties be additionally payable by POWERGRID as per the provisions of the Bidding Documents."

The final contract price constitutes the contract price of both onshore and offshore. This is to be received by the assessee company. Has this been separate contracts, the prices for contracts would be separate. Moreover, the contractee is the same person that is the assessee company.

7.7 In view of the aforesaid discussions, it is established beyond doubt that the assessee company has been awarded a single composite contract in respect of a turnkey power project by Power Grid

Corporations Ltd. This was artificially segregated in to two separate agreements: offshore and onshore subsequently with a primary intention to avoid payment of taxes. It may be pertinent to note here that the OECD in its final report on Action plan 6 relating to artificial avoidance of PE status, prohibited the artificial splitting of contracts used to avoid payment of legitimate taxes in source countries.

Therefore, the next question would be what could be the profit attributed to such business activities in India of the assessee company. This may be understood from the succeeding paragraphs.

8. Taxability of business income by the assessee

8.1 Taxation of cross-border business income is governed by the source rules under section 5(2) read with section 9(1)(i) of the Income-tax Act and Article 7 of the relevant DTAA. Under Article 7 of the Indian DTAA, the business income of non-resident is taxable in India if it establishes a Permanent establishment (PE) in India. It is a two-step process. First, to establish the taxable presence of non-resident in India and second, determining the profits attributable to such activities in India.

8.2 To tax the business profits of the non-resident, dual test of existence of "business connection" under section 9(1)(i) of the Act and the Permanent Establishment (PE) threshold under Article 7 of the relevant DTAA is required.

8.3. Taxable presence:

8.3.1 Business connection threshold:

8.3.1.1 Non-resident's business income is liable to be taxed in India if it has a "Business connection" in India. Income-tax Act does not define the word "business connection". However, the Apex court had the occasion to define the meaning of business connection in the case of R D Agrawal (56 ITR 20,24) where in a very wide meaning was assigned to it. As per the apex court, non-resident is said to have a business connection if there exists a real and intimate relation between trading AAVCS74760-SHENZHEN SDO INFORMATION

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activity carried on outside the taxable territories and trading activity within the territories. The Authority of Advance Ruling in the case of Honeywell Technologies SARL. after referring to the decisions of the Hon'ble Supreme Court in R.D. Aggarwal & Co. (supra) and in Anglo

French Textile Co. Ltd. v. CIT (1953) 23 LTR 101 (SC) summed up the essential features of the business connection thus:

(a) a real and intimate relation must exist between the trading activities carried on outside India by a non-resident and the activities within India.

(b) such relation, shall contribute, directly or indirectly, to the earning of income by the non-resident in his business.

(c) a course of dealing or continuity of relationship and not a mere isolated or stray nexus between the business of the non-resident outside India and the activity in India, would furnish a strong indication of 'business connection' in India.

The Andhra Pradesh High Court in the case of GVK Industries Ltd (228 ITR 564) held that to constitute a business activity there must be continuity of activity or operation of the non-resident with the Indian party.

8.3.1.2 Undoubtedly, the assessee company because of its contractual engagement for a power project in India, constitutes a business connection in India as there exists a real and intimate relation of the non-resident assessee in India.

8.3.1.3 Under Tax Treaty framework, taxing right is allocated to the contracting states based on categorization/characterization of income: Active or passive income. Generally, regarding passive income such as dividend, interest, Royalty and FTS or capital gains, both the contracting states have right to tax such income. However, in respect of active income (business income), the source country has a right to tax only when the non-resident has a PE in that state. The threshold of PE under DTAA's and "business connection" under Income-tax Act cover situations where the business activities of non-resident satisfy "business in" criteria for establishing a taxable presence in the source country. A reference may be made to the decision of Andhra Pradesh High Court in the case of CIT Vs Visakhapatnam Port Trust (144 ITR 146).

8.3.1.4 Therefore, whether the income to be characterized as active business income or passive income is decided based on degree of involvement in the activities by the non-resident taxpayer in a source country. To categorize certain income stream as business income in the hands of non-resident in a source country, the taxpayer need to exhibit that his/her involvement is substantial. In other words, the non-resident creates a taxable presence in a source country only when it establishes a significant/substantial economic connection. The PE

threshold rules for taxation of business profits of non-resident in a source country are based on this criterion. Physical presence with certain degree of permanence of a non-resident or doing activities through a dependent person or employees are considered to satisfy the substantial economic connection in a source country.

8.3.1.5 The courts in India including Apex court had several occasions to deal with what constitute business income or investment income. There is unanimous view that regularity, continuity, frequency, volume are the basic attributes of a business activities. These attributes signify substantial involvement of a taxpayer. In the instant case, the transaction between the Assesse Company and Indian user does not satisfy these criteria. Therefore, it is clear that the assessee's case is that of "business in" in India as against "business with". In view of this, consideration received by the assessee company from Power Grid Corporation for contractual work would constitute business income.

8.3.1.6 It is further ascertained from various clauses of bid documents and contract agreements that there is an artificial splitting of an otherwise single composite contract to obtain a favourable tax position. The bottom line of the facts is that assessee Company has been awarded a composite contract by the Power Grid Corporation to perform a power project contract in India. Therefore, the assessee's activity in the form of a contract constitutes "business connection" in India. Hence, there is no need for establishing business connection on transactional basis.

8.3.2 "Permanent Establishment" threshold -

8.3.2.1 The PE threshold rule is a physical presence-based threshold. Under India-China DTAA Article 5 defines the expression "Permanent Establishment" (PE). The relevant portion is as under:

"1. For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.

2. The term "permanent establishment" includes especially:

(a) a place of management;

(b) a branch;

(c) an office;

(d) a factory;

(e) a workshop:

(f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources;

(g) a warehouse in relation to a person providing storage facilities for others;

(h) a farm, plantation or other place where agriculture, forestry, plantation or related activities are carried on;

(i) an installation or structure used for the exploration or exploitation of natural resources, but only if so used for a period of more than 183 days.

3. The term "permanent establishment" likewise encompasses:

(a) building site or construction, installation or assembly project or supervisory activities in connection therewith, but only if such site, project or activities last more than 183 days. (a)

For the sole purpose of determining whether the 183 day period referred to as above has been exceeded,

- i. where an enterprise of a Contracting State carries on activities in the other Contracting State at a place that constitutes a building site or construction, installation or assembly project and these activities are carried on during one or more periods of time that in the aggregate do not exceed 183 days, and*
- ii. connected activities are carried on at the same building site or construction, installation or assembly project during different periods of time, each exceeding 30 days, by one or more enterprises closely related to the first-mentioned enterprise,*

8.3.2.2 Paragraph 1 sets out a general definition, as a fixed place through which business of an enterprise is carried on. It is sometimes referred to as the basic rule. Paragraph 2 gives an inclusive definition, defining the type or nature of place such as branch, factory, workshop, office, etc. Paragraph 3 prescribes a limitation to paragraph 1. It is a further extension of the inclusive definition which is made subject to a qualification based on period of continuance. For instance, under India- China DTAA, a construction PE would be constituted if it is carried beyond a time frame of 6 months. Apparently, the assessee company's contractual engagement in India is more than 6 months. Therefore, it constitutes a construction PE in India.

8.4 Attribution of Profit to PE under Indian DTAA's including India-China DTAA: In general

8.4.1 Once both the thresholds are met, the next question is what would be the amount of profit attributable to the PE. Before going to facts of the case, it is essential to understand the scope and mechanism of computation of profit as provided in Article 7 of Indian DTAA's.

8.4.2 Article 7 of Indian DTAA's (also Indian China DTAA) deals with taxation of business profits. The primary rule is that the profits of an enterprise of a Contracting State shall be taxable only in that resident state. The source state may tax business profits if the enterprise carries on business in the Source State through a Permanent Establishment situated therein. The determination of profits of the PE would be the profit it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment. This shall be treated as profits directly attributable to that PE. In a simpler term, the arm's length profit would be the profit of the PE that is attributable to the PE.

8.4.3 However, Source state's taxing right is limited to only the profit that is attributable to that permanent establishment, whether directly or indirectly. The indirect attribution of profit is basically referring to attribution of additional profit by application of "force of attraction" clause.

8.5 Legal position under Indian DTAA's: whether FAR analysis is approved

8.5.1 Arm's Length principle is the basis of allocation of profit between the AEs under Article 9 and profit attribution to PE under Article 7 of the Indian DTAA's. However, there is a marked difference in the application of Arm's Length principle in both the situations. Profit allocation under Article 9 of the Indian DTAA prescribes determination of Arm's length profit based on functional analysis (FAR analysis). This is also recognized under Income-tax Act. However, FAR analysis is not accepted as a standard to determine Arm's Length Profit in the case of PE under Indian DTAA as well as under Income-tax Act.

8.5.2 The concept of determination of profit of the PE on the basis of functional analysis was introduced for the first time by the OECD in 2010 on the basis of recommendations made in OECD's report on attribution of profit to PE. The idea of bringing FAR analysis for profit

attribution to PE similar to profit allocation in case of AEs was that the taxable outcomes of subsidiaries and PE should be similar. This argument was based on the neutrality principle of taxation as per which the form chosen to conduct a business: whether branch or subsidiary, should not have different taxable income. The work was taken up way back in 1998 by OECD which culminated with a final report on PE attribution in 2010. The mechanism was provided by the OECD's AOA (Authorized OECD Approach) which requires to allocate functions, assets, risk and capital on the basis of SPF (Significant Peoples' Function).

8.5.3 However, the AOA has not been accepted even within the OECD member countries. The UN Expert committee also rejected the functionally separate entity approach for attribution of PE's profit as it was in direct conflict with provision of Article 7(3) of UN model dealing with computation mechanism and force of attraction clause. Second, by introducing a FAR analysis would bring in all the practical problem of a complete transfer pricing analysis that is presently faced under Article 9. Accordingly, the most of the non-OECD countries and several OECD countries still continue to follow earlier version (prior to 2010 OECD model). India has also made specific reservations on application of OECD AOA to Indian DTAAS. The relevant portion is reproduced as under: However, the AOA has not been accepted by India. India has also made specific reservations on application of OECD AOA to Indian DTAAS. The relevant portion is reproduced as under:

1. India reserves the right to use the previous version of Article 7, i.e., the version that was included in the Model Tax Convention immediately before the 2010 update, subject to its positions on that previous version (see annex below). It does not agree with the approach to the attribution of profits to permanent establishments in general that is reflected in the revised Articles in its Commentary and in the consequential changes to the Commentary on other Articles..."

8.5.4 The UN Expert committee also rejected the functionally separate entity approach for attribution of PE's profit as it was in direct conflict with provision of Article 7(3) of UN model and Indian DTAAs which provides for computation mechanism and also with force of attraction clause. For instance under India- China DTAA, the sub-article 4 of Article 7 provides as under:

"4. In determining the profits of a permanent establishment, there shall be allowed as deduction expenses which are incurred for the purposes of the business of the permanent establishment, including executive and general administrative expenses so incurred, whether

in the Contracting State in which the permanent establishment is situated or elsewhere in accordance with the provisions of tax law of that Contracting State"

Accordingly, the most of the non-OECD countries including India and several OECD countries still continue to follow earlier version (prior to 2010 OECD model).

8.5.5 Therefore, there is no legal basis of attribution of profit to the PE based on functions performed, assets used, or risks assumed under Indian DTAAS read with Income-tax Act.

8.6 India's approach: Relevant business activity as against functionally separate entity

8.6.1 Though Article 7 has been widely accepted, approaches to implementing the rule adopted by the countries were different. The OECD discussion draft, 2004 details the broad methodologies adopted by the countries as far as attribution of profit to PE is concerned. As per OECD, the methods were broadly of two types i, e. the relevant business activity approach and functionally separate entity approach. Under the relevant business activity approach, the profits of an enterprise refer only to the profits of the business activities in which the PE has some participation. Under this approach, the profits to be attributed to a PE would be based on appropriate share of profits of the non-resident for the relevant business activity of the enterprises in the source state. This method usually follows a formulary apportionment approach to allocate some portion of global profit of the non-resident to the PE for its business activities in source country. However, the idea is that such profit should be identical to arm's length profit. On the other hand, under the functionally separate entity approach the profits attributed to the PE is by reference to functions performed, assets used, or risks assumed by the enterprise in the source state. This is carried out through a detailed a transfer pricing analysis.

8.6.2 Indian DTAAAs follow relevant business activity approach to attribute profit to the PE. Under this approach, the arm's length profit would be what the independent party performing same of similar business activities under same or similar condition would earn. In a simpler term, it refers to the arm's length profit of the business activity as whole. For instance, if a non-resident through its PE carries out a turnkey power project, the arm's length profit to be attributed to this PE would be what the independent party carrying out turnkey power project would earn irrespective of where the function is performed, asset used or risk assumed.

8.6.3 The wording used in DTAA as "is limited to only the profit that is attributable to that permanent establishment" and section 9(1)(a) of the Income-tax Act as only such part of the income as is reasonably attributable to the operations carried out in India" refers to determination of the arm's length profit in respect of the business activities carried on by the non-resident in India only. For instance, the non-resident may be a full-fledged manufacturer of pharmaceutical goods. In India, it only distributes the goods through its PE. The relevant business activities in this case is distribution of goods. Therefore, while attributing profit to PE in India, the arm's length profit relating to distribution activities of pharmaceutical goods is to be adopted only. On the other hand, under functionally separate entity approach, the profit of PE would be based on functions carried out in India. In this case, the PE's activity is marketing support.

8.6.4 On a quantitative term, this may be explained by way of an example. Let say arms' length profit margin is 5% for distribution of pharmaceutical goods in India. The total revenue is 100. In that case the arm's length profit would be 5 (5% *100). However, if the arms' length remuneration for marketing function of pharmaceutical goods is 1%, then the profit of the PE is 1. In a way, the functionally separate entity only remunerates the supply side factor whereas the relevant business entity approach remunerates the both supply side as well as demand side factors (sales). In a simpler term, under relevant business activity approach, the profit of the PE is profit relating to functions plus profit in respect of the sales revenue. This principle is embedded in all of Indian DTAA's by introduction of "force of attraction clause" and also in Rule 10 by reference to applying certain profit margin on gross revenue earned in India.

9. Determination of income of the PE under the Income-tax Act

9.1 DTAA does not impose tax. Tax is imposed under the provisions of domestic tax law. Under the scheme of Income-tax Act, the mechanism of computation of profit of the PE (non-resident's relevant business activities) in India is provided in two ways: general rule and specific rule. The Income-tax Rule 10 provides the general rule for determination of profits of non-resident's business activities in India whereas provisions like section 44B, 44BB, 44BBB of the Act provide rules for specified business activities carried out by the non-residents. However, under both, the objective is to arrive at the arm's length profit. The specific rules provide a pre-determined arm's length mark-up while under rule 10 the arm's length mark-up of profit is required to be determined on the basis of relevant business activities.

9.2 The Income-tax rules under Rule 10 provide the method of determination of profit that is attributable to the PE of the non-resident

in India which adopts formulary apportionment instead of transfer pricing analysis based on FAR. This rule adopts the relevant business activities approach to determine the Arms' length profit of the PE. The Rule 10 of Income-tax Rule is as under.

"10. In any case in which the [Assessing Officer] is of opinion that the actual amount of the income accruing or arising to any non-resident person whether directly or indirectly, through or from any business connection in India or through or from any property in India or through or from any asset or source of income in India or through or from any money lent at interest and brought into India in cash or in kind cannot be definitely ascertained, the amount of such income for the purposes of assessment to income-tax may be calculated:

- i. at such percentage of the turnover so accruing or arising as the [Assessing Officer] may consider to be reasonable, or*
- ii. on any amount which bears the same proportion to the total profits and gains of the business of such person (such profits and gains being computed in accordance with the provisions of the Act), as the receipts so accruing or arising bear to the total receipts of the business, or*
- iii. in such other manner as the [Assessing Officer] may deem suitable."*

9.3 The legal mandate is that the profit attributable to the PE should be the Arm's length profit. The Rule 10 of the Income-tax Rule that deals with the mechanism for determination of PE's profit intends to replicate the desired result that would have been arrived through a TP analysis.

The Rule 10 provides basically two methods under clause (i) and (ii) to determine the profit. Under the first clause, certain percentage of the turnover so accruing or arising to the PE is the profit attributable to it. This clearly indicates that the total receipt sourced in India should be taken as the tax base. The profit margin to be applied on these Indian receipts should be at Arm's length to arrive at Arms' length profit.

Under the second clause, total profit of the assessee company from similar businesses may be apportioned on the proportion of Indian turn over to global turn AAVCETANGTHENZHEN OG FORBAT

over in relation to similar business activities to arrive at the profit of the PE. However, the power of AO is extended in certain scenario as indicated in clause (iii). For instance, when the non-resident shows loss position, then no profit can be attributed to the PE in India as per clause (i) and (ii). In that case, the AO may apply the profit shown by

independent taxpayers who are in same or similar line of business as the arm's length profit.

9.4 It may be pertinent to mention here that under the specific provisions such as 44BB or 44BBB etc., the tax base is identical to that under Rule 10. The only difference is that arm's length profit margin has been pre-determined. For instance, for businesses falling under section 44BB or 44BBB, the arm's length profit margin is 10% of the total revenue earned in India. Even though the Income-tax Rule 10 is the mechanism to compute the business profits of a non-resident's operations in India. there are certain special sections provided under the scheme of the Income-tax Act in respect of certain specific business activities dealing with scope and determination of taxable base. One such special provision is section 44BBB of the Act. This section deals with taxation of business profits of non-resident in respect of turnkey power projects. As in the instant case, the assessee company being a non-resident is engaged in certain specified activities in respect of turn-key power project contracts, the profit of the non-resident represented by its PE is required to be carried out under section 44BBB of the Act instead of Rule 10. As provisions of Income-tax Act prevails over income-tax rule which is a secondary legislation as a general principle, business profit in turnkey power projects would be carried out under section 44BBB of the Act.

10. Summary:

- 1. Non-resident's business profit for its activities in India is required to be determined by following Arm's length principle in view of Article 7 of Indian DTAAs Including India-China DTAA.*
- 2. Attribution of profit to PE under Article 7 and Income allocation under Article 9 between the Associated Enterprises Indian DTAAs, even though follow Arm's length principle, are not identical.*
- 3. There is no legal basis to attribute profit to PE under Article 7 of Indian DTAAs on the basis of function performed, assets used or risk assumed.*
- 4. FAR analysis is the basis for allocation of income only with regard to AEs under the scope of Article 9 of Indian DTAAs.*
- 5. The rejection of functionally separate entity approach (FAR analysis) by India is because of the fact that Indian DTAAs also adopts force of attraction wherein profit from sales and provisions of services are also captured in the tax base.*
- 6. Indian DTAAs adopt formulary apportionment for determination of arm's length profit of PE by following relevant business activities approach instead of functionally separate entity approach. The rule 10 is accordingly designed to determine the arm's length profit.*

7. *If the computation mechanism is provided in a special provision like section 44BBB of the Act etc., then the tax base and arm's length profit would be decided as per the said special provision.*

11. *Taxability of Income in the hands of the assessee: Offshore component*

11.1 *During the period under consideration, the assessee company has received income of INR 64,37,76,118 from offshore supplies relating to turn- key power project in the State of Jharkhand which was awarded to it by Power Grid Corporation Ltd. As stated, this was a single composite contract involving planning, design, engineering, supply, supervision of erection/installation of OPGW cable. As per detailed discussion carried out in preceding paragraphs, the assessee company constitutes a Construction PE in India in view of Article 5(3) of the India-China DTAA. Assessee's business activities also has a business connection in India in view of section 9(1)(i) of the Act.*

11.2 *Under the Income-tax Act, a non-resident is chargeable to tax on income that is sourced in India. The source rules are provided in section 5(2) and section 9 of the Income-tax Act. Under sub-section(2) of section 5 of the Act, a foreign company or any other non-resident person is liable to tax on income which is received or is deemed to be received in India by or on behalf of such person, or income which accrues or arises or is deemed to accrue or arise to it in India. Section 9 of the Act, thereafter, specifies certain types of income that are deemed to accrue or arise in India in certain circumstances. These two sections embody the source rule of income taxation in India. Under Section 9(1)(i) of the Act provides that all that all income accruing or arising, whether directly or indirectly, through or from any business connection in India is chargeable to tax. This takes care of certain situation when the primary source rule under section 5(2) of the Act fails to bring the income into tax in India. The deeming rule under section 9(1)(i) of the Act states that all income that accrue or arise, whether directly or indirectly would be sourced in India provided there exists a business connection in India. The income from offshore component of supplies or services is taxable in India as the assessee's activity in the instant case creates a business connection in India because of its contractual engagement in India.*

11.3 *Further it is ascertained that the profit attributable to the PE in India would be carried out under Arms' length principle. Accordingly, the arm's length profit of the PE in the instant case would be what the independent party carrying out a similar contractual work (turnkey power project in India) under similar conditions would earn. While carrying out this exercise, transfer pricing analysis on the basis of*

functions, assets and risk is not to be considered as India it has no legal basis under the Indian DTAA's and also under the provisions of Income-tax Act. FAR analysis to allocate income is adopted only for transactions between related parties (AEs) falling under the scope of Article 9 of India DTAA's. As far as profit attribution to PE is concerned, Article 7 comes into play. India adopts relevant business entity approach to attribute arm's length profit to PE instead of a functionally separate entity approach based on FAR analysis. Under the relevant business entity approach, some percentage of global profit of the non-resident is attributed to Indian operation by following Arm's length principle. Already a detailed discussion has been made in this regard in preceding paragraphs. The rule 10 is the computation mechanism for determination of profit of the PE. However, as the business activities of the assessee falls into a special category (in this case relating to turnkey power project), the taxation of income from such activities would be carried out as per the special provisions. Therefore, in this case the taxation has to be carried out as per the provisions of section 44BBB of the Act.

11.4 Now coming to the aspect of applicability of the decision of the Supreme Court in the case of Ishikawajima Harima. On the facts, the case is different from the instant case as the assessee being engaged business of civil construction, installation, assembly etc., in certain turnkey power projects, the taxation of income need to be dealt only as per the section 44BBB of the Act. Section 44BBB of the Act is a special code by itself for the purposes of computation of business profit and it overrides all other provisions in the chapter IV-D dealing with "Profit and gains from business or profession". The Apex court had no occasion to decide on the interplay of section 44BBB of the Act with section 9(1)(i), Rule 10 and Article 7 of the relevant DTAA. As discussed, the tax base under the section 44BBB of the Act includes all revenue earned from India and therefore, there is no room for segregation of receipts into offshore or onshore. On the facts the case is different from the instant case as this is case where the assessee has resorted to tax avoidance through artificial splitting of a single composite contract.

The ratio has two strands. One, taxation is linked to territoriality and second, for the purposes of taxation, transactional approach was allowed instead of holistic one. This contradicts the principle approved by Hon'ble Supreme Court in the case of Vodafone International Holdings B.V. v. Union of India (2012)341ITR1(SC). The Apex Court had held that in order to ascertain the taxability of the cross-border transaction in India, the business activities as a whole is required to be ascertained. As far as business income is concerned, the deeming rule under section 9(1)(i) of the Act provides that all that all income accruing or arising, whether directly or indirectly, through or from any

business connection in India is chargeable to tax. Therefore, the source rule of non-resident under Income-tax act has provided to capture income of extra-territorial nature one a business connection is established. In this case, the assessee has a business connection in India. In order to negate the effect of the said ration for other passive income, an Explanation below sub-section (2) to Section 9 of the Income-tax Act was inserted vide Finance Act, 2010. As per the said provision, the place of rendering of services is not important. The services shall be taxed where the services are utilized. Under the EPC contracts, therefore, offshore services are held to be taxable in India as the services are utilized in the project situated in India. Even though, offshore supplies are not expressly covered by the said provision, there is no dispute that the supplies are also utilized in the project situated India. In case of EPC contracts the supplies and services are inseparable. Therefore, segregation of supplies from services for tax purposes is undesirable. As a result, the said explanation to section 9 of the Income-tax Act should also be applicable to offshore supplies if the same is utilized in India.

11.5 Now the other question is when the order of a Court could be binding. This issue has been decided by the Apex court and also certain High Courts in several cases. The Hon'ble Andhra Pradesh High Court in the case of CIT VS BR Constructions reported in 202 ITR 222 held that even though the doctrine of stare decisis is part of our judicial system, it may not be followed in case any order is considered to be per incuriam that is when the decision is given in ignorance of the terms of a statute or rule having statutory force. The relevant part of the decision is reproduced as under:

"39. In paragraph 578 at page 297 of Halsbury's Laws of England, Fourth Edition, the rule of per incuriam is stated as follows:

"A decision is given per in curiam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decided which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."

40. In Punjab Land Development and Reclamation Corporation Ltd. v. Presiding Officer, Labour Court, the Supreme Court explained the expression "per incuriam" thus (at page 36 of 77 FJR):

"The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given per incuriam when the Supreme Court has acted in ignorance of a pervious decision of its

own or when a High Court has acted in ignorance of a decision of the Supreme Court."

42. As has been noticed above, a judgment can be said to be *per incuriam* if it is rendered in ignorance or forgetfulness of the provisions of a statute or a rule having statutory force or a binding authority. But, if the provision of the Act was noticed and considered before the conclusion arrived at, on the ground that it has erroneously reached the conclusion the judgment cannot be ignored as being *per incuriam*.

In *Salmond on Jurisprudence, Twelfth Edition*, at page 151, the rule is stated as follows:

"The mere fact that (as is contended) the earlier court misconstrued a statute, or ignored a rule of construction, is no ground for impugning the authority of the precedent. A precedent on the construction of a statute is as much binding as any other, and the fact that it was mistaken in its reasoning does not destroy its binding force."

11.6 It is pertinent to mention here that the Hon'ble Supreme Court in the case of *Distributors (Baroda) Ltd. Vs CIT [1985] 155 ITR 120/22 Taxman 49 (SC)* has dealt similar issue. The Hon'ble Apex Court held that "to perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience." This ratio of the Hon'ble Supreme Court has been applied in several cases. Therefore, following the decision of a legally wrong order under the pretext of uniformity and legal consistency is undesirable. The Hon'ble Apex Court in the case of *Union of India & Anr Vs Raghbir Singh (178 ITR 548)* had reiterated the same ratio. It held that, if the previous decision is plainly erroneous, there is a duty of the Court to review it and not perpetuate the mistake i.e. a vital point was not considered or when an relevant statutory provision had not been brought to the notice of the court. Similar view was taken by the Apex Court in the case of *Sri Agasthayar Trust Vs. CIT (236 ITR 23)*. Therefore, this is a well settled position that an erroneous order does not set any binding precedence. In view of the above, the court cases cited will not be helpful.

11.7 Scope of taxation under section 44BBB of the Act.

Section 44BBB of the Act is a special provision for computing profits and gains of foreign companies engaged in the business of civil construction, etc., in certain turnkey power projects.

For the purpose of convenience, the provision is reproduced as under:

44BBB. (1) Notwithstanding anything to the contrary contained in sections 28 to 44AA, in the case of an assessee, being a foreign company, engaged in the business 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 in this behalf, a sum equal to ten per cent of the amount paid or payable (whether in or out of India) to the said assessee or to any person on his behalf on account of such civil construction, erection, testing or commissioning shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession".

(2) Notwithstanding anything contained in sub-section (1), an assessee may claim lower profits and gains than the profits and gains specified in that sub-section, if he keeps and maintains such books of account and other documents as required under sub-section (2) of section 44AA and gets his accounts audited and furnishes a report of such audit as required under section 44AB, and thereupon the Assessing Officer shall proceed to make an assessment of the total income or loss of the assessee under sub-section (3) of section 143 and determine the sum payable by, or refundable to, the assessee.

11.8 Under its personal scope it applies to all non-resident being foreign company who are engaged in the business of engaged in the business of civil construction, etc., in certain turnkey power projects. Therefore, whether the non-resident is having a permanent establishment in India or not, the taxation has to be carried out as per the scope defined under section 44BBB of the Act. The activities may be 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 in this behalf. This section overrides all independent sections under chapter IV dealing with profits and gains from business or profession" from section 28 to 44AA in case of conflict.

11.9 The tax base for the purposes of Section 44BBB of the Act is all amount that is paid or payable, in or outside India, and amount received or deemed to be received in India by the non-resident company. By reference to " whether in or out of India, the section ascertains that all payment: onshore and offshore would form the tax base. By reference to paid or payable, it intends to apply mercantile system and cash system of accounting in determining the tax base. Once the tax base is determined, the arms' length profit would be equal to ten per cent of the aggregate of the amounts specified in sub-section (1).

11.9.1 Accordingly, there exists no ambiguity that the offshore component of income would be taken in computing the tax base for the purpose of determining profit. In the instant case, the receipts from

offshore supply amounting to INR 64,37,76,118 is required to be taken in the tax base as per sub-section(1) of the Section 44BBB. As per sub-section (1) of section 44BBB, the profit would be 10% of the such receipts which is INR 6,43,77,612.

11.9.2 Needless to say, the bench marking of Arm's length profit for contracts relating to turnkey power project contracts at 10% of gross revenue has already been decided by the legislature. In other words, this is the profit that the independent party doing the same or similar activities under similar conditions would earn in India. As discussed in aforesaid paragraphs, this is the arm's length profit as per the meaning of Article 7 of India-China DTAA and under section 9(1)(a) of the Income-tax act. Alternatively, any profit below this would not be at arm's length and therefore, would be contrary to legislative intent.

11.9.3 As a result, the receipts from offshore supply amounting to INR 64,37,76,118 is taken in the tax base as per sub-section (1) of the Section 44BBB of the Act. The profit in this case would be 10% of INR 64,37,76,118 which is INR 6,43,77,612.

12. In view of the aforesaid discussions of facts and legal provisions, the impugned order of the Assessing Officer dated 30.12.2019 is cancelled as the same is erroneous being prejudicial to the interest of revenue. Further, in view of the aforesaid discussions of facts and legal provisions, the income from offshore supplies is brought to taxed under section 44BBB of the Act and the profit on such receipts would be 10% of INR 64,37,76,118 which is INR 6,43,77,612. The Assessing Officer is directed to revise the aforesaid assessment order accordingly.”

This is what leaves the assessee aggrieved against the learned CIT(IT)'s above section 263 revision direction holding its “offshore” revenues from sale of equipment from China (Rs.64,37,76,118/-), as taxable in India under section 44BBE of the Act.

5. We now advert to the basic relevant facts. The assessee/appellant is admittedly a chinese company engaged in R&D, manufacturing of fiber-optic cable, wiring and

communication network equipment etc. It had entered into an offshore supplies contract with the twin indian PSUs namely Power Grid Corporation of India Ltd. and Jharkhand Urja Sancharan Nigam Limited to supply optical ground wire cables and related equipments which form subject matter of learned CIT(IT)'s revision direction and held as taxable in India under the presumptive scheme of section 44BBB of the Act. The above statutory provision admittedly provides that such an income is taxable in case the former entity concerned is engaged in the business of civil construction or erection of plant and machinery or testing or commissioning thereof, in connection with a "turnkey" power project, as the case may be.

6. It is therefore evident that *de-hors* the technical aspect of the Assessing Officer's alleged failure in not having carried out detailed inquiries, the key question which arises before us herein is regarding applicability of section 44BBB in the assessee's case herein. We wish to clarify here that the assessee and its twin "PSU" clients had separately arrived at offshore supplies and "onshore" services/supervision agreement involving varying sums wherein contract award (at page 110 of the paper-book II) had duly provided

for all works of offshore contract to be performed outside India including design, engineering, testing or commissioning etc. Our attention is further invited to page 151 in paper-book II indicating the assessee's "onshore" operation as involving local transportation, insurance and other incidental services etc. of Rs. 30,24,400/-only. The assessee further seeks to buttress the point in light of pages 587 to 601 in the paper-book II that it had already appointed M/s. Incap Limited for performing onshore operation of the contract than itself having carried out the corresponding activities in the relevant previous year. All the above facts make it abundantly clear that the learned CIT(IT)'s impugned revision directions firstly clubbing both the assessee's offshore and onshore revenues and then holding the former head as taxable in India; are not sustainable in light of Hyundai Heavy Industries Co. Ltd., (2007) 291 ITR 482 (SC) and Ishikawajima Harima Heavy Industries Ltd. Vs. Director of Income-tax, (2007) 288 ITR 408 (SC) wherein their lordships have settled the issue long back that such offshore supply(ies) revenue could not be held as taxable in India.

7. We thus conclude in light of above assessee's cogent supportive material involving all the contracts documents as well

the foregoing case law that the learned CIT(IT) has erred in law and on facts in treating the assessee's offshore supplies revenue as taxable in India after having unilaterally re-drawn the above agreement clauses forming subject matter of our adjudication; are hereby reversed in very terms. That being the case, it is concluded in assessee's favour and against the department that once it is not assessable even under the normal provisions, section 44BBB would also not apply in its case. Ordered accordingly.

8. This assessee's appeal is allowed.

Order pronounced in the open court on 5th June, 2025

Sd/-
(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(SATBEER SINGH GODARA)
JUDICIAL MEMBER

Dated: 5th June, 2025.

RK/-

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi