IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI G.S. PANNU, PRESIDENT AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.1679/Mum./2022	**ITA no.2483/Mum./2022**
(Assessment Year : 2018–19)	(Assessment Year : 2019–20)

Schindler China Elevator Company Ltd.
C/o Bansi S. Mehta & Co.
Metro House, 3rd Floor, Dhobi Talao
M.G. Road, Mumbai 400 020
PAN – AASCS8166L

……. Appellant

v/s

Asstt. Commissioner of Income Tax
International Taxation
Circle–4(2)(1), Mumbai

…….Respondent

Assessee by : Shri Yogesh Thar a/w
Ms. Sakshi Dande
Revenue by : Shri Amit Kumar Soni

Date of Hearing – 20/12/2022	Date of Order – 02/03/2023

ORDER

PER BENCH

The aforesaid appeals have been filed by the assessee challenging the final assessment order dated 29/04/2022, for the assessment year 2018–19 and final assessment order dated 26/07/2022 for the assessment year 2019–20, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 ("*the Act*"), pursuant to the directions issued by the learned Dispute Resolution Panel–2, Mumbai, [-*learned DRP*‖], under section 144C(5) of the Act.

2. Since both appeals pertain to the same assessee and the issues involved are also common, therefore, as a matter of convenience, these appeals were heard together and are being disposed off by way of this consolidated order. With the consent of the parties, the assessee"s appeal for the assessment year 2018–19 is taken up as a lead case.

ITA no.1679/Mum./2022
Assessee's Appeal – A.Y. 2018–19

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

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

1. On the facts and circumstances of the case and in law, the Ld. AO erred in adding a sum of Rs. 1,01,16,484/- out of receipts emanating from offshore supply of escalators and elevators to the total income of the Appellant.

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

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

Without Prejudice to above,

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

1. On the facts and circumstances of the case and in law, the Ld. AO erred in making an ad–hoc addition of 5% (50% of the alleged estimated Net Profit Ratio of 10%) of total receipts amounting to Rs. 1,01,16,484/- to the total income of the Appellant in India by invoking provisions of Rule 10 of Income-tax Rules, 1962.

2. The Appellant prays that the Ld. AO be directed to delete ad–hoc addition of Rs. 1,01,16.484- or appropriately reduce the same, after considering the facts and loss, if any, incurred by the Appellant in respect of above transaction.

General:

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

4. The issue arising in ground No. 1, raised in assessee"s appeal, is pertaining to taxability of receipts from the offshore supply of escalators and elevators.

5. The brief facts of the case as emanating from the record are: The assessee is a non-resident company incorporated in China and is engaged in the business of supply of elevators and escalators, which includes design and manufacturing. The assessee is a part of Schindler group of companies. For the year under consideration, the assessee filed its return of income on 31/10/2018 with returned income of Rs.Nil and claimed a refund of Rs. 43,76,387. The return of income filed by the assessee was selected for scrutiny and statutory notices under section 143(2) and section 142(1) of the Act were issued and duly served on the assessee. During the year under consideration, the assessee considered receipts of Rs.17,42,55,454 from Delhi Metro Rail Corporation Ltd (DMRCL) and Rs. 2,80,74,219 from Maharashtra Metro Rail Corporation Ltd (MMRCL) in its return as appearing in Form 26AS statement. The assessee considered both receipts as not taxable in India and claimed a refund of taxes deducted at source. During the assessment proceedings, the assessee was asked to show cause as to why these receipts are not taxable in India. In response thereto, the assessee submitted that the payment made by the DMRCL and MMRCL to the assessee for the supply of elevators and escalators will be regarded as *„supply of goods*" and will accordingly be taxable as business income under Article 7 of the India China Double Taxation Avoidance Agreement ("*DTAA*‖). The assessee claimed that it does not have any permanent establishment in India and therefore, no part of

the income earned by the assessee can be taxed in India by virtue of the provisions of Article 7 of the DTAA. The assessee also submitted that it had entered into a contract with DMRCL and MMRCL for offshore supply of escalators and elevators only. The title to the goods passed outside India and payment thereof was also received outside India, therefore the transaction of sale was not taxable in India.

6. The Assessing Officer vide draft assessment order dated 14/06/2021 did not agree with the submissions of the assessee and after considering the agreements entered into with DMRCL and MMRCL held that the income of the assessee from the offshore supply of elevators and escalators is taxable in India in terms of section 9(1)(i) of the Act. The Assessing Officer further held that the assessee entered into an arrangement with its Indian associated enterprise, Schindler India Private Limited (*„SIPL'*) for the fulfilment of its obligation under the contract. It was also held that the income of the assessee earned from India in respect of a composite contract has significant onshore elements also. The Assessing Officer treated the consortium of the assessee and SIPL as an Association of Persons ("*AOP*") within the meaning of section 2(31) of the Act and held that the contract with DMRCL and MMRCL was composite and indivisible and could not be split up into supply and commissioning parts as sought to be done by the assessee. The Assessing Officer also held that the consortium is liable to be assessed as an AOP and the income from the transaction was chargeable to tax in India, as no benefit of India–China DTAA could be afforded to the association. It was also held that the offshore supplies have been made by the assessee on the Indian port of

disembarkation basis and the delivery of the goods is to be taken as having been made in India. Therefore, the profits from supplies made by the assessee on CIF basis are liable to be taxed in India on the ground that the sale is completed in India. Accordingly, the Assessing Officer proceeded to tax 5% of the total receipts of Rs.20,23,29,673 as income from composite contract liable for taxation in India.

7. The assessee filed detailed objections before the learned DRP, inter-alia, against the addition made by the AO. Vide directions dated 30/03/2022, issued under section 144C(5) of the Act, the learned DRP rejected the objections filed by the assessee. As regards the AOP, the learned DRP held that the Assessing Officer has only raised a prima facie finding and no assessment in hands of AOP has been made in this case. It was further held that these are matters of fact, which have to be inquired into by the Assessing Officer having jurisdiction over the AOP and it would be premature for the panel to issue any directions at this stage. Accordingly, the learned DRP proceeded to decide the issue on the basis that addition in hands of the assessee is on a substantive basis. The learned DRP upheld the findings of the Assessing Officer that the contracts are completely composite contracts, which cannot have any other interpretation in terms of dividing the same into separate segments. In conformity with the directions issued by the learned DRP, the Assessing Officer passed the impugned final assessment order dated 29/04/2022. Being aggrieved, the assessee is in appeal before us.

8. During the hearing, the learned Authorised Representative ("*learned AR*") by referring to the provisions of the Memorandum of Understanding

("*MOU*") between the assessee and the SIPL submitted that the responsibility of the assessee is confined only to design, manufacture, and supply of escalators and elevators. On the other hand, the SIPL was responsible for the clearance of material after reaching at the port, its transportation to the site as per contract conditions, complete installation, testing, commissioning, and maintenance of escalators and elevators. The learned AR also submitted that the payments to the two parties were made separately by DMRCL and MMRCL based on their respective invoices. It was submitted that the assessee was paid in USD, while SIPL was paid in Indian currency and the Indian entity"s work starts after the escalators and elevators reach India. The learned AR also submitted that only the assessee was taxed, though the Assessing Officer recorded the finding that the consortium of the assessee and SIPL is an AOP. It was also submitted that installation profits have been offered to taxation by SIPL and the same has also been assessed in its hands by the Revenue.

9. On the contrary, the learned Departmental Representative ("*learned DR*") vehemently relied upon the orders passed by the lower authorities and submitted that the MOU between the assessee and SIPL is a single composite contract, therefore, the income earned by the assessee from the supply of elevators and escalators are taxable in India.

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

Similarly, the aforesaid consortium bid for the tender floated by MMRCL for the design, manufacturing, supply, installation, testing, and commissioning of heavy-duty machine room less elevators and escalators for NMRCL Project. The bids were accepted by the DMRCL and MMRCL and letters of acceptance were issued. Subsequently, separate contract agreements were signed between the consortium and DMRCL, and the consortium and MMRCL. It is pertinent to note that the MOU entered into between the assessee and SIPL was made part of both the aforesaid contract agreements. From the perusal of the contract agreements, forming part of the paper book, we find that the consortium agreed to perform efficiently and faithfully all of the work under the agreement. It was also agreed that the consortium shall be jointly and severally liable for undertaking the contracts. Responsibility of each member of the consortium in respect of the contract is provided in the MOU entered between the assessee and SIPL. From the perusal of the MOU in respect of DMRCL, we find that the parties jointly bid for the project as a consortium with each party responsible for its own scope of work. It was further agreed that both parties shall be jointly and severally responsible for completing the project. As per Article 3 of the MOU, the assessee agreed to undertake the design, manufacturing, and supply of escalators, while SIPL"s scope of work included clearance of material after reaching at port and transportation to the site as per contract conditions, installation, testing, commissioning and maintenance of escalators. We find similar terms in MOU in respect of contract with MMRCL. Firstly, from the above, it is evident that the scope of work of each of the parties in the consortium is separately defined and since the MOU forms part of the contract agreement, it cannot be denied that the same was

not known to the DMRCL/MMRCL. Secondly, the work of SIPL can only start after the goods reach the port of destination. In Article 2 of the MOU, the parties specify the percentage of effort and time that is expected to be spent by them on the project. In this Article, it has been clarified that the said percentage does not, in any way, imply the share of profit or losses, and each party will bear its own losses and retain its own profits separately based on the contract price and invoices raised. In the MOU, it is also mentioned that separate invoices would be raised by each party on the DMRCL for the work performed by them under the contract and the consideration shall be paid by the DMRCL as per the terms of the contract and quoted price in respective currency to the concerned consortium member raising such an invoice. From clause 4 of the contract agreement entered with DMRCL, we find that the same mentions contract price of Rs.15,38,93,850.16 and USD 37,60,376. As per the assessee, the consideration in Indian currency was payable to SIPL and the consideration in USD was payable to the assessee.

11. In big projects, it is a common practice that two or more companies with different expertise come together to form a consortium to bid for the project and jointly agree to undertake the project. In such a case, it cannot be said that the roles and responsibilities of one of the members can be performed by the other member. The purpose of the consortium is only to jointly bid for the project and win the mandate to perform the contract. Thereafter, each party is responsible for its own scope of work as agreed amongst them by way of MOU. The joint agreement can at best be for the purpose of completion of the contract for which the joint bid was made by the consortium. Due to the

different expertise of the consortium members, the roles and responsibilities are also clearly demarcated, at the outset, at the time of bidding for the contract. Since multiple parties form part of the consortium, the members may choose a lead member amongst them for the purpose of representing the parties in such a contract and the same is only for administrative convenience and coordination. Therefore, for the purpose of taxation, it is relevant to take into consideration the roles/functions performed by each member of the consortium.

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

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

13. As per the assessee, the title in the goods i.e. escalators and elevators was transferred to DRMCL and MMRPL outside India and payment thereof was also received outside India, therefore the transaction cannot be taxed in India. It is the plea of the assessee that the goods were transferred on a CIF basis. In this regard, reference was made to the copy of sample invoices forming part of the paper book from pages no.239-243. From the perusal of the aforesaid invoices, it is evident that the same are in the name of DMRCL and MMRCL and

the transaction is on a CIF basis. In the draft assessment order, it has been held that since the offshore supplies have been made by the assessee on an Indian port of disembarkation basis, therefore the delivery of the goods is to be taken as having been made in India. Thus, it has been held that the profit made by the assessee on a CIF basis is liable to be taxed in India on the basis that the sale is completed in India. We find that in a case, wherein the assessee made an offshore supply of equipment on a CIF basis at an Indian port, the coordinate bench of the Tribunal in JCIT vs Siemens Aktiengesellschaft, [2009] 34 SOT 16 (Mumbai) observed as under:

> *"12. From the above clause of the contract it is patent that BPL acquired the absolute right in the property when it was delivered to the carrier at the port of shipment i.e., in Germany. The reference of the learned D.R. to the invoice for depicting that it was on CIF basis at Bombay and hence the right of the buyer in the property should be construed as getting vested in Bombay, is not acceptable. The INCO Terms, 1990 explains various relevant terms. Page 755 of it mentions that :—*
>
> > *"'Cost, Insurance and Freight' means that the seller has the same obligation as under CFR but with the addition that he has to procure marine insurance against the buyer's risk of loss of or damage to the goods during the carriage. The seller contracts for insurance and pays the insurance premium.*
> >
> > *The buyer should note that under the CIF term the seller is only required to obtain insurance on minimum coverage. The CIF term requires the seller to clear the goods for export. CFR, in turn, has been explained as "Cost and Freight" means that the seller must pay the cost and freight necessary to bring the goods to the named port of destination but the risk of losses of or damage to the goods, as well as any additional costs due to events occurring after the time the goods have been delivered on board the vessel, is transferred from the seller to the buyer when the goods pass the ship's rail in the port of shipment. It has further been explained that in the case of CIF the seller must 'deliver the goods on board the vessel at the port of shipment on the date or within the period stipulated'. Clause A.5 also states that "Subject to the provisions of clause B.5, bear all risks of loss of or damage to the goods until such time as they have passed the ship's rail at the port of shipment." Clause B.5 in turn states that the buyer must 'bear all risks of loss of or damage to the goods from the time they have passed the ship's rail at the named port of shipment'."*
>
> 14. *As of the above it follows that in the case of CIF, the property in goods passes on to the buyer at the port of shipment. Though the Cost, Insurance and Freight etc. is met by the seller but the property in the goods gets transferred to the buyer at the port of shipment. The buyer incurs all risks of loss of or damage to the goods from the port of shipment. Therefore, it can be precisely seen that when the assessee made offshore supply of equipment to BPL on*

> *CIF Bombay basis against the stated consideration, the property in the equipment passed on to BPL on the port of Germany itself. It is trite law that income accrues at the place where the title to goods passes to the buyers on the payment of price. Our view is fortified by the judgment of the Hon'ble Supreme Court in Seth Pushalal Mansighka (P.) Ltd. v. CIT [1967] 66 ITR 159. As it is the case of offshore supply of equipment, it is axiomatic that this transaction got completed outside India. Thus no income accrued to the assessee in India towards this transaction.*

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

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

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

ITA NO.2483/Mum./2022
Assessee's Appeal – A.Y. 2019–20

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

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

1. On the facts and circumstances of the case and in law, the Ld. AO erred in adding a sum of Rs 1,69,76,405/- out of receipts emanating from offshore supply of escalators and elevators to the total income of the Appellant.

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

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

Without Prejudice to above,

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

1. On the facts and circumstances of the case and in law, the Ld. AO erred in making an addition of Rs. 1,69,76,405/- to the total income of the Appellant in India.

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

General:

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

19. During the hearing, both parties agreed that the facts for the year under consideration are similar to the preceding assessment year. Since similar issues have been decided in assessee"s appeal being ITA No. 1679/Mum./2022, for the assessment year 2018–19, therefore, our findings/conclusion rendered in the said appeal shall apply *mutatis mutandis*. As a result, ground No. 1 raised in assessee"s appeal is allowed. While grounds no.2 raised on without prejudice basis is dismissed as infructuous.

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

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

Order pronounced in the open Court on 02/03/2023

Sd/-	**Sd/-**
G.S. PANNU	**SANDEEP SINGH KARHAIL**
PRESIDENT	**JUDICIAL MEMBER**

MUMBAI, DATED: 02/03/2023

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai