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

BEFORE,
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA No.3186/Del/2016
(ASSESSMENT YEAR 2011-12)

ITA No.255/Del/2017
(ASSESSMENT YEAR 2012-13)

ITA No.6190/Del/2017
(ASSESSMENT YEAR 2014-15)

ITA No.7070/Del/2018
(ASSESSMENT YEAR 2015-16)

ITA No.7282/Del/2019
(ASSESSMENT YEAR 2016-17)

ITA No.115/Del/2021
(ASSESSMENT YEAR 2017-18)

ITA No.1619/Del/2022
(ASSESSMENT YEAR 2018-19)

DSD Noell GMBH C/o Mohinder Puri & Co., CA's 1A-D, Vandhna, 11 Tolstoy Marg New Delhi-110 001 PAN-AABCD 3024F	Vs.	Dy./Asst. CIT Circle-1(2)(2) International Taxation New Delhi
(Appellant)		**(Respondent)**

Assessee by	Sh. Rajan Bhatia, Advocate & Ms. Shruti Srivastava, CA
Department by	Sh. Sanjay Kumar, Sr. DR

Date of Hearing	23/08/2023
Date of Pronouncement	21/11/2023

ORDER

PER M. BALAGANESH AM:

All these appeals of the Assessee arises out of the orders of the Learned Commissioner of Income Tax (Appeals)-42, New Delhi [hereinafter referred to as 'Ld. CIT(A)], against the order passed by Assistant Director/Assistant Commissioner of Income Tax, Circle-1(2), International Taxation, New Delhi for Assessment Years 2011-12, 2012-13, 2014-15, 2015-16, 2016-17, 2017-18 & 2018-19.

3. The assessee has raised the following grounds of appeals:-

ITA No.3186/D/2016

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

2. That the Ld. CIT(A) has erred in computing the taxable income of the Appellant at Rs. 1,89,12,640/- as against 'Nil' income as declared in the return of income;

3. That the Ld. CIT(A) has erred in holding that consideration received by the Appellant in relation to contract for off- shore services for planning and supply of drawings and designs, is essentially in the nature of "Fees for Technical Services" under the provisions of section 9(1)(vii) of the Income - tax Act, 1961 (the Act) and provisions of Article 12 of the Double Taxation Avoidance Agreement between India and Germany (DTAA);

4. That the learned CIT(A) has erred in rejecting the contention of the Appellant that the offshore services are inextricably linked to the supply of plant & equipment and thus consideration for such services partake the nature of business profits which should be taxed in terms of provisions of Article 7 of the DTAA, read with Protocol Para 1(a) and (b) thereof;

5. That the Ld. CIT(A), while arriving at the aforesaid conclusion, has erred in not relying upon the decisions of different courts in the following cases:

• Mitsui Engineering and Shipbuilding 174 CTR 66 (Delhi);

• Linde AG v. DIT 44 taxman.com 244 (Delhi);

• CIT v. Neyveli Lignite Corporation Limited 243 ITR 459 (Madras)

• Ishikawajima Harima Heavy Industries Company Ltd. v DIT (2007) 228 ITR 408 (SC)

6. Without prejudice, the Ld. CIT(A) has erred in holding that the impugned services are not covered by the exclusionary clause, provided for 'assembly', 'construction' or 'like project activities' in India, under section 9(1)(vii) of the Act.

7. Without prejudice the Ld. CIT(A) also erred in not considering the fact that the impugned contractual activities are ipso facto covered by the provisions of Section 44BBB of the Act;

8. That the Ld. CIT(A) grossly erred in considering that only income arising from the onshore activities of the power project comes under the purview of section 44BBB and thus consideration for offshore activities does not form part thereof;

9. That the learned CIT(A) has erred in not adjudicating on the initiation of penalty proceedings under section 271 (1)(c) of the Act, as initiated by the Learned Associate Director of Income - tax (Ld. ADIT), provisions of which are not attracted on the facts and circumstances of the case;

10. That the appellant may be allowed to add, supplement, revise, amend grounds as raised hereinabove.

ITA No.255/Del/2017

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

2 That the Ld CIT(A) has erred in computing the taxable income of the Appellant at Rs 2 39,48,515/- as against Rs, 77,28,097/- income as declared in the return of income;

3. That the Ld CIT(A) has erred in holding that consideration received by the ' Appellant n relation to contract for off- shore services for planning and supply of drawing" and designs, is essentially in the nature of "Fees for Technics Services under the provisions of section 9(l)(vii) of the Income - tax Act, 1961 (the Act) and provisions of Article

12 of the Double Taxation Avoidance Agreement between India and Germany (DTAA);

4. That the learned CIT(A) has erred in rejecting the contention of the Appellant that the offshore services are inextricably linked to the supply of plant & equipment and thus consWeration for such services partake the nature of business profits which should be taxed in terms of provisions of Article 7 of the DTAA, read with Protoco Para 1(a) and (b) thereof;

5. That the order of the Ld. CIT(A) is grossly incorrect in considering that separate paymcru towlrds the offshore services including drawings and designs ,ndica.es the severance of this contract from the contract for the supply of plant & equipment,

6. That the Ld CIT(A), while arriving at the aforesaid conclusion, has erred in not relying upon the decisions of jurisdictional High Court and Hon'ble Supreme Court of India.

7. Without prejudice, the Ld. CIT(A) has erred in holding that the impugned services are not covered by the exclusionary clause, provided for 'assembly, 'construction' like project activities' in India, under section 9(l)(vu) of the Act,

8. That the Ld C1T(A) erred in refuting the contention of the Appellant that the P™Ject u, d taken by the appellant is a turnkey project and aforementioned offshore services areessential to the carrying on of onsite project activities m India Accordingly, these activities should be covered by the exclusionary clause provided under section 9(l)(vii) of the Act;

ITA No.6190/Del/2017

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

2. That the Ld. CIT(A) has erred in computing the taxable income of the Appellant at Rs. 3,26,09,861/- as against Nil income as declared in the return of income;

3. That the Ld. CIT(A) has erred in holding that consideration received by the Appellant in relation to contract for off-shore services for planning and supply of drawings and designs, is essentially in the nature of "Fees for Technical Services" under the provisions of section 9(1)(vii) of the Income - tax Act, 1961 (the Act) and provisions of

Article 12 of the Double Taxation Avoidance Agreement between India and Germany (DTAA);

4. That the Ld. CIT(A) has erred in rejecting the contention of the Appellant that the offshore services are inextricably linked to the supply of plant & equipment and thus consideration for such services partake the nature of business profits which should be taxed in terms of provisions of Article 7 of the DTAA, read with Protocol Para 1(a) and (b) thereof;

5. That the order of the Ld. CIT(A) is grossly incorrect in considering that separate payment towards the offshore services including drawings and designs indicates the severance of this contract from the contract for the supply of plant & equipment;

6. That the Ld. CIT(A), while arriving at the aforesaid conclusion, has erred in not relying upon the decisions of jurisdictional High Court and Hon'ble Supreme Court of India.

7. Without prejudice, the Ld. CIT(A) has erred in holding that the impugned services are not covered by the exclusionary clause, provided for 'assembly', 'construction' or 'like project activities' in India, under section 9(1)(vii) of the Act;

8. That the appellant may be allowed to add, supplement, revise, amend grounds as raised hereinabove.

ITA No.7070/Del/2018

1. That the order of the Learned Commissioner of Income-Tax (Appeals)-42, New Delhi [Ld. CIT(A)] is bad both in law and on facts of the case.

2.1. That the Ld. CIT(A) has erred in concluding that the offshore supply of plant and equipment made by the Appellant is taxable in India as Business Profits.

2.2. That the Ld. CIT(A), based on erroneous appreciation of terms of the contracts, erred in holding that the property in the equipment did not get transferred outside India and the delivery was completed upon commissioning at site.

2.3. That without prejudice to the other grounds, the Ld. CIT(A) erred in confirming the attribution of the business profits from supply of the equipment to the extent of 20% to the supervisory PE of the Appellant

in India and thus taxable @ 42.024% in India, not warranted on the facts as well as in view of provisions of Article 7 of the DTAA between India and Germany read with protocol 1(a) thereof.

3.1. That the Ld. CIT(A) has erred in holding that consideration received by the Appellant in relation to contract for off-shore services for planning and supply of drawings and designs, is in the nature of 'Fees for Technical Services' under the provisions of section 9(l)(vii) of Act and the DTAA.

3.2. That the Ld. C1T(A) has erred in rejecting the contention of the Appellant that the off-shore drawings and designs are inextricably linked to the off-shore supply of plant & equipment and thus consideration for such services partake the nature of business profits, not taxable in terms ol provisions of Article 7 of the DTAA read with Protocol Para 1(a) and (b) thereof as well as under the provisions of Income Tax Act, 1961.

3.3. That the Ld. CIT(A) has erred in making the erroneous observation that separate payment towards off-shore drawings and designs indicates the severance ol this contract from the contract for the supply of equipment.

3.4. That, without prejudice, the Ld. CIT(A) has erred in not appreciating that even on a standalone basis the off-shore design and drawings were in the nature of goods, the transfer of which constitutes outright sale of goods, not taxable in India.

3.5. That, without prejudice, the Ld. CIT(A) has erred in holding that the impugned design and drawings are not covered by the exclusionary clause under section 9(l)(vii) of the Act, providing for exclusion of 'assembly', 'construction' or 'like project activities' from the ambit 'Fees for Technical Services'.

4. That the appeal is within time as the order of the Ld. CIT(A) was received on September 12. 2018.

5. That the appellant may be allowed to add, supplement, revise, delete all or any grounds as raised hereinabove.

ITA No.7282/Del/2019

1. That the order of the Learned Commissioner of Income-Tax (Appeals)-42, New Delhi [Ld. CIT(A)] is bad both in law and on facts of the case.

2.1. That the Ld. CIT(A) has erred in concluding that the offshore supply of plant and equipment made by the Appellant is taxable in India as Business Profits.

2.2. That the Ld. CIT(A), based on erroneous appreciation of terms of the contracts, erred in holding that the property in the equipment did not get transferred outside India and the delivery was completed upon commissioning at site.

2.3. That without prejudice to the other grounds, the Ld. CIT(A) erred in confirming the attribution of the business profits from supply of the equipment to the extent of 20% to the supervisory PE of the Appellant in India and thus taxable @ 42.024% in India, not warranted on the facts as well as in view of provisions of Article 7 of the DTAA between India and Germany read with protocol 1(a) thereof.

3.1. That the Ld. CIT(A) has erred in holding that consideration received by the Appellant in relation to contract for off-shore services for planning and supply of drawings and designs, is in the nature of 'Fees for Technical Services' under the provisions of section 9(1)(vii) of Act and the DTAA.

3.2. That the Ld. CIT(A) has erred in rejecting the contention of the Appellant that the off-shore drawings and designs are inextricably linked to the off-shore supply of plant & equipment and thus consideration for such services partake the nature of business profits, not taxable in terms of provisions of Article 7 of the DTAA read with Protocol Para 1(a) and (b) thereof as well as under the provisions of Income Tax Act, 1961.

3.3. That the Ld. CIT(A) has erred in making the erroneous observation that separate payment towards off-shore drawings and designs indicates the severance of this contract from the contract for the supply of equipment.

3.4. That, without prejudice, the Ld. CIT(A) has erred in not appreciating that even on a standalone basis the off-shore design and drawings were in the nature of goods, the transfer of which constitutes outright sale of goods, not taxable in India.

3.5. That, without prejudice, the Ld. CIT(A) has erred in holding that the impugned design and drawings are not covered by the exclusionary clause under section 9(1)(vii) of the Act, providing for exclusion of

'assembly', 'construction' or 'like project activities' from the ambit of 'Fees for Technical Services'.

4. That the appeal is within time as the order of the Ld. CIT(A) was received on July 31, 2019.

5. That the appellant may be allowed to add, supplement, revise, delete all or any grounds as raised hereinabove.

ITA No.115/Del/2021

1. That the order of the Learned Commissioner of Income-Tax (Appeals)-42, New Delhi [Ld. CIT(A)] is bad both in law and on facts of the case.

2.1. That the Ld. CIT(A) has erred in holding that consideration received by the Appellant in relation to contract for offshore services for planning and supply of drawings and designs, is in the nature of Fees for Technical Services' under the provisions of section 9(1)(vii) of Act and Article 12 of the Double Taxation Avoidance Agreement between India and Germany ('DTAA').

2.2. That the Ld. CIT(A) has erred in rejecting the contention of the Appellant that such offshore drawings and designs, prepared and transferred from Germany, are inextricably linked to the offshore supply of plant & equipment and thus consideration for such services partake the nature of business profits, not taxable in terms of provisions of Article 7 of the DTAA read with Protocol Para 1 (a) and (b) thereof as well as under the provisions of Income Tax Act, 1961.

2.3. That the Ld. CIT(A) has erred in making the erroneous observation that separate payment towards offshore drawings and designs indicates the severance of this contract from the contract for the supply of equipment.

2.4. That, without prejudice, the Ld. CIT(A) has erred in refuting the claim of the Appellant that even on a standalone basis the offshore design and drawings were in the nature of goods, the transfer of which constitutes outright sale of goods, not taxable in India.

2.5. That the Ld. CIT(A) has erroneously rejected the application of judgments of the jurisdictional High Court as cited and has erred in following judgments not relevant on facts.

2.6. That, without prejudice, the Ld. CIT(A) has erred in holding that the impugned design and drawings are not covered by the exclusionary clause under section 9(l)(vii) of the Act, providing for exclusion of 'assembly', 'construction' or 'like project activities' from the ambit of 'Fees for Technical Services'.

3. That the appeal is within time as the order of the Ld. CIT(A) was received on December 18, 2020.

4. That the appellant may be allowed to add, supplement, revise, delete all or any grounds as raised hereinabove.

ITA No.1619/Del/2022

All of the below grounds of appeal are without prejudice and notwithstanding each other.

1. That the order of the Learned Commissioner of Income-Tax (Appeals)-42, New Delhi [Ld. CIT(A)] is bad both in law and on facts of the case.
2. That the Ld. CIT(A) has erred in upholding the computation of taxable income of the Appellant at Rs. 1,15,39,186 as against the nil returned income.

3.1. That the Ld. CIT(A) has erred in upholding that consideration of Rs. 1,07,56,599/- received in relation to contract for offshore services for planning and supply of drawings and designs, is in the nature of 'Fees for Technical Services' under the provisions of section 9(l)(vii) of Act and Article 12 of the Double Taxation Avoidance Agreement between India and Germany ('DTAA').

3.2. That the Ld. CIT(A) has erred in rejecting the contention of the Appellant that such offshore drawings and designs are inextricably linked to the offshore supply of plant & equipment and thus consideration for such services partake the nature of business profits, not taxable in tenns of provisions of Article 7 of the DTAA read with Protocol Para 1(a) and (b) thereof as well as under the provisions of Income Tax Act, 1961.

3.3 That the Ld. CIT(A) has erred in making the erroneous observation that separate payment towards offshore drawings and designs indicates the severance of this contract from the contract for the supply of equipment.

3.4. That, without prejudice, the Ld. CIT(A) has erred in refuting the claim of the Appellant that even on a standalone basis the offshore design and drawings were in the nature of goods, the transfer of which constitutes outright sale of goods, not taxable in India.

3.5. That, without prejudice, the Ld. CIT(A) has erred in holding that the impugned design and drawings are not covered by the exclusionary clause under section 9(1)(vii) of the Act, providing for exclusion of 'assembly', 'construction' or 'like project activities' from the ambit of 'Fees for Technical Services'.

3. That the Ld. CIT(A) has erred in considering the amount of Rs. 7,82,587/- towards offshore supply of plant and equipment as receipts towards drawings and design and thus taxed the same as 'Fees for Technical Services' ('FTS').

4. That the appeal is within time as the order of the Ld. CIT(A) was received on May, 20, 2022.

5. That the appellant may be allowed to add, supplement, revise, delete all or any grounds as raised hereinabove."

2. The issues involved in all these appeals are inter connected and identical and hence they are taken up together and disposed of by this common order for the sake of convenience.

3. The assessee is a company and a tax resident of Germany. The assessee is engaged in the business of engineering, designing, manufacturing and installing plants for the Hydro Electric Power Projects. The assessee entered into agreement(s) with M/s Hindustan Construction Company Ltd (HCC) for carrying out Hydro-Mechanical Works ('HM Works') in relation to set up of Kishanganga Hydro Electric Power Project. The contracts entered by the assessee was entered into in pursuance of the main contract entered between NHPC Ltd. and HCC for 330 MW (110x3) Kishanganga Hydro Electric Power Project in Jammu & Kashmir, India. In respect of HM Works, the scope of work of the assessee involved the following activities:-

a) Offshore Supply of hydro mechanical plant & equipment.
b) Offshore Services which primarily involve supply of drawings and design related to the Hydromechanical Plant & Machinery supplied to HCC.
c) Onshore activities involving supply of indigenous parts etc. and rendering of onshore services.

3.1. The taxability of consideration received onshore services rendered by the assessee is not in dispute before us.

4. During the previous years' relevant to the abovementioned assessment years, the assessee received consideration from HCC towards offshore supply of plant & equipment as well as for offshore services (involving supply of related drawings design). Such receipts were claimed as non-taxable in India under the provisions of the Act as well as under the relevant Articles of the Double Taxation Avoidance Agreement (DTAA).

5. The Ld. AO and the Ld. CIT(A) however did not accept the contentions of the assessee and held these receipts to be taxable in India. Aggrieved, the assessee is in appeals before us.

6. The list of additions made by the Ld. AO and upheld by the Ld. CIT(A) could be captured in the following table :-

DSD Noell GMBH Assessment year wise Income Declared and Taxed

A Y .	Returned Income	Income Taxed as FTS	Income Taxed as Business Income in respect of offshore supplies	Remarks
2011-12		1,89,12,640/-		
2012-13		1,62,20,418/-		(Int. Income of 77,28,097/- offered by assessee and taxed as such)
2014-15		3,26,09,861/-		
2015-16	20,550/-	4,64,78,944/-	Rs 3,33,245/- CIT(A) confirmed Rs 1,32,898/-	Total offshore supplies Rs 1,58,96,915/-

2016-17	25,92,014/- (Interest Income)	14,91,66,928/-	Rs 24,89,914/- CIT(A) confirmed Rs 9,95,685/-	Total Offshore supplies Rs 9,95,96,358/-
2017-18	Nil	3,49,48,713/-	NIL	
2018-19	Nil	1,15,39,186/-	Nil	
	Total	30,98,76,690/-	11,28,674/-	Rs 11,54,93,273/-

7. The ld. DR before us after making elaborate arguments during the course of hearing had filed the following written submissions before us:-

On the issue of chargeability to tax in India of profits arising to the assessee company trom offshore supply of plant & equipments and taxability of the amounts received by the appellant company in consideration for providing technical services in relation to the drawings and designs supplied from offshore under the provisions of Indian Income Tax Act and the provisions of applicable DTAA , in addition to the findings given by the Assessing Officer and the Ld CIT(A)/DRP based on the specific facts of the cases and verbal arguments made during the course of hearing, the following brief written submissions are placed on record for kind consideration by the Hon'ble Bench.

Assessment year wise details of Income Declared and income brought to tax by the Assessing Officer

A.Y	**Returned Income**	**Income Taxed as FTS (Offshore supply of**	**Income Taxed as Business Income (offshore supply of plant and**	**Remarks**
2011-12	**-**	1,89,12,640/		
2012-13	-	1,62,20,418/		(Interest Income of 77,28,097/
2014-15	-	3,26,09,861/-	–	
2015-16	20,550	4,64,78,944	Rs 3,33,245/ reduced to Rs 132898/ by Ld C1T(A)	Total offshore supplies 1,58,96,915/-
2016-17	25,92014/(Interest Income)	14,91,66,928/	24,89,914/ reduced to Rs 9,95,685/ by Ld CIT(A)	Total offshore supplies **9,95,96,358/**
2017-18	Nil	3,49,48,713/	NIL	
2018-19	Nil	1,15,39,186/	Nil	
	Total	**30,98,76,690/**	**11,28,674/**	**Rs 11,54,93,273**

From the above it could be seen that offshore services related to the Drawings and designs have been provided in all the assessment years under appeal whereas, there were no offshore supplies during the A Y. 2011-12, 2012-13 & 2014-15 Supplies of plants and equipments started from A.Y.2015-16 only. However, there were no offshore supplies in the A.Y.2017- 18 & 2018-19 too though offshore services continued in these assessment years also. For offshore service total consideration received during the year was Rs 30.98 Cr whereas, the aggregate considerations for offshore supply of plant and machinery during the period were Rs 11.54 Cr.

It is the contention of the appellant that offshore services in the form of drawings and designs are inextricably linked to the offshore supply of plant and equipments and therefore have to treated as part of offshore supplies of plant and equipments only.

Most humbly it is submitted that the issue of chargeability to tax in India of income arising from offshore supply of Drawings and designs under the provisions of Indian Income Tax Act and the provisions of DTAA is no more res integra. In this regard reliance is placed on the following authoritative pronouncements in support;

1. Decision of the Hon'ble Supreme Court in the case of Ishikawajima-Harima Heavy Industries Ltd vs Director Of Income Tax, (2007) 288 ITR 408(SC).

2. Decision of the Hon'ble Jurisdictional High Court in the case of Linde AG, Linde Engineering Division and another Vs Deputy Director of Income Tax (2014) 365 ITR 1 (Delhi);

3. Decision of the Hon'ble High Court of Karnataka in the case of AEG Aktiengesllschaft vs Commissioner Of Income-Tax: (2004) 267 ITR 209 (KAR)

4. Decision of the Hon'ble ITAT Kolkatta Bench in the case of M/s Gentex Merchants Pvt. Ltd. vs Dy. Director Of Income-,Tax (2005) 94 ITD 211 Kol, (2005) 95 TTJ Kol 956

Ishikawajima-Harima Heavy Industries Ltd vs Director Of Income Tax (SC),;

In this landmark judgement, the Hon'ble Apex Court interalia enunciated the following principles of law

i. It is to be seen whether obligations under contracts for Supply and Services are distinct or indistinguishable.

ii. Taxable events in the execution of a contract may arise at several stages in several years.

iii. The liability of the parties may also arise at several stages

iv. Service obligation is considered distinct and separate from supply obligation when price for each of the component of the contract is separate.

v. Service obligation is considered distinct and separate from supply obligation when the obligations have separately been dealt with in the contract.

vi. The test for considering whether the contract is deemed to be one of sale and not of service is whether the object of the party sought to be taxed is that the

chattel as chattel passes to the other party and the services rendered in connection with the installation are under a separate contract or are incidental to the execution of the contract of sale."

vii. Delhi High Court decision in CIT v. Mitsui Engineering and Ship Building Co. Ltd. [259 ITR 248] is not applicable when payment for the offshore and onshore supply of goods and services was clearly demarcated and cannot be held to be a complete contract that has to be read as a whole and not in parts.

viii In construing a contract, the intention of the parties is most relevant. The intention of the parties, must be judged from different types of services, different types ot prices, as also different currencies in which the prices are to be paid.

ix. Under the provisions of Section 9(1)(vii) it is necessary that the services not only be utilized within India, but also be rendered in India

Hon'ble Apex Court while analyzing the scope of taxation identified the following basic issues for consideration;

" 16 Two basic issues which, thus, arise for our consideration are : (a) the taxation of the price of goods supplied, by way of offshore supply price of which is specified in Ex. D, Clause 2.1; and ***(b) the taxation of consideration paid for rendition of services described in the contract as offshore services at Ex. D." Obligations under contracts are distinct, Supply Obligation is distinct from Service Obligation- In Para 17, the Hon'ble Apex Court observed as under***;

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

(Emphasis supplied)

Specifying supply segment and service segment in different parts of the contract would saddle the appellant with different liabilities .; Further, in para 18 the Honble Apex Court categorically held as under;

"18. The very fact that in the contract, the supply segment and service segment have been specified in different parts of the contract is a pointer to show that the liability of the appellant there under would also be different."

Different and identifiable scope of work under supply contract and services contract

"Para 20. Scope of work is contained in clause 2.1 of Ex. A appended to the contract which includes supply of equipment, materials and facilities. The said exhibit spells out different systems to be set in place. It imposes an obligation on the contractor to supply equipments required therefor. It was to arrange for the engineering services in relation thereto. It was also required to render various other services within India. Ex. D, however, provides for the prices to be paid in respect of offshore supplies and offshore services, onshore supply and onshore services, construction and erection. Payment schedule has also been separately specified in respect of each of the components separately.

Sale and Service contract distinguishable , reliance upon earlier decision in State of Rajasthan Vs M/s Man Industrial Corporation Ltd (1969) 1SCC 567;

" 35 In M/s Man. Industrial Corporation Ltd. (supra), this Court held :

"16. Our attention was invited to a judgment of the Court of Appeal in Love v. Norman Wright (Builders) Ltd. [1944] 1 K.B. 484 In that case the respondents contracted with the Secretary of State for War to do the work and supply the material mentioned in the Schedules to the contract, including the supply of black-out curtains, curtain rails and battens and their erection at a number of police stations. It was held by the Court of Appeal that the respondents were liable to pay purchase-tax. Reliance was placed upon the observations made by Godiard, L.J. at p. 482:

"If one orders another to make and fix curtains at his house the contract is one of sale though work and labour are not involved in the making and fixing, nor does it matter that ultimately the property was to pass to the War Office under the head contract. As between the plaintiff and the defendants the former passed the property in the goods to the defendants who passed it on to the War Office."

We do not think that these observations furnish a universal test that whenever there is a contract to "fix" certain articles made by a manufacturer the contract must be deemed one for sale and not of service. The test in each case is whether the object of the party sought to be taxed is that the chattel as chattel passes to the other party and the services rendered in connection with the installation are under a separate contract or are incidental to the execution of the contract of sale.

(Emphasis supplied)

Delhi High Court decision in CIT v. Mitsui Engineering and Ship Building Co. Ltd. [259 ITR 248] distinguished;

"Para 46. In CIT v. Mitsui Engineering and Ship Building Co. Ltd. [259 ITR 248], on which reliance was placed; the contention was that the finding that the contract for designing, engineering, manufacturing, shop testing and packing up to f.o.b port of embarkation could not be split up since the entire contract was to be read together and was for one complete transaction. It was in the said fact situation held that it was not possible to apportion the consideration for design on one part and the other activities on the other part. The price paid to the assessee was the total contract price which covered all the stages involved in the supply of machinery.

47 This case is clearly distinguishable from the facts of the present case, since the payment for the offshore and onshore supply of goods and services was in itself clearly demarcated and cannot be held to be a complete contract that has to be read as a whole and not in parts.

Intention of the parties relevant for construing the contract;

"62. In construing a contract, the terms and conditions thereof are to be read as a whole. A contract must be construed keeping in view the intention of the parties. No doubt, the applicability of the tax laws would depend upon the nature of the contract, but the same should not be construed keeping in view the taxing provisions.

68. In cases such as this, where different severable parts of the composite contract is performed in different places, the principle of apportionment can be applied, to determine which fiscal jurisdiction can tax that particular part of the transaction. This principle helps determine, where the territorial jurisdiction of a particular state lies, to determine its capacity to tax an event. Applying it to composite transactions which have some operations in one territory and some in others, is essential to determine the taxability of various operations.

70. We would in the aforementioned context consider the question of division of taxable income of offshore services. Parties were ad idem that there existed a distinction between onshore supply and offshore supply. ***The intention of the parties, thus, must be judged from different tvnes of services, different types of prices, as also different currencies in which the prices are to be paid.***

(Emphasis supplied)

Thereafter, the Hon'ble Apex Court on the issue of taxability of receipts from offshore services held, "For Section 9(l)(vii) to be applicable, it is necessary that the services not only be utilized within India, but also be rendered in India or have such a "live link" with India that the entire income from fees as envisaged in Article 12 of DTAA becomes taxable in India."

Since, subsequent to the decision of the Hon'ble Apex Court, amendment has been made in the Income Tax Act, ***the above ratio that services should also be rendered in India is no more applicable as has been held by the Hon'ble Delhi High Court in the case of Linde AG Vs DDIT (2014) 365 ITR 1 (Delhi)***

" Para 96. It is clarified that in the event, it is found that the offshore services rendered by Linde are not inextricably linked to the manufacture and fabrication of equipment overseas so as to form an integral part of the supply of the said equipment, the income arising from the said services would be taxable in India as fees for technical services. By virtue of Section 9(1)(vii) of the Act, fees for technical services paid by a resident are taxable in India (except where such fees are payable in respect of services utilised by such person in business and profession carried outside India). In view of the Explanation to Section 9(2) as substituted by Finance Act 2010 with retrospective effect from 01.06.1976, the decision of the Supreme Court in Ishikawaiima-Harima Heavy Industries (supra), in so far as it holds that in order to tax fees for technical services under the Act, the services must be rendered

in India, is no longer applicable. Therefore, in the event the services in question are not considered as an integral and inextricable part of equipment and material supplied, it would be necessary to examine whether any relief in respect of such income would be available to Linde by virtue of the DTAA between Germany and India."

(Emphasis supplied)

From the decision of the Hon'ble Apex Court it is evident that the obligations to tax under the contract for offshore supply of equipment and offshore supply of services are distinct.

Decision of the Hon'ble High Court in Linde case (2014) 365 ITR 1 (Delhi);

Hon'ble High Court dismisses ' Look through' approach applied by the AAR; The Hon'ble High Court while disapproving of the look through approach adopted by the AAR observed as under;

" 86. The reference of the Authority to the decision of the Supreme Court in the case of Vodafone International Holdings B V. ,(supra) is also not apposite. In that case, the Supreme Court was considering a matter which, inter alia, involved a transfer of a capital asset outside India which was sought to be taxed by the Income Tax Authorities under Section 9(1)(i) of the Act. The subject matter of controversy was a transaction of sale and purchase of a share of an overseas company (capital asset) This capital asset was sold by a non-resident company to another non-resident company. The Revenue contended that the capital gains arising from this transaction was eligible to tax under the Act by virtue of Section 9(1)(i) of the Act as the transaction also implied transfer of control and assets of the Indian subsidiary of the overseas company, whose share had been sold and purchased. The Supreme Court observed that the last sub-clause of Section 9(1)(i) of the Act referred to income arising from "transfer of capital asset in India". The Court further explained that Section 9(1) of the Act created a legal fiction which had a limited scope and could not be expanded. Accordingly, transfer of capital asset situated outside India could not be taxed by virtue of Section 9(1)(i) of the Act. The expression "look through" had been used by the Supreme Court in this context. The relevant extract of the judgment is as under:-

88 The Supreme Court also reiterated the "look at" principle as was enunciated in W.T. Ramsay Ltd. v. IRC: (1981) 1 All ER 865 (HL). That matter related to a combination of transactions where gains in one transaction were sought to be counteracted by another, so as to avoid tax The set of transactions was designed to create an artificial loss in one transaction which was counteracted by a gain in another. The House of Lords' dismissed the appeal of the tax payer by holding that the Courts would "look at the entire combination of transactions. It was held that the Revenue or the Courts were not limited to consider the genuineness or otherwise of each individual transaction in the scheme but could consider the scheme as a whole The contentions being considered by the Supreme Court in the Vodafone International Holdings B.V. (supra) as well as the House of Lords' in Ramsay Ltd. (supra) were in respect of schemes which were contended to be for the purposes avoiding tax. The Supreme Court held that the "look at" principle must be applied to see the transaction as it existed and piercing of the Corporate Veil was not necessary

where the transactions were genuine and had commercial substance. In the present case, there is no controversy which involves lifting of the corporate veil or "looking at" any scheme to find whether a transaction is a sham or has any substance. Both the Revenue and Linde are accepting the Contract as it stands and the controversy only revolves around the situs of the income accruing or arising from the contract. To our minds, the Authority has read the principles applied by the Supreme Court in Vodafone International Holdings B.V. (supra) completely out of context.

To fall outside the scope of section 9(1 (vii) , the link between the supply of equipment and services must be so strong and interlinked that the services in question are not capable of being considered as services on a standalone basis and are therefore subsumed as a part of the supplies; -- The Hon'ble Delhi High Court held that services are taxable u/s 9(l)(vii) of the Act, however, only when services cannot be considered as services on standalone basis and are subsumed in the supplies ,only then services can be considered taxable along with the supplies . In this regard, Para 95 of the decision is reproduced as under;

" 95. It is clarified that in order to fall outside the scope of Section 9(l)(vn) of the Act, the link between the supply of equipment and services must be so strong and interlinked that the services in question are not capable of being considered as services on a standalone basis and are therefore subsumed as a part of the supplies. Given the fact that its Linde's case that the consideration for the supplies are separately specified, this aspect would require a closer scrutiny and determination of facts, which we do not propose to do in the present proceedings.

(Emphasis supplied)

Hon'ble Karnataka High Court in Aeg Aktiengesllschaft vs Commissioner Of Income- Tax: (2004) 267 ITR 209 (KAR) held that burden is on the assessee to show that the payment received were not for technical services;

" 10. Further, at paragraph 8 of the order, the Tribunal has observed that since the agreement provides for two different payments and the payments under consideration have clearly been termed in the agreement as "engineering fees", there is no reason for it to think otherwise than that the payment was actually made was not in the nature of "fee paid for technical services". It has also found that since the burden is on the assessee to show that the payments made were not for technical services and the assessee has failed to discharge the burden by showing that what is apparent in the agreement between the two parties is not the real state of affairs ; and the "engineering fees", as stipulated in the agreement, really represented the "engineering fees" only and therefore, such fees, in accordance with Article VIIIA of amended DTA Agreement must be considered as payments made for technical services. Thus, the Tribunal affirmed the finding recorded by the Commissioner (Appeals) and the Assessing Officer. We do not find any error in the said conclusion reached by the Tribunal It is necessary to point out that the return filed by the asses-see shows that the assessee itself has shown it as "engineering fees". The Tribunal negatived the contention of the assessee that the engineering fees paid should be treated as plant and machinery as the drawings and designs were prepared outside India and delivered outside India. In our view, the decision in

the case of Scientific Engineering House Pvt. Ltd. relied upon by Sri Sarangan is of no assistance to him... " (Emphasis Supplied)

There is no repugnancy between the decision of the Hon'ble Karnataka High Court and the decision of the Hon'ble Delhi High Court so far as the issue of taxability of receipts in respect of Engineering, Drawing and design inextricably linked to the supply of goods is concerned. The Honble High Court of Karnataka noted that supply of drawing and designs cannot, in all circumstances be treated as cost of plant and machinery. (Emphasis Supplied)

The Hon'ble High Court observed as under:

"11. That is not the position here. In the present case, the assessee has undertaken the electrical contract for light and medium merchant mill and in that connection, it had prepared certain documents and drawings which were handed over to the Indian company—MECON. It is necessary to point out that separate payments were made towards drawings and designs. It cannot be disputed that depending upon the nature of the work entrusted, the nature of technical services rendered also varies. Therefore, it cannot be laid down in strait-jacket formula what could be considered as technical services which can have universal application. We are also unable to accede to the submission of Sri Sarangan that since the manufacture of equipment has to be in accordance with the design and drawing and without design and drawing no erection can be done and therefore the design, drawing technical data, etc., should be treated as cost of plant and machinery and have to be added to the cost. Even for the purpose of manufacture of equipment, technical services may have to be given. As noticed by us earlier, the format or the method of technical services may vary depending upon the nature of the work undertaken or entrusted. It is for the parties to agree upon what should be the nature of technical assistance or service to be rendered. In a given case, supply of design and drawing also could be in the nature of technical services. Supply of design and drawing cannot, in all circumstances, be treated as cost of plant and machinery. In a matter where installation of sophisticated machinery or where the manufacturing process is involved through the machinery, in that case, the supply of necessary designs and drawings, which would enable the working of the machinery, in our view, can be considered as technical services rendered. Just as information or advice tendered by a lawyer either could be oral or writing, in our view, supply of technical services in the nature of printed documents by way of design, chart or drawing and depending upon the nature of the services rendered, can be treated as "technical service". Ultimately, the question is how the parties have understood with regard to the nature and purpose for which the payment is made. In the instant case, as rightly concluded by the Tribunal and the subordinate authorities, the engineering fees paid have to be understood as "payment made for technical services" The decisions in the case of Associated Cement Companies Ltd. ; Parasrampuria Synthetics ltd. ; Klayman Porcelains Ltd. ; Neyveli Lignite Corporation Ltd. and in the case of Energomach Exports , relied upon by Sri Sarangan, in our view, will not be of any assistance to him.

"20. We also do not find any merit in the submission of Sri Sarangan that the manufacture of the equipment is required to be made in accordance with the design and drawing and without design and drawing, no erection can be done or the

equipment operated, and therefore, the design, drawing and chart, etc., should be treated as plant and machinery and are required to be added to the cost. It is necessary to point out that this was not the case pleaded before the Assessing Officer. The assessee cannot be permitted to make out a new case, which was not pleaded before the Assessing Officer. Further, as noticed by us earlier, if the object of the preparation of designs and drawings is to bring home the point as to how the manufactured equipment is required to be erected, the same should also be considered as technical advice rendered. The technical service rendered cannot be given a restricted meaning to understand only as oral advice given, etc. It could, as noticed by us earlier, be in the nature of preparation of designs and drawings. So long as the parties have treated it as technical advice, the parties are bound by it and when the question of liability to pay tax arises, the assessee cannot be permitted to turn around and say that the supply , of designs, drawings, etc.. are part of plant and machinery and must be added to the cost. Since the contract in question deals with the execution of several works, merely because the provision is made for security deposit/guarantee or provision for levy of. liquidated damages for execution of the project, in our view, that is of no assistance to support the contention of Sri Sarangan that the payments were not made for rendering the technical services". As noticed by us earlier, the Tribunal has negatived the claim of the assessee that the payment made to the assessee by MECON should be construed towards the plant and machinery supplied by it on the ground that undisputedly there is a separate provision made in the agreement for making payment by MECON to the assessee towards cost of plant and machinery. The Tribunal also has not accepted the plea that a separate provision for payment towards plant and machinery and for engineering services was made in the agreement only for the sake of convenience In this connection, it is useful to refer to the observation made by the Tribunal at paragraph 8 ot the order, which reads :

"8. The other contention of the assessee that the payments under consideration represented supplemental payments towards cost of the plant and machinery supplied by it may also be examined by us now. It is an admitted fact that there is a separate provision tor making of payment by the Indian company to the assessee towards such cost of plant and machinery The representative of the assessee has merely stated that for the sake of convenience only the supplemental payment for that purpose was stipulated as engineering fees in the contract between the two parties. The said representative has not, however, come up with any concrete reasons or evidence in support of this particular contention. Since the agreement shows two different payments and the payment under consideration has clearly been termed in the agreement as 'engineering fees', there is no reason for us to think otherwise that this payment is also actually supplemental to the other payment. In any case, the onus lies heavily on the assessee to prove its contention in this regard by showing that what is apparent in the agreement between the two parties is not the real state of affairs. The assessee has not undertaken any care to discharge its onus. In the face of such facts and circumstances, we must come to the conclusion that the engineering fees as stipulated in the agreement really represented engineering fees only, and therefore, such fees in accordance with Article VI1IA of the amended Double Taxation Avoidance Agreement between the two parties or even in terms of Section 9(l)(vii) read with Explanation 2 to the said section."

21. We do not find any error in the said conclusion reached by the Tribunal. We have no hesitation to approve the conclusion reached by the Tribunal that the engineering fees paid to the assessee were for technical services as contemplated under Section 9(l)(vii) of the Act. In the light of the above conclusion, the second question referred to us by the Tribunal is required, unhesitatingly, to be answered against the assessee and in favour of the Revenue.

Income Tax Appellate Tribunal - Kolkata Gentex Merchants Pvt. Ltd. vs Dy. Director Of Income-Tax (2005) 94 1TD 211 Kol, (2005) 95 TTJ Kol 956 on identical facts held as under;

"9. On reading of the Agreement between the parties as a whole, we note that various phases contemplated in the agreement were composite and cumulative. Every phase was related to each other and the contract was a single composite contract and the American company was to undertake the work on cumulative basis for which composite non-divisible fee was to be paid. It is clear from the agreement that each phase was depended on the other and each phase was carried out in succession and only on completion of all phases the scope of work envisaged in the agreement stood fulfilled. It is, therefore, incorrect to say that the agreement merely provided for giving advice to the appellant and there was no transfer of any design or knowledge. The reading of the agreement clearly indicates that the appellant company was to execute the water features at 22 Aurangazeb Road, New Delhi in accordance with the designs, drawings and technical specifications provided by the American company and the American company was to ensure that the features executed by the contractors at the site conformed to the drawings, designs specifications provided by the American company. From the agreement between the assessee and the foreign company, it is also quite clear that the American company was not only to provide the Schematic ideas but also to provide technical designs, drawings and information on the basis of which alone the Indian company was to execute and install the Water Features. Article 12(4)(b) provides that fees for included services shall include "services which makes available technical knowledge, experience, skill, know-how or consists of development and transfer of technical plan or technical design". The Ld. A/R placed reliance on the fact that the assessee did not become the owner of the technical drawings or designs and the Intellectual Property Rights in the drawings always retained with the American company It was argued that since the assessee did not acquire the ownership rights nor he could transfer or alienate the designs or information to any third party the assessee got mere right to use for which payment was effected For deciding the issue under Article 12(4) it is not material as to whether the . assessee acquired on outright basis any technical knowledge, know-how, technical plan or design. The said Article 12(4) is attracted the moment a person resident of one State makes available technical knowledge, experience or transfers a technical plan or technical design to the person of other contracting state. From the agreement between the assessee and the American company it is apparent that the later was to deliver the technical drawings and designs to the former for its own use and benefit in India. The term transfer as used in Article 12(4) does not refer to the absolute transfer of rights of ownership. It refers to the transfer of technical drawing or designs to be effected by the Resident of one State to the Resident of other State which is to be used by or for the benefit of Resident of other state The said Article 12(4)(b), in our opinion, does not

contemplate transfer of all rights, title and interest in such technical design or plan. Even where the technical design or plan is transferred for the purpose of mere use of such design or plan by the person of other contracting state and for which payment is to be made. Article 12(4)(b) will be attracted The facts on record clearly indicate that under the agreement the American company was required to deliver such technical designs or plan for the sole use by the assessee company in India. In fact, the assessee did use these technical plans and drawing for constructing and / or installing the Water Feature at 22 Aurangazeb Road, New Delhi. In the above circumstances we are of the opinion that the payments effected under the agreement with the American company squarely fell within the definition of "fees for included services" and therefore the assessee was liable to deduct tax @15% of the amount payable, Under Section 195 of the Act. We also note that the case laws cited by the assessee are not applicable to the facts of the case. In the case of Raymond Ltd. the payment was effected by the assessee to a company, Resident of U.K. The nature of activities contemplated in the contract between the Indian company and the U.K. company were totally different as the question was whether the amount so paid were tees tor technical services In that case although Tribunal held that services rendered were technical services; due to specific clauses of DTAA between U.K. and India, income was not taxable. Moreover, since there is a specific clause included in Article 12(4) of DTAA with the USA which defines the term fees for included services and further since the payment made under the agreement in the present case falls within the said definition, the assessee cannot get benefit of the decision of the Mumbai Bench which was rendered in the context of DTAA between India and U.K. As regards the decision of the Coordinate Bench of the IT AT, Calcutta in the case of CESC Ltd. we find that under the agreement the role of the foreign company was limited to review and give opinion to the Indian Resident rather than to design and direct the project. On these facts the Tribunal had found that making suggestions for corrections was only the incidental part of the agreement and it was not the substance of the agreement between the parties. On the contrary we find that the substance of the present agreement envisaged that the American Company shall not only advice the Indian company but in fact it will prepare all the designs and drawings necessary for implementing the Water Features and also assist the Indian company in actual erection and commissioning of water features. We thus find that from the very inception of preparing schematic designs and drawings till the actual implementation and commissioning of the water features the American company was intimately connected with the project and in fact the whole project was intended to be conducted at the behest direction and supervision of the American company. In the circumstances the decision of the Coordinate Bench in the case of CESC Ltd. cannot be applied. We, therefore, agree with the view taken by the CIT (A) that the amounts payable to American company were "fees for included services" within the meaning of Article 12(4)(b) of the DTAA with the USA and therefore liable for withholding of tax Under Section 195 of the Act. Accordingly we dismiss the appeal of the assessee."

Thus, from the conjoint reading of all the above decisions it is evident that in the facts of the present case when obligations under supply and services contract are distinct, prices are distinct, no further enquiry as to the inextricable nature of the 2 contracts for supply and services is required and the receipts from provision of offshore services relating to the supply

of drawings and designs is clearly taxable u/s 9(l)(vii) of the Income Tax Act and Article 12 of the applicable DTAAs.

Facts of the present case as culled out from the contract agreement-

From the contract agreement filed by the appellant in its paper book, it is seen that the contract No 1 (SC/100/KGHEP/004-1) defines the scope of service to be provided offshore, whereas Contract No 2 & 3 are in respect of offshore supply of plants and equipments and onshore supply of plants and equipments respectively.

The overall scope of work defined in the subcontract (assessee is a sub contractor and main contractor is Hindustan Construction company Ltd.) for offshore service is reproduced as under:

"2. *Scope of Work*:

2.1 Planning of Hydro-Mechanical Plant & Machineries -The Sub-Contractors Scope of Works shall Include but not limited to the following:

SL. No	*Item*	*Description Contract for Offshore planning Design and Engineering*
1	*Review of Existing Data/Studies*	*• Review of technical parameters for HM Works is specified in the Main Contract.*
2	*Overall and detailed planning of the project*	*• Providing necessary input to contractor to preparation and submission of " Overall Planning Report for this project, for fully defining the HM works, accompanied by all necessary layout drawing. This report shall form the basis*
3	*Detailed Design*	• *Preparation & submission for review / approval or the Contractor Owner of design briefs / design memorandum along with layout drawings of all components of the HM Works, as part of the entire project.* • *Preparation & submission for review / approval of the Contractor/Owner of design criteria, arrangement drawings and specifications of al HM Works.* • *Coordination of design of Hydro mechanical Works with design of Civil Works and Electro-mechanical Works.* • *Preparation & submission for review / approval of Contractor/Owner, of detailed design and calculations, Drawings, quality assurance plan specifications, installation, testing and commissioning schedules and operation and maintenance manuals for HM Works.* • *Preparation & submission for information of the Owner/Contractor, of manufacturers detailed specifications, sub assembly drawings and detailed fabrication drawings*
4	*Project completion Report*	• Furnishing of Input to Contractor for HM Works for Preparation and submission of Project Completion

5	*Liaison support for contractor, with the Owner*	• *Design liaison support for the contractor, with the Owner in Faridabad, from the start of the Subcontract and until commissioning of the last generating unit and completion of warranty / defect liability period, for obtaining necessary approval from owner.* • *Preparation of Monthly Reports on the progress of the HM Works for information of the Contractor/Owner.* • *To participate in co-ordination / progress review meetings between the members of the Consortium and the Owner on regular.*

Thus, from the above it could be seen that the scope of work related to offshore services is not confined merely to the service in relation to fabrication and design of plants and equipments to be supplied overseas but extends much beyond that. Fabrication and design of plants and equipments to be supplied overseas is only a miniscule part of the overall contract of offshore services. Evidently, the offshore service work comprises ,review of Existing Data/Studies, Overall and detailed planning of the project, Detailed Design, Project completion Report, Liaison support for contractor etc.

Further, it can also be seen that even the work relating to the fabrication and design of plants and equipments is not related to the offshore supplies of plant and equipments but also include fabrication and design of plants and equipments to be supplied onshore too. A bare perusal of the below mentioned table would make it clear that the work of fabrication and design of equipments to be supplied onshore is much more than the work of offshore supply of plant and equipments.

Design & Engineering of Hydro Mechanical Plant and Machinery	**Overall Design and Engineering work as per contract No 1 (contract for services)**	**Design and engineering work as per Contrat No 1 related to Plant and equipments to be supplied offshore (refer Contract No2)**	**Design and engineering work as per Contrat No 1, related to Plant and equipments to be supplied onshore (refer Contract No3)**
A	The scope of work under this section shall include and cover provision of all labour, plant, materials and performance of all Works necessary for: a) Detailed Specifications b) Detailed Design & detailed drawings Fabrication drawings of all Hydro-mechanical Plant & Machinery as per scope of supply given in Article 2.7 of Project Profile (Vol.!)	The scope of work under this section shall include and cover provision of all labour, plant, materials and performance of all Works necessary for: c) Detailed Specifications d) Detailed Design & detailed drawings Fabrication drawings of all Hydromechanical Plant & Machinery as per scope of supply given in Article 2.7 of Project Profile (Vol.!)	The scope of work under this section shall include and cover provision of all labour, plant, materials and performance of all Works necessary for: e) Detailed Specifications f) Detailed Design & detailed drawings Fabrication drawings of all Hydromechanical Plant & Machinery as per scope of supply given in Article 2.7 of Project Profile (Vol.) and Part — II of Owner's Requirements (Vol. Ill) including all necessary embedded parts, spares

	and Part — II of Owner's Requirements (Vol. III) including all necessary embedded parts, spares and other works necessary for proper completion and functioning of Works including any revisions and amendment thereto defined in the Main Contract except as excluded from the scope of Subcontractor under HM Works as defined under SI. No. 2.0 below.	and Part — II of Owner's Requirements (Vol. Ill) including all necessary embedded parts, spares and other works necessary for proper completion and functioning of Works including any revisions and amendment thereto defined in the Main Contract except as excluded from the scope of Subcontractor under HM Works as defined under SI. No. 2.0 below.	and other works necessary for proper completion and functioning of Works including any revisions and amendment thereto defined in the Main Contract except as excluded from the scope of Subcontractor under HM Works as defined under SI. No. 2.0 below.
	The broad scope of works to be more fully defined by the subcontractor in the submitted and shall include the design & engineering for equipment plant and material and ot all incidentals not specified but are necessary for proper completion and satisfactory functioning of works and guarantee of the following permanent equipment, along with all auxiliary equipment in the designated location of the project as specified in the following sections. The description in the following section as well as the Owner's requirement Volume 111, Part-II, does not specify complete details of Plant & Machinery. However, the subcontractor shall design the equipment which will meet in all respects, the requirements in regard to performance, durability and	The broad scope of works to be more fully defined by the subcontractor in the documents to be submitted and shall include the design & engineering for equipment plant and material and of all incidentals not specified but are necessary for proper completion and satisfactory functioning of works and guarantee of the following permanent equipment, along with all auxiliary equipment in the designated location of the project as specified in the following sections. The description in the following section as well as the Owner's requirement Volume III, Part-II, does not specify complete details of Plant & Machinery. However, the subcontractor shall design the equipment which will meet in all	The broad scope of works to be more fully defined by the subcontractor in the documents to be submitted and shall include the design & engineering for equipment plant and material and of all incidentals not specified but are necessary for proper completion and satisfactory functioning of works and guarantee of the following permanent equipment, along with all auxiliary equipment in the designated location of the project as specified in the following sections. The description in the following section as well as the Owner's requirement Volume III, Part-II, does not specify complete details of Plant & Machinery. However, the subcontractor shall design the equipment which will meet in all respects, the requirements in regard

	satisfactory operation. All the equipment designed shall conform to the relevant Indian Standard. Wherever Indian standards are non-existent or silent, relevant international Standards, (as agreed between the Owner and the Contractor/ Subcontractor) shall be followed.	respects, the requirements in regard to performance, durability and satisfactory operation. All the equipment designed shall conform to the relevantIndian Standard Wherever Indian standards are non-existent or silent, relevant international Standards, (as agreed	to performance, durability and satisfactory operation. All the equipment designed shall conform to the relevantIndian Standard. Wherever Indian standards are non-existent or silent, relevant international Standards, (as agreed between the Owner and the Contractor/Subcontractor) shall be followed
	Diversion Tunnel Gate Equipment as defined under Clause 1.1.1 of Part II of Volume 111 viz. c) One no fixed wheel type gate for opening size 5.3m (w) x 6.5 m(H) d) One set of embedded parts including latching arrangement e) One set of electromechanical hoist with hoist supporting structures and controls	Diversion Tunnel Gate Equipment as defined under Clause 1.1.1 of Part 11 of Volume 111 viz. a) One set of electromechanical hoist with hoist supporting structures and controls.	Diversion Tunnel Gate Equipment as defined under Clause 1.1.1 of Part II of Volume 111 viz. a)One no. fixed wheel type gate for opening size 5.3m (w) x 6.5 m (H) b)One set of embedded parts including latching arrangement
	Spillway Gate Equipment as defined under Clause 1.1.2 of Part II of Volume III viz. Low Level Spillway Radial Gates f) Three nos. submerged radial gate for opening size 7.4 m (w) x 9.5 m(H) g) Three sets of embedded parts and anchorage for radial gates including dogging arrangement h) Three sets of hydraulic hoist including cylinders and independent power pack for each gate, controls and supporting structures.	Spillway Gate Equipment as defined under Clause 1.1.2 of Part II of Volume III viz. Low Level Spillway Radial Gates a) Three sets of hydraulic hoist including cylinders and independent power pack for each gate, controls and supporting structures.	-Spillway Gate Equipment as defined under Clause 1.1.2 of Part II of Volume III viz. Low Level Spillway Radial Gates a) Three nos. submerged radial gate for opening size 7.4 m (w) x 9.5 m (H) b) Three sets of embedded parts and anchorage for radial gates including dogging arrangement

	Low Level Spillway Stoplog Equipment i) One set of stoplog for opening size 8.0 m (w) x 12.0 m (H) j) Three sets of embedded parts Including dogging arrangement and storage grooves. k) One no Liftirtg beam for spillway slop log. ci) One no, travelling gantry crane for handing the sloping along with crane, rails, embedded parts etc. **Crest Spillway Vortical Gatos** e) Two nos. vertical lift gates for opening size 5.25 m (w) x 1 2 m (H) f) Two sets of embedded parts including latching/clogging arrangement g) Two sets of suitable operating mechanism for gates	Low Level Spillway Stoplog Equipment a) One no, travelling gantry crane for handing the sloping along with crane, rails, embedded parts etc. **Crest Spillway Vortical Gatos** a) a) Two sets of suitable operating mechanism for gate	Low Level Spillway Stoplog Equipment a)One set of stoplog for opening size 8.0 m (w) x 12.0 m (H) b)Three sets of embedded parts Including dogging arrangement and storage grooves, c) One no Lifting beam for spillway slop log. **Crest Spillway Vortical Gatos** a)Two nos. vertical lift gates for opening size 5.25 m (w) x 1 2 m (H) b)Two sets of embedded parts including latching/clogging arrangement
	- Power Tunnel Intake Equipment as defined under Clause 1.1.3 of Part II of Volume III viz Intake Service Gate a) Two nos fixed wheel type gates for opening size 4.25 m (w) x 2.5 m (H) b) Two sets of embedded parts including latching/doggin g arrangement c) Two sets of electromechanic al hoist with hoist supporting structures (Viz. Columns, Platform) and	Power Tunnel Intake Equipment as defined under Clause 1.1.3 of Part II of Volume III viz Intake Service Gate a) Two sets of electromechanical hoist with hoist supporting structures (Viz. Columns, Platform) and controls **Intake Bulkhead Gate** a) Two sets of electromechanical hoist with hoist supporting structures (Viz_ Columns, Platform) and controls. **Intake Trash Rack**	Power T unnel Intake Equipment as defined under Clause 1.1.3 of Part II of Volume III viz Intake Service Gate a)Two nos fixed wheel type gates for opening size 4.25 m (w) x 2.5 m(H) **b)** Two sets of embeddedparts including latching/dogging arrangement **Intake Bulkhead Gate** a)Two nos. slide type gates for opening size 4.25 m (w) x 2.5 m (H) b)Two sets of embedded parts including atching/dogging arrangement **Intake Trash Rack** a) Two sets of trash rack

	controls **Intake Bulkhead Gate** **a)** Two nos. slide type gates for opening size 4.25 m (w) x 2.5 m b)Two sets of embedded parts including latching/dogging Arrangement c) Two sets of electromechanical' hoist with hoist supporting structures (Viz_ Columns, Platform) and controls **Intake Trash Rack** a) Two sets of trash rack for intake area of size 8.95 m (w) x 4.3 m (H) inclined embedded parts		for intake area of size 8.95 m (w) x 4.3 m (H) inclined embedded parts.
	Surge Shaft Gate as defined under Clause 1.1.4 of Part II of Volume 111 viz. I) One no slide type gate for opening size 3.5 in (w) x 5.0 m (H) b) One set of embedded parts including latching arrangement c) One set of electromechanical hoist with hoist supporting structures and controls	Surge Shaft Gate as defined under Clause 1.1.4 of Part II of Volume 111 viz. a) One set of electromechanical hoist with hoist supporting structures and controls	Surge Shaft Gate as defined under Clause 1.1.4 of Part II of Volume 111 viz. a)One no slide type gate for opening size 3.5 in (w) x 5.0 m(H) b)One set of embedded parts including latching arrangement
	Tall Race Stoplog Equipment as defined under Clause 1.1.5 of Part II of Volume III viz a) One set of stoplogs for opening size of 4.0 m (w) x 7.0 in (H) b) Three. sets of embedded parts including dogging arrangement c) One no Lifting beam to handle tail race stoplog. (d) One travelling gantry crane for handing the stoplogs along with crane rails and	Tall Race Stoplog Equipment as defined under Clause 1.1.5 of Part II of Volume 111 viz a) One travelling gantry crane for handing the stoplogs along with crane rails and	Tall Race Stoplog Equipment as defined under Clause 1.1.5 of Part II of Volume III viz a) One set of stoplogs for opening size of 4.0 m (w) x 7.0 in (H) b) Three, sets of embedded parts including dogging arrangement c) One no Lifting beam to handle tail race stoplog.

	Automatic Reservoir Monitoring and Control System as defined under clause Ch. 1,1.6 of Part 11 of Volume III PLC based remote control system for operation*' of Low Level spillway radial gates, The system shall also include and provide following components, transducers, Instrumentation at various locations.- i. Gate position indication, control and monitoring for Low Level spillway radial gates ii. Water level indications and monitoring along with necessary alarms at spillway Input discharge in reservoir discharge through spillway radial gates, gate opening displays etc. iii. Differential pressure measurement across trash rack one uninterrupted power supply to provide back up (Minimum 30 minutes.	Automa tic Reservoir Monitoring and Control System as defined under clause Ch. 1,1.6 of Part II of Volume III PLC based remote control system for operation of Low Level spillway radial gates, The system shall also include and provide following components, transducers, Instrumentation at various locations.- iv. Gate position indication, control and monitoring for Low Level spillway radial gates v. Water level indications and monitoring along with necessary alarms at spillway Input discharge in reservoir discharge through spillway radial gates, gate opening displays etc. vi. Differential pressure measurement across trash rack one uninterrupted power supply to provide back up (Minimum 30 minutes.	Automa tic Reservoir Monitoring and Control System as defined under clause 1,1.6 of Part II of Volume III PLC based remote control system for operation of Low Level spillway radial gates, The system shall also include and provide following components, transducers, Instrumentation at various locations.- m) Gate position indication, control and monitoring for Low Level spillway radial gates n) Water level indications and monitoring along with necessary alarms at spillway Input discharge in reservoir discharge through spillway radial gates, gate opening displays etc. o) Differential pressure measurement across trash rack one uninterrupted power supply to provide back up (Minimum 30
	Adit Inspection Gates as defined under Clause 1.1.8 of Part II of Volume Clause 1.1.11 of Part II of Volume III vis. a) Three nos. 'hinged type gates for opening size 2.5 m (w) x 2.5 m (H) b) Three sets of embedded parts including locking device c)Three sets of embedded steel drain		Adit Inspection Gates as defined under Clause 1.1.8 of Part of Volume III viz. Part II of Volume III viz. p) Three nos. hinged type gates for opening size 2.5 m (w) x 2.5 m (H) q) Three sets of embedded parts including locking device r) Three sets of embedded steel drain pipes along with valves and pressure gauge.

	pipes along with valves and pressure gauge.		
	One no. DG Set (500 kVA, 415 V) as defined under Clause 1.1.9 of Part II of Volume 111 a) One D. G set of 500 kVA, 415 V, 50 Hz output three phase synchronous type along with all accessories, equipment, instrument and wiring for DG set.		One no. D.G Set (500 kVA, 415 V) as defined under Clause 1.1.9 of Part II of Volume 111 a) One D. G set of 500 kVA, 415 V, 50 Hz output three phase synchronous type along with all accessories, equipment, instrument and wiring for DG set.
	Local Control Panel as defined under Clause 1.1.10 of Part II of Volume III	Local Control Panel as defined under Clause 1.1.10 of Part II of Volume III	Local Control Panel as defined under Clause 1.1.10 of Part II of Volume III
	Main Distribution Board in Dam Area including cables and cabling to local starter cum control panel of various HM equipments.	Main Distribution Board in Dam Area including cables and cabling to local starter cum control panel of various HM equipments.	Main Distribution Board in Dam Area including cables and cabling to local starter cum control panel of various HM equipments.
	Suitable de-icing / heating arrangement for HM works as defined under clause 1.1 of Part II of Owners requirements (Vol. III).	Suitable de-icing / heating arrangement for HM works as defined under clause 1.1 of Part II of Owners requirements (Vol. III).	Suitable de-icing / heating arrangement for HM works as defined under clause 1.1 of Part II of Owners requirements (Vol. III).
	Spares as defined under Clause 1.1.11 of Part II of Volume III viz. a) Mandatory spare parts for HM equipments as per the owner's requirement mentioned in the Main Contract. b) Additional spares recommended by sub-contractor for 5 years trouble free operation.	Spares as defined under Clause 1.1.11 of Part II of Volume III viz. cii) Mandatory spare parts for HM equipments as per the owner's requirement mentioned in the Main Contract. ciii) Additional spares recommended by sub-contractor for 5 years trouble free operation.	Spares as defined under Clause 1.1.11 of Part II of Volume III viz. h) Mandatory spare parts for HM equipments as per the owner's requirement mentioned in the Main Contract. i) Additional spares recommended by sub-contractor for 5 years trouble free operation.
	- Tools as defined under Clause 1.1 12 of Part II of Volume 111 Two sets of tools and equipment including special tools required	- Tools as defined under Clause 1.1 12 of Part II of Volume 111 Two sets of tools and equipment including special tools required	- Tools as defined under Clause 1.1 12 of Part II of Volume 111 Two sets of tools and equipment including special tools required for

	for repair and maintenance of the equipment for HM works.	for repair and maintenance of the equipment for HM works.	repair and maintenance of the equipment for HM works.
	Installation and Commissioning Procedure (four sets) as defined under Clause 1.1.13 of Part II of Volume 111 Four sets of installation and commissioning procedures indicating the supervisory services to be provided, tolerances to be achieved, equipment to be deployed, procedure to be followed including site inspections, quality control checks, in-site performance testing etc.	Installation and Commissioning Procedure (four sets) as defined under Clause 1.1.13 of Part II of Volume 111 Four sets of installation and commissioning procedures indicating the supervisory services to be provided, tolerances to be achieved, equipment to be deployed, procedure to be followed including site inspections, quality control checks, insite performance testing etc.	Installation and Commissioning Procedure (four sets) as defined under Clause 1.1.13 of Part II of Volume 111 Four sets of installation and commissioning procedures indicating the supervisory services to be provided, tolerances to be achieved, equipment to be deployed, procedure to be followed including site inspections, quality control checks, insite performance testing etc.
	-Operation and Maintenance Manual as defined under Clause 1.1.14 of Part II of Volume III s) 20 sets of operation and maintenance manual containing drawings, all related catalogues and brochures for plants and machinery, handling procedures for assemblies and sub assemblies of all equipment covered under this specification properly bound and placed in folder t) 10 sets of soft copies of 0 & M Manuals on good quality compact disc suitable for editing and printing.	-Operation and Maintenance Manual as defined under Clause 1.1.14 of Part II of Volume III civ) 20 sets of operation and maintenance manual containing drawings, all related catalogues and brochures for plants and machinery, handling procedures for assemblies and sub assemblies of all equipment covered under this specification properly bound and placed in folder (b) 10 sets of soft copies of 0 & M Manuals on good quality compact disc suitable for editing and printing.	-Operation and Maintenance Manual as defined under Clause 1.1.14 of Part II of Volume III j) 20 sets of operation and maintenance manual containing drawings, all related catalogues and brochures for plants and machinery, handling procedures for assemblies and sub assemblies of all equipment covered under this specification properly bound and placed in folder k) 10 sets of soft copies of 0 & M Manuals on good quality compact disc suitable for editing and printing.
	- Inspection and Quality Assurance Plan as defined under Clause 1.1 15 of Part II of Volume III a) Four sets of Inspection and	Inspection and Quality Assurance Plan as defined under Clause 1.1 15 of Part II of Volume III a) Four sets of	Inspection and Quality Assurance Plan as defined under Clause 1.1 15 of Part II of Volume III a) Four sets of Inspection and quality assurance

	quality assurance plan	Inspection and quality assurance plan	plan

Thus it is evident that offshore services related to supply of drawings and designs are not confined to the plant & machinery supplied overseas alone. Offshore service are predominately in respect of drawings and designs of plants & Machinery supplied onshore and therefore, chargeable to tax in India under the applicable DTAA as well as under the provisions of Section 9(1)(vii) of Indian Income Tax Act.

Decision of the Hon'ble ITAT in the case of M/s SMS Concast not applicable to the facts of the present case-

It is submitted, that the decision of the Hon'ble ITAT in the case of M/s SMS Concast cannot be applied to the facts of the present case as the decision is applicable to the facts of that case alone where the Hon'ble Bench after considering the obligations under service and supply have come to a firm conclusion that the obligations under 2 contracts are not disjoint and any default leading to the cancelation of contract of supply will lead to the cancelation of the other contract too in addition to recording a finding that drawing and designs supplied in that case were specifically related to the supply of plant and equipments. It is therefore submitted that the said decision is not applicable without examining the facts in the light of principles of law laid down by the Hon'ble Supreme Court in the case of Ishikawajma Harima Heavy Industries Ltd.

In the present case, it is undisputed fact amply demonstrated from the contract agreement in the above paras that drawing and designs are related to the onshore supply of plants and Machinery too and in fact offshore supply of plant and Machinery was a minuscule part of the total contract value. The contracts were predominantly for provision of offshore services in the form of supply of drawings, designs and basic engineering. Ottshore supply of plants and Machinery was only incidental to the provision of services and not vice versa as is evident from the fact that total value of offshore services was more than 300% of the total value of Plants and Machinery supplied overseas. Offshore services have been provided continuously for various assessment years on standalone basis without any supply of plants and Machinery. The mere fact that even after supply of Plant & Machinery, provision of offshore services continued for several years provides an ample testimony to the absolute de linkage between services and supplies.

In view of the above it is humbly submitted that the appeals filed by the assessee being devoid of merit be dismissed. It is prayed accordingly.

8. The ld. AR made submitted that assessee is only a sub-contractor for civil construction of dam carried out by HCC and that Hydro Electrical work is done by another party. Supplies are made by the assessee offshore ; payments received overseas ; designs are manufactured abroad and shipped from abroad ; designs are also 'plant' and hence monies received is for equipment ;

that the designs are used for own use and hence the provisions of section 9(1)(vii) of the Act are not applicable and that accordingly the ld AO was not justified in taxing the designs as Fee for Technical Services (FTS) ; designs are machine related supply and hence the same are to be looked along with the offshore supplies ; dominant purpose of the agreement is only supply of machinery ; that the designs cannot be used independently since they are tailor made to the equipment supplied ; the pith and substance of the agreement is only supply of plant and hence designs should be looked into as plant ; that no control over equipment happens in India as the title has passed from overseas ; that admittedly there is no PE at all in India for Asst Year 2011-12 ; that designs gets subsumed in the supply; 95% of consideration is received at the time of supply of machineries itself .

9. The ld. AR also placed on record the approval copy of Kishanganga Project by the Central Government vide approval dated 20.07.2007 as Additional Evidence in terms of Rule 29 of ITAT Rules before us. This approval letter dated 20.7.2007 enabled National Hydroelectric Power Corporation (NHPC) Limited to set up the Kishanganga Hydroelectric Project (3 * 110MW) in the Central Sector in Jammu & Kashmir at a total cost of Rs 2238.67 crores including IDC & FC Charges of Rs 165.12 crores based on November 2005 price levels. It was submitted that provisions of section 44BBB of the Act deals with the taxability of income in relation to such activities and that one of the conditions prescribed in section 44BBB of the Act is that the power project must be approved by the Central Government. The applicability of provisions of section 44BBB of the Act had been taken by the assessee vide Ground No. 9 and that similar ground was also taken before the ld. CIT(A). Since this approval papers could not be placed on record by the assessee before the lower authorities, it is now placed in the form of additional evidence. It was also submitted that this document in any case is available in public domain and that the same is placed on record only to assist the bench for better

appreciation of facts. The ld. DR before us did not raise any objections for admission of these additional evidences by the bench. Either way, the copy of sub-contract No. SC/100/KGHEP/004-1 dated 12.6.2009 between HCC and assessee for HM works excluding pressure shaft liners (off shore services) for Kishanganga Hydroelectric Project and copy of sub-contract No. SC/100/KGHEP/004-2 dated 12.6.2009 between HCC and assessee for HM works excluding pressure shaft liners (off shore supply) for Kishanganga Hydroelectric Project is already on record before us. In any case, we find that without this approval, the project per se could not have taken off and hence we deem this as only an additional document to support the transactions carried out by the assessee. Accordingly, the said document is taken on record for the purpose of adjudication without taking recourse to sending back to the file of the lower authorities.

10. The ld. AR also placed reliance on the decision of co-ordinate bench of Delhi Tribunal in the case of SMS Concast AG vs DDIT in ITA No. 1361/Del/2012 dated 16.6.2023 which in his opinion, squarely covers the entire dispute before us. The ld. AR also placed reliance on the following decisions in support of his contentions:-

a) Decision of Hon'ble Supreme Court in the case of Ishikawajima Harima Heavy Industries Ltd reported in 288 ITR 408 (SC) ;

b) Decision of Hon'ble Jurisdictional High Court in the case of DIT vs LG Cables Ltd reported in 197 Taxman 100 (Del) ;

c) Decision of Hon'ble Jurisdictional High Court in the case of Linde AG, Linde Engineering Division vs DIT reported in 365 ITR 1 (Del);

d) Decision of Hon'ble Supreme Court in the case of Mahabir Commercial Co. Ltd vs CIT reported in 86 ITR 417 (SC);

e) Decision of Hon'ble Jurisdictional High Court in the case of National Petroleum Construction vs DIT reported in 66 taxmann.com 16 (Del);

f) Decision of Hon'ble Jurisdictional High Court in the case of DIT vs Ericsson AB reported in 204 Taxman 192 (Del);

g) Decision of Hon'ble Jurisdictional High Court in the case of CIT vs Mitsui Engineering reported in 123 Taxman 182 (Del) ;

h) Decision of Hon'ble Supreme Court in the case of ONGC Ltd vs CIT reported in 376 ITR 306 (SC);

i) Decision of Hon'ble Supreme Court in the case of CIT vs Hyundai Heavy Industries Co. Ltd reported in 291 ITR 482 (SC)

j) Decision of Delhi Tribunal in the case of SMS Concast AG vs DDIT in ITA No. 1361/Del/2012 dated 16.6.2023

11. We have heard the rival submissions , perused the materials available on record and the case laws that were relied upon by the parties before us. We find that the issues to be decided in these appeals are as under:-

a) Whether the amount received by the assessee under the contract for offshore supply of plant & equipment during the previous years' relevant to abovementioned assessment years, from HCC is chargeable to tax in India as per the provisions of the Act as well as under the India Germany Treaty?

b) Whether the amount received from HCC under the contract for offshore services is chargeable to tax as per the provisions of the Act as well as under the India Germany Treaty?

12. It is not in dispute that during the relevant years, the assessee had supplied plant and equipment to HCC which were designed and manufactured

outside India. The title to the said plant and equipment was duly passed on to the customer outside India on FOB basis. The consideration for such offshore supplies was also received outside India in foreign currency either through letter of credit or through bank transfer. All activities such as manufacturing, fabrication, designing etc. of plant & equipment has been undertaken outside India. The assessee in order to substantiate the fact that the transfer of title and risk had happened outside India had submitted the proof together with documentary evidences by enclosing the copy of invoices, bill of lading, shipping documents etc before the Ld. AO. On perusal of the contract for offshore supply of plant and equipment entered into by the assessee, we find that though the custom clearances shall be the responsibility of the assessee, however, all the plant & machinery and materials received shall remain absolute property of the owner and shall at all time open for inspection. The Ld. DR before us vehemently harped on the point that assessee had taken insurance for the said plant and equipment. In this regard , we find that as per Clause 8.4. of the Contract , HCC is also the co-insurer in the Insurance policy and Clause 8.7. thereon clearly specifies that plant and equipment shall remain absolute property of HCC. The Ld. DR further submitted that the title and custody of equipment passed only after successful commissioning of the plant and equipment at project site in India. We find that the Ld. AR before us had buttressed this argument of the revenue by stating that it is factually incorrect as separate agreement (onshore services agreement) has been entered for installation, erection, commissioning and supervision thereof at project site in India and consideration received separately for the same. We find that the Hon'ble Jurisdictional High Court had also addressed the very same argument of the revenue before us in the case of DIT vs LG Cables Ltd reported in 197 Taxman 100 (Del) by observing as under:-

> Furthermore, as noticed above, the scope of work under the onshore contract was under a separate agreement and for separate consideration. There is,

> therefore, in our opinion, no justification to mix the consideration for the offshore and onshore contracts. ***None of the stipulations of the onshore contract could conceivably postpone the transfer of property of the equipment supplied under the offshore contract, which, in accordance with the agreement, had been unconditionally appropriated at the time of delivery, at the port of shipment.*** When the equipment was transferred outside India, necessarily the taxable income also accrued outside India, and hence no portion of such income was taxable in India.
>
> ***(Emphasis Supplied by us)***

13. We find that the lower authorities had made an observation in their orders that 100% supply of machinery is not preceded to the formation of Project Office in India which is inconclusive to hold that the offshore supply is taxable in India. This has to be looked into from the size of the project undertaken by the assessee by appreciating the fact that several machineries were supplied at different point of time from outside India and for all the machineries that were supplied, the title had been transferred outside India. With regard to the Defects Liability Clause addressed by the Ld. AO and consequentially conclude that the ownership in the Plant and Equipment is transferred subsequent to the Defects Liability Period, it had to be understood in a practical manner that the Defects Liability Clause would be incorporated in every contract to take care of a contingent event. This has got nothing to do with the passing of title to the equipment. We find that this aspect is also addressed by the Hon'ble Jurisdictional High Court in the case of DIT vs LG Cables Ltd reported in 197 Taxman 100 (Del) by observing as under:-

> Undue importance cannot be attached to the fact that the agreement imposed on the assessee company the obligation to handover the equipment functionally completed. This obligation has been rightly construed by the Tribunal to be in the nature of a trade warranty. We may note also that the buyers right to examine and repudiate the goods in law does not by itself indicate that the property in the goods had not passed, as is evident from the provisions of section 59 of the Sale of Goods Act.

14. We find that the lower authorities had also observed that full payment of consideration for supply of plant and equipment was not received by the assessee outside India and that part of the consideration was retained and would be paid only after satisfactory functional demonstration of equipment in India. In our considered opinion, this is a normal clause which is incorporated in any contract especially the nature of contract undertaken by the assessee herein that there would always be some portion of the retention amount of the contracted value that would be retained by the buyer / user of machinery. In the instant case, the Ld. AR drew our attention to Clause 14.2. of the Contract for offshore supplies, which states that assessee would be entitled to receive 95% of contracted revenue at the time of shipment of such plant, equipment and spares and only 5% of the revenue was to be payable on successful commissioning of the plant. This aspect is also addressed by the Hon'ble Jurisdictional High Court in the case of DIT vs LG Cables Ltd reported in 197 Taxman 100 (Del) by observing as under:-

> Although the entire consideration was not paid on shipment of equipment, but non-payment of a part of the price could not prevent the transfer of equipment. The passing of the property to the purchaser, as rightly held by the Tribunal had nothing to do with the payment of the entire price of the equipment 4 to the seller. Thus, the mere fact that 15 percent of the payment was to be retained by the PGCIL to be paid 30 days after operational acceptance on erection and completion of the system cannot be construed to mean that the title in the goods did not pass to the buyer in the country of origin.

15. Our aforesaid observations are further fortified by the decision of the Hon'ble Supreme Court in the case of Ishikawajima-Harima Heavy Industries Limited reported in 288 ITR 408 (SC), wherein, it was held that where the property in respect of the goods is transferred to the buyer outside India, the sale of such goods has to be regarded as having completed outside the taxable territories of India and hence, the income from such sale is not liable to tax in India. Similar view is also expressed by the Hon'ble Jurisdictional

High Court in the case of National Petroleum Construction vs DIT reported in 66 taxmann.com 16 (Del).

16. In view of the aforesaid observations and respectfully following the various judicial precedents relied upon hereinabove, we hold that no part of consideration received outside India for offshore supplies of plant and equipment and spares could be deemed to accrue or arise in India as per section 9 of the Act in the hands of the assessee. Admittedly , there is no existence of any Permanent Establishment (PE) of the assessee in India. Such consideration would only be in the nature of business income not attributable to PE in India and hence not taxable under Article 5 read with Article 7 of the India Germany DTAA. In this regard, it would also be relevant to reproduce the provisions of Protocol of India Germany Treaty for better appreciation of law :-

PROTOCOL

The Republic of India and the Federal Republic of Germany have agreed at the signing at Bonn on 19th June, 1995 of the Agreement between the two States for the avoidance of double taxation with respect to taxes on income and capital upon the following provisions which shall form an integral part of the said Agreement.

1. With reference to Article 7

(a) in the determination of the profits of a building site or construction, assembly or installation project there shall be attributed to that permanent establishment in the Contracting State in which the permanent establishment is situated only the profits resulting from the activities of the permanent establishment as such. If machinery or equipment is delivered from the head office or another permanent establishment of the enterprise (situated outside that Contracting State) or a third person (situated outside the Contracting State) in connection with those activities or independently therefrom there shall not be attributed to the profits of the building site or construction, assembly or installation project the value of such deliveries.

17. Accordingly, there is no case to treat the receipt of such consideration for offshore supplies of equipment as income taxable in India. Hence we direct the Ld. AO to delete the addition made on account of consideration received for offshore supplies of Plant and Equipment outside India. The grounds raised in this regard by the assessee are allowed for various years and accordingly, the issue number 1 framed hereinabove by us is decided in favour of the assessee.

Taxability of offshore services

18. The assessee entered into contract with HCC for rendering offshore services which mainly comprised of 'Planning, designing and Engineering' of Hydro Mechanical Plant and Machinery and included the overall and detailed planning of the project. It was submitted that the plant & equipment as supplied by the assessee from outside India are tailor-made to suit the specifications, requirements of the Kishanganga project undertaken by NHPC. Taking into account the nature, size and specific purpose of the plant and equipment to be supplied, it is necessary for the assessee to first prepare the drawing, design of the plant and equipment to be manufactured/fabricated and get the same approved by the customer. These drawings & designs are also required by the customer for locally procuring certain parts, equipment etc. and other civil construction to be integrated with the imported plant and for arranging installation, civil works as well as for the purpose of operation and maintenance of the Plant. The offshore services contract as referred above, thus involve supply of drawings and design that are required for the manufacturing of the imported plant & equipment, proper installation of such equipment and synchronisation of the same with civil construction as well as with the locally procured equipment and parts. These facts are not in dispute before us.

19. The assessee's case is that the entire work related to the drawings and designs were undertaken outside India and that the property both in the designs and drawings as well as in the equipment had passed outside India. The consideration for such drawings and design is also received outside India in foreign currency. The Ld. AR submitted that offshore services are integral part of the offshore supply of plant and equipment and therefore the consideration received for offshore services should be given the same treatment of offshore supplies as both were carried out outside India and consideration received in foreign currency outside India and accordingly no part of it would become taxable u/s 9 of the Act as no income thereon shall be deemed to accrue or arise in India and also the same would not be taxable as per the India Germany Treaty. Per Contra, the Ld. DR submitted that these services are purely technical in nature and hence had to be construed as 'Fee for Technical Services' (FTS) thereby making it taxable u/s 9(1)(vii) of the Act.

20. It is not in dispute that the assessee indeed had supplied offshore drawings and designs together with the supply of plant and equipment. We find that the Contract for offshore services and the Contract for the offshore supply of Plant and Equipment were entered on the same date i.e. 12.06.2009 and are inextricably connected because the supply cannot be made without the drawings. Admittedly, the drawings and designs could not be utilised by HCC to get the manufacturing of plant from another manufacturer. The drawings and designs made by the assessee are tailor made to suit the requirements of the Plant and equipment supplied by the assessee. We find that the preamble in the offshore services contract specifically defines the scope of total services to be rendered by the assessee. For the sake of convenience, the Preamble to the offshore services contract is reproduced hereunder:-

Preamble

This Subcontract Agreement for ***"Planning, Design, & Engineering of Hydro Mechanical Plant & Machinery*** excluding Pressure Shaft Steel Liners (hereinafter referred as "HM Works") for Kishanganga Hydroelectric Project of 330MW (3x110MW) in J&K, India is made and entered on this day of 12 June 2009.

(Emphasis supplied)

21. Further we find that Clause 2 of the offshore services contract divides the scope of work in three parts which are as under:-

a) Planning of Hydro-Mechanical Plant & Machineries

b) Design & Engineering of Hydro-Mechanical Plant & Machinery.

c) Offshore procurement services which include procurement for offshore parts, inspection test at manufacturing facility, supervision during manufacturing and dispatch of offshore HM gates.

22. From the abovementioned scope of work and Preamble, it is evident that offshore service contract primarily involves preparation and supply of drawings and design for imported plant & equipment and thus is inextricably linked with the offshore supply of plant & equipment. Considering the nature of work undertaken by the assessee as per the Contract, in our considered opinion, the drawings and design as supplied are inextricably linked with the plant and equipment supplied by the assessee. We find that the similar issue had been addressed by the Hon'ble Jurisdictional High Court in the case of Linde AG, Linde Engineering Division vs DIT reported in 365 ITR 1 (Del) wherein it was held that if design and engineering is inextricably linked with the manufacture and fabrication of the material and equipment to be supplied from overseas, and form an integral part of the said supply, then the services rendered would not be amenable to tax as Fees for Technical Services.

23. We find that the lower authorities had not disputed the position that the entire work related to the designs was carried out outside India and that the ownership in such designs was passed outside India. The lower authorities had relied on the provisions of section 9(1)(vii) of the Act as well as Article 12 of the DTAA to come to the conclusion that the consideration received by the assessee is in the nature of fees for technical services and, therefore, the amount would be chargeable to tax in India on a gross basis under both the Act as well as the DTAA. In coming to this conclusion, the lower authorities had relied on the judgment of the Hon'ble Karnataka High Court in AEG Aktiengesllschaft vs. CIT reported in 267 ITR 209 (Kar). This decision was also heavily relied upon by the Ld. DR before us. In this regard, we find that the Hon'ble Jurisdictional High Court in case of Linde AG, Linde Engineering Division vs. DIT reported in 365 ITR 1 (Del) had considered the very same issue and the decision of the Hon'ble Karnataka High Court is contrary to the decision of Hon'ble Jurisdictional High Court. In any case, the decision of the Hon'ble Jurisdictional High Court is binding on this Tribunal. Moreover, the Hon'ble Karnataka High Court in case of AEG (supra) did not allow that assessee to make an argument that design and engineering should be treated akin to plant and machinery as this was not the case pleaded by that assessee before their Assessing Officer. In this regard, the observations made by the Hon'ble Karnataka High Court in para 11 in case of AEG (supra) would be relevant as under:-

> "It is necessary to point out that this was not the case pleaded before the Assessing Officer. The assessee cannot be permitted to make out a new case, which was not pleaded before the Assessing Officer. "

24. Further, we find that the Co-ordinate Bench of Delhi Tribunal in the case of SMS Concast AG vs DDIT in ITA No. 1361/Del/2012 dated 16.6.2023 also observed that in so far as the decision of the Hon'ble Karnataka High Court in

AEG Aktiengesllshaft Vs. CIT (supra) is concerned, in view of the ratio laid down by the Hon'ble Jurisdictional High Court in case of Linde Engineering Division Vs. DIT (supra), there is no need for much deliberation on the said decision. We find that the issue in dispute is squarely covered by the decision of the Co-ordinate Bench of Delhi Tribunal in the case of SMS Concast AG referred supra, wherein it has been held that supply of drawings and designs inextricably linked to sale and supply of equipment cannot be taxed in India as FTS. It was observed by the Tribual in SMS Concast AG (supra) that the supply of drawing and design could not be considered on standalone basis as the purchaser could not have utilized such drawings and designs without the supply of plant and equipment. It was further concluded that where offshore supply of plant and equipment are treated as not taxable in India, the supply of drawings and designs inextricably linked to such plant and equipment had to be considered as non-taxable in India, being part of supply of plant and equipment. Moreover, the decision of SMS Concast AG supra had also considered the aspect of entering separate contracts for supply of equipment and offshore services but the same had been executed on the very same date.

25. We find that the Ld. DR argued that the value of contract for offshore services is more than the contract value of offshore supply of plant and equipment. This was buttressed by the Ld. AR by submitting that the setting up of HM works for the power project mainly involve supply of gates, stop log equipment, control panel, automatic reservoir monitoring and control system, remote control system, cables, de-icing / heating arrangements etc. The Ld. AR before us submitted that the equipment supplied by the assessee vis a vis the complete plant for power project may not be sizeable, however the drawings and designs to be supplied by the assessee is not only required for the manufacture of such equipment supplied but also to integrate the same

with the entire plant. The importance of drawings and design is increased with the fact that functioning of the equipment supplied by the assessee in an integrated manner is of paramount importance for the proper functioning of entire plant & machinery used to set up the Kishanganga project. Owing to such facts, the drawings and designs have a higher monetary value than the offshore supply of plant & equipment.

26. Further we find that the dominant object of the contract entered by the assessee with HCC was to supply a plant manufactured according to the designs developed, then, even though the obligation to carry out the designs may be under a separate contract of same date and a separate consideration is mentioned therein, the character of the receipt must be that of a sale price for the supply of the equipment. Reliance in this regard has been rightly placed by the Ld. AR on the decision of the Hon'ble Supreme Court in the case of ONGC vs CIT reported in 376 ITR 306 (SC), wherein it was held that for determining the nature and taxability, the pith and substance, the dominant purpose of the agreement under which payment is to be made, is to be seen.

27. In view of the above observations, it could be safely concluded that when the supply of drawings and designs is coupled with supply of equipment, which is manufactured in accordance with the designs supply, the amount received cannot be characterized as FTS.

28. We find that the Ld. AR fairly addressed the taxability of offshore designs and drawings in the event of existence of a Permanent Establishment (PE) in India on without prejudice basis. The Ld. AR submitted that even assuming the consideration is to be characterized as FTS, then, also, the amount would not be chargeable to tax in India having regard to the provisions of Article 12 and Article 7 of the DTAA. From AY 2012-13 onwards, the activities undertaken by the assessee in India has resulted in the constitution of

deemed PE in terms of Article 5(2)(i) of the DTAA. The Ld. AR submitted that once it is undisputed that there exists a PE, then, having regard to the provisions of paragraph 6 of Article 12, it would be clear that the provisions of Article 12 would have no application to bring to tax the consideration received from the sale of the designs and plant and such consideration could only be brought to tax in terms of Article 7 of the DTAA. The Ld. AR submitted that undoubtedly, paragraph 1 of Article 7 would get attracted because the assessee does have a PE in India but the mere existence of the PE is not sufficient to bring to tax the consideration of the nature of Business Profits. Paragraph 1 of Article 7 postulates that it is only so much of the profits as are attributable to the permanent establishment that could be brought to tax. We find that in the present case, the entire work of preparing the designs and drawings is carried out outside India, the question of bringing to tax any part of the consideration in accordance with Article 7 cannot be sustained. This aspect of the matter is concluded by the judgment of the Hon'ble Supreme Court in the case of Ishikawajima-Harima Heavy Industry Ltd vs DIT reported in 288 ITR 408 (SC), wherein the Hon'ble Apex Court laid down the principle that if the permanent establishment had no role to play in the rendering of the offshore services, then, in that event, the consideration for the services cannot be brought to tax in terms of Article 7 of the DTAA. Similar views were expressed by the Hon'ble Supreme Court in the case of CIT vs Hyundai Heavy Industries Co. Ltd reported in 291 ITR 482 (SC). Further, we find that as per the Protocol to the DTAA, when technical services were rendered outside India, the consideration received thereon shall not be attributable to the PE in India. The relevant text of Protocol 1(b) is reproduced below for the sake of convenience:-

> "1(b) Income derived by a resident of a Contracting State from planning, project, construction or research activities as well as income from technical services exercised in that State in connection with a

permanent establishment situated in the other Contracting State, shall not be attributed to that permanent establishment…..”

29. In view of the aforesaid observations, it could be safely concluded that in the facts and circumstances of the instant case, the offshore services that primarily involve offshore supply of drawings and designs are inextricably linked with the offshore supply of Plant and equipment and accordingly, the receipts from offshore services does not give rise to any income accruing or arising in India and therefore not taxable under the Act. Further, such consideration qualifies as business profits of the company in terms of the provisions of Article 7 of the DTAA, which cannot be attributed to India for computing taxable income in India. Hence, income arising therefrom should be treated as non-taxable in India. Accordingly, we have no hesitation in directing the Ld. AO to delete the addition made on account of FTS in respect of offshore designs and drawings for the various years under consideration.

30. In the result, the appeals of the assessee are allowed.

Order pronounced in the open court on 21st November, 2023.

Sd/-	Sd/-
(CHALLA NAGENDRA PRASAD)	**(M. BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 21/11/2023
Pk/sps
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI