IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES 'L', MUMBAI

ITA No. 1318/Mum/2001
Asst. Year: 1997-98

THE JOINT COMMISSIONER OF INCOME TAX
SPECIAL RANGE 12, MUMBAI

Vs

M/s SIEMENS AKTIENGESELLSCHAFT
C/o A F FERGUSON & CO
MAKER TOWER 'E',
CUFFE PARADE, MUMBAI-400005
PAN NO: AABCS8516K

CO No. 151/Mum/2001
Asst. Year: 1997-98

M/s SIEMENS AKTIENGESELLSCHAFT
C/o A F FERGUSON & CO
MAKER TOWER 'E',
CUFFE PARADE, MUMBAI - 400005

Vs

THE JOINT COMMISSIONER OF INCOME TAX
SPECIAL RANGE 12, MUMBAI

R S Syal, AM and N V Vasudevan, JM

Dated: June 30, 2009

Appellant Rep by: Rajiv Nabar
Respondent Rep by: Percy Pardiwala

Income tax - Sec 9(1) (i) - Indo-German DTAA - assessee is a German supplier of telecom equipment - makes offshore supplies - provides after-sale support services through subsidiary company in India - taxability of business profits - whether income is taxable under the domestic law or is exempted under the DTAA?

The assessee a **German** Company had been executing various contracts through its PE in India for many decades. During the relevant year, the assessee was asked to furnish the details of the contracts executed by it in India for turnkey project, supplies and

services. Despite various reminders the assessee did not submit copies of the contracts executed in India. Copies of some contracts executed in India were collected by DCIT, Non-resident Circle, New Delhi which were transferred to the A.O. of the assessee. One such contract executed during the year was with BPL for execution of the Cellular Mobile Project on CIF basis for a total consideration of US$ 2,08,53,039, converted into Rs.74,57,04,674. In the absence of any information about the consideration in respect of other contracts, the A.O. estimated the same at Rs.10 crores. Thus the total turnover of the Indian projects was determined at Rs 84, 57, 04,674-. In response to the query as to why the profit be not computed under Rule 10, the assessee replied that it did not have any employees stationed in India for carrying out any activity on its behalf. It was further stated that some of its employees were deputed to Siemens Ltd. who were on their rolls under their supervision and control for the purposes of fulfilling of the obligations of the M/s. Siemens Limited, the Indian company. It was further clarified that all the onshore operations were the responsibility of the Indian company, who was engaged in ensuring supplies and the availability of know-how whenever required. It was further clarified that for such services, there was no separate recovery by the assessee company and the charges were recovered by the Indian company directly from the customers. It was thus stated that the assessee did not have any P. E. in India and hence no income was taxable. The Assessing Officer, relying on Article 7 of **Indo-Australia Treaty,** came to the conclusion that the assessee was present in India for more than many decades and further it had executed many contracts in India exceeding the period of six months. Even the contract with BPL Mobile was also found to have been executed for a period of far more than six months. The A.O. further noted that the assessee-company had taken full turnkey contract but assigned a part of it to its subsidiary M/s.Siemens Limited. He further took note of the fact that the assessee had sent its technicians for executing projects in India who were paid through their Indian subsidiary. In view of these facts it was held that the assessee had P.E. in India and its income from all contracts was taxable India. In the absence of any detail of expenditure, the profit earned was determined at 10% of the total turnover and thus the total business income was determined at Rs. 8, 45, 70,467 on this score.

In the first appeal, the CIT (A) observed that the A.O. had wrongly relied on DTAA with Australia, whereas the assessee was a German company. He further held that the contract between the assessee and BPL was for supply of equipment on principal to

principal basis and since the assessee did not have any P.E. in India, the question of supply of equipment being attributable to the P.E. did not arise.

On further appeal, it was argued by the Department that the goods were not supplied to BPL outside India as the assessee was under obligation to supply the equipment at Bombay on CIF basis, that that training was to be given in India for 15 working days for 5 trainees. It was argued that the income accrued to the assessee in India as per the regular provisions of the Act and further that since it had a TAC (Technical Assistance Centre)in Bombay, it meant having PE in India also and even going as per DTAA, the taxable business profits were to be determined on the basis of such PE in India.

The assessee contended that there was contract of the assessee with BPL for the supply of equipment only and the services in this regard were rendered by Siemens Ltd, the Indian company, which had received the income in its individual right and offered the same for tax in its own hands. That the AO had considered the **DTAA with France** for fixing the assessee's liability to tax, whereas the assessee was tax resident of Germany. It was submitted that the assessee did not have any taxable income from this contract as per Income-tax Act, 1961 and hence there was no question of going into DTAA with Germany. It was stated that the assessee had supplied the equipment to BPL outside India and the payment was also received outside India. It was pointed out that the ownership of equipment was to be delivered to the carrier at the port of the shipment and the equipment was to become the absolute property of the purchaser free from any encumbrances at the time of delivery at the port of shipment only. It was stated that the concept of CIF basis was not properly appreciated. That all the risks of loss or damages to the goods were to be borne by the seller until the property was delivered at the port of the shipment. The incurring of cost insurance and freight by the seller was only after the delivery of the property at the port of shipment to the buyer.

Held,

++ that the object of the DTAA is not to create any fresh tax liability if it is not there as per domestic law but to restrict it, if it exists and is permissible. If there is no tax liability as per domestic law then the DTAA cannot create it. The assessee received the payment outside India. The offshore supply of equipment from abroad, in common parlance, means that the supply of goods is made outside India. Ordinarily in such a

case, the Indian party opens a letter of credit and nominates a bank to issue irrevocable LOC favouring the foreign party. Equipment is handed over to ship and Bill of Lading etc are delivered to the nominated bank. With such delivery of bill of lading and other relevant documents, the property in goods passes to the Indian party and thus the sale of equipment is complete outside India. The local activity with respect to the installation was carried out by Siemens India Limited in their independent capacity.

++ that in a letter from the assessee to the A.O it is mentioned that the copies of invoices raised by the assessee were duly furnished and the copies of contract with Siemens India Limited was already with the A.O.Thus it cannot be said that the assessee had not furnished any information enabling the Assessing Officer to determine the correct income. It is settled legal position that the primary onus to produce the desired details/information, necessary for the assessment, is on the assessee. Once the needful is done and such information etc. is supplied, then the onus shifts on the assessing authority to controvert the assessee's stand. It becomes his duty to make out a case contrary to what has been stated, if he is not agreeable with the submissions and evidence advanced before him. Thereafter he cannot allege the existence of a fact contrary to record without specifically disproving the material before him.

++ that in the case of CIF contract, 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.

++ that where there is a transaction of sale between two parties on principal to principal basis, it cannot be held that there is any business connection which would attract the deeming provisions of section 9(1) (i).Even if there is a business connection of the non-resident in India, then also only that part of the income shall be deemed to accrue or arise in India which is relatable to the operations carried out in India.

++ that the AO went to estimate the further receipt at Rs. 10.00 crores without any material, worth the name to indicate, even remotely, that the assessee did earn any income from other contracts.

++ that the TAC (Technical Assistance Centre) is not there to carry out any repair on behalf of the assessee. Its role is to accept the defective parts from BPL and then ship it

back to the assessee for replacement or repair as the case may be. Further, it has been stated that the TAC is no organization of the assessee but in fact part of Siemens Ltd., the Indian concern, which has the obligation to render the services to BPL for consideration as per their separate contract.The assessee cannot be said to have any PE in India through the TAC in Bombay.

++ that no interest is chrgeable under section 234B.

++ that following the Tribunal's decision in assessee's own case, fees for technical services should be taxed on receipt basis.

ORDER

Per: R S Syal:

This appeal by the Revenue and cross objection by the assessee emanate from the order of the Commissioner of income tax (Appeals) on 18.12.2000 in relation to the assessment year 1997-98.

2. The first ground of the departmental appeal is against the direction given by the learned CIT(A) to delete the addition of Rs. 8,45,70,467 included as business income of the assessee. Briefly stated the facts of the case are that the assessee is a German Company. According to the Assessing Officer it had executed various contracts through its PE in India for many decades. The assessee was asked to furnish the details of the contracts executed by it in India for turnkey project, supplies and services. Despite various reminders the assessee did not submit copies of the contracts executed in India. Copies of some contracts executed in India were collected by DCIT, Non-resident Circle, New Delhi which were transferred to the A.O. of the assessee. According to that one contract was executed during the year with BPL Systems & Projects Limited (hereinafter referred to as the "BPL") for execution of the Cellular Mobile Project for the Bombay region on CIF basis for a total consideration of US$ 2,08,53,039. The A.O. noted that it

was performed by the Indian P.E. The assessee was asked to show cause as to why the profit of the above project should not be taxed since the project was performed by the Indian P.E. Despite various reminders, as per the AO, the assessee did not furnish any information. Its value in Indian rupees was converted into Rs.74,57,04,674. In the absence of any information about the consideration in respect of other contracts, the A.O. estimated this amount at Rs.10 crores. Thus the total turnover of the Indian projects, other than fees for technical services, was determined at Rs.84,57,04,674- In response to the query as to why the profit be not computed under Rule 10, the assessee replied vide its letter dated 15.3.2000, some part of which has been extracted in the assessment order, that it did not have any employees stationed in India for carrying out any activity on its behalf. It was further stated that some of its employee were deputed to Siemens Ltd. who were on their rolls under their supervision and control for the purposes of fulfilling of the obligations of the M/s. Siemens Limited, the Indian company. It was further clarified that all the onshore operations were the responsibility of the Indian company, who was engaged in ensuring supplies and the availability of know-how whenever required. It was further clarified that for such services, there was no separate recovery by the assessee company and the charges were recovered by the Indian company directly from the customers. It was thus stated that the assessee did not have any P.E. in India and hence no income was taxable. The Assessing Officer, relying on Article 7 of Indo-Australia Treaty, came to the conclusion that the assessee was present in India for more than many decades and further it had executed many contracts in India exceeding the period of six months. Even the contract with BPL Mobile was also found to have been executed for a period of far more than six months. The A.O. further noted that the assessee-company had taken full turnkey contract but assigned a part of it to its subsidiary M/s.Siemens Limited and another contract between Indian party was signed on 9.10.1995. He further took note of the fact that the assessee had sent its technicians

for executing projects in India who were paid through their Indian subsidiary. In view of these facts it was held that the assessee had P.E. in India and its income from all contracts was taxable India. In the absence of any detail of expenditure the profit earned was determined at 10% of the total turnover and thus the total business income was determined at Rs. 8,45,70,467 on this score. In the first appeal the learned CIT(A) overturned the assessment order on this issue by observing that the A.O. had wrongly relied on DTAA with Australia, whereas the assessee was a German company. He further took into consideration the contract dated 10.3.1995 entered into between the assessee and BPL which was for supply of equipment on principal to principal basis. He held that the assessee did not have any P.E. in India and hence the question of supply of equipment being attributable to the P.E. did not arise. He further referred to the new DTAA with Germany notified on 29.11.1996 which was to be applicable with effect from assessment year 1998-99 onwards. Considering the relevant clauses of DTAA, the learned CIT(A) opined that the assessee did not have any P.E. in India and hence no part of such income was chargeable to tax in India.

3. Before us the learned Departmental Representative contended that the assessee miserably failed to furnish relevant information/evidence at the assessment stage. While referring to the impugned order he submitted that the learned CIT(A) had not actually appreciated the facts in me light of the Treaty with Germany for determining precisely as to whether or not that the assessee had P.E. in India. It was further slated that neither the comments of the Assessing Officer were called for nor any remand report was sought and hence the learned CIT(A) fell in error in deciding the issue in assessee's favour in violation of Rule 46A. On the question of P.E. in India, the learned D.R. submitted that the Assessing Officer had specifically asked about the number of employees of the assessee who had come to India in the execution of the contract with

BPL for the purposes of ascertaining if the assessee had P.E. in India or not. No information was provided by the assessee. He further stated that the Assessing Officer had a copy of contract between the assessee and BPL but the contract between BPL and Siemens India Limited was not provided. While referring to the copy of contract between BPL and the assessee, he stated that Article I of the contract provides that the assessee was to deliver the equipment on CIF basis. While referring lo copy of invoice, he showed that BPL was billed on CIF Bombay basis. According to the learned D.R this invoice amply demonstrate that the goods were not supplied to BPL outside India as the assessee was under obligation to supply the equipment at Bombay on CIF (Cost Insurance and Freight) basis. While referring lo Annexure 2 to the contract between the assessee and BPL he stated that the services were to be rendered by the assessee in installation and bringing into operation / commissioning. He further invited our attention towards the equipment list which is part and parcel of the said contract dated 10.3.1995 to show that the training was to be given in India for 15 working days for 5 trainees. Then he referred to Annexure 7 dealing with warranty/repair programme for the Mobile Radio Network. While referring to clause 2 of Annexure 7, he submitted that BPL was to identify any defect in the unit and replace it with a operable module from the spare parts tools and ship it to the TAC 2 (Technical Assistance Centre) organization in Bombay. It was, therefore, suited that the assessee had its presence in India through TAC 2 Centre in Bombay, which clearly meant that there was a permanent establishment of the assessee in India. Further since the equipment was supplied on cost insurance freight basis at Bombay, it was submitted that the property in the equipment stood vested in BPL only in India and hence the income accrued in India. Thus it was summed up that [he income accrued to the assesses in India as pet the regular provisions of the Act and further since it had TAC in Bombay, it meant of having PE in India also and even going as per DTAA, the taxable business profits were to be determined on the basis of such

PE in India. It was further stated that as the assessee failed 10 furnish any information/evidence to the AO. it will be in the fitness of things if the matter is sent back to the AO for fresh computation of income.

4. Per contra the learned Counsel for the assessee contended that the ld CIT(A) had rightly held that the assessee did not have any P.E. in India. It was put forth that there was contract of the assessee with BPL for the supply of equipment only and the services in this regard were rendered by Siemens Ltd, the Indian company, which had received the income in its individual right and offered the same for tax in its own hands. It was reiterated that the assessee did not have any P.E. in India and hence the AO fell in error to hold so. He further argued that the AO had considered the DTAA with France for fixing the assessee's liability to tax, whereas the assessee was tax resident of Germany and only the DTAA with Germany was required to be examined. It was submitted that the assessee did not have any taxable income from this contract as per Income-tax Act, 1961 and hence there was no question of going into DTAA with Germany. It was stated that the assessee had supplied the equipment to BPL outside India and the payment was also received outside India. While referring to Article 15 of the contract dated 10.3.1995, he pointed out that the ownership of equipment was to be delivered to the carrier at the port of the shipment and the equipment was to become the absolute property of the purchaser free from any encumbrances at the time of delivery at the port of shipment only. Refuting the allegations of the learned D.R. that the properly in goods passed over to BPL in Bombay on me basis of quotation of CIF price, it was stated that the concept of CIF basis was not properly appreciated. While referring to INCO Terms, 1990, a copy of the relevant pages of which, has been placed in the paper book, he showed that all the risks of loss or damages to the goods were to be borne by the seller until the property was delivered at the port of the shipment. The incurring of cost

insurance and freight by the seller, in the opinion of the learned A.R., was only after the delivery of the property at the port of shipment to the buyer. He further stated that the assessee had entered into contract with BPL only for the supply of equipment and the offshore supply and rendering of the services was the responsibility of the Indian company i.e. Siemens India Limited. It was, therefore, submitted that the consideration staled in the contract dated 10th March. 1995 was only for the supply of equipment and not for supply of equipment offshore and there was no consideration included in this amount for the rendition of onshore services.

5. He further stated that the payment was also received by the assessee outside India as was apparent from Annexure 8 to the said contract The learned A.R. submitted that the income from offshore supply of equipment did not accrue or arise in India as per the judgement of the Hon'ble Supreme Court in the case of *Ishikawajma Harima Heavy Industries Ltd. Vs. Director of Income Tax [(2007) 288 ITR 408 (SC)]* = ***(2007-TIOL-03-SC-IT)***. He further referred to Instruction No. 1829 issued by the CBDT as per which profit from sale of equipment and material on FOB basis where the payment was made outside India would not be deemed to accrue or arise in India. In the light of the above facts he stated that there was no income which accrued to the assessee under the Income-tax Act, 1961. As regards the objection by the learned D.R. that the assessee had not supplied any information to the Assessing Officer, he placed on record a copy of the letter dated 15th March, 2000, which has also been incidentally referred to in assessment order, as per which the complete detail was made available. It was, therefore, stated that the Assessing Officer fell in error in coming to the conclusion that the assessee had P.E. in India. The sum and substance of the learned A.R's submission was that the assesses is not liable to tax under the regular provisions of the Income-tax Act, 1961 and further DTAA with Germany also does not fasten any liability on the

assessee in respect of offshore supply made by the assessee. It was further stated that the assesses had not earned any business income from any contract other than that with BPL which was not declared and hence the learned CIT(A) was justified in deleting the addition of Rs. 1 crore which was included in the total addition of Rs. 8.45 crores towards the estimated other contract receipt to the tune of Rs.10 crores.

6. We have heard the rival submissions and perused the relevant material on records. The first issue raised by the learned D.R. is that since the assessee has P.E. in India and hence income from supply of equipment should also be brought to tax. The contention of the Revenue in this part of the ground is that the provisions of DTAA will be attracted on the assesses as it has PE in India and hence the income will be taxable. In our considered opinion, this contention deserves the fate of rejection. Section 90(1) empowers the Central Government to enter into an contract with the Government of any country outside India for the granting of relief in respect of income on which have been paid both income-tax under this Act and income-tax in that country' etc. The logic behind the Agreement for the avoidance of double taxation of income is to allow relief to the assessee. If the income is taxable as per the domestic law, then the assessee can opt for the provisions of the DTAA for extincting or marginalizing the liability so created. If the income is not taxable and there does not exist any tax liability of the assessee as per the regular provisions of the Act, it is simple and plain that the DTAA cannot be invoked to create any such tax liability. The object of the DTAA is not to create any fresh tax liability if it is not there as per domestic law but to restrict it, if it exists and is permissible. If there is no tax liability as per domestic law then the DTAA cannot create it. The Hon'ble Supreme Court in the case of *Union of India and Anr. Vs. Azadi Bachao Andolan & Ant. [(2003) 263 ITR 706 (SC)]* = ***(2003-TIOL-13-SC-IT)*** has held to this extent. Similar view has been taken by the Hon'ble Bombay High Court in the case of *CIT Vs. Siemens*

Aktiongesellschaft [(2009) 310 ITR 320 (Bom.)] = ***(2008-TIOL-569-HC-MUM-IT)***. Circular no. 333 dated 2.4.1982 also lays down accordingly. Hence we have to first determine whether there is any tax liability of the assessee under the regular provisions of the Act.

7. Section 4, which is a charging section provides that where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, income-tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of this Act in respect of the total income of the previous year of every person. Section 5(2) deals with the scope of total income of non-residents and provides that subject to the provisions of the Act the total income of non-resident includes income from whatever sources which is received at is in India during such year. Now we will examine if any income was received by the in India during such year. Now we will examine if any income was received by the assessee in India or accrued to it in India. Thereafter we shall see if the deeming provisions of receipt or accrual are applicable.

8. As regards the mode of payment, the relevant governing clause is Article 6 of the contract along with Annexure 8. Clause 3.0 of the Annexure 8 provides for the payment outside India in the following words:-

"3.0 Payments by telegraphic bank transfer by PURCHASER to CONTRACTOR shall be made in United States Dollar only and to the account # 2013100 with Deutsche Bank AG, Munich Branch with reference to OEN MN KV 2. The PURCHASER shall provide the CONTRACTOR by telefax transfer details (e.g. amount, date, corresponding bank) not later than 24 hours after having taken the transfer."

A cursory look at the above clause clearly indicates that the assessee received the payment outside India. Thus it can be seen that the assessee did not receive any income in India.

9. Now let us examine the facts of the instant case to determine if any income accrued to the assesses in India on account of this transaction. From the narration of the above facts it is clear that the assessee entered into contract with BPL for the supply of equipment on offshore basis. The offshore supply of equipment from abroad, in common parlance, means that the supply of goods is made outside India. Ordinarily in such a case, the Indian party opens a letter of credit and nominates a bank to issue irrevocable LOC favouring the foreign party. Equipment is handed over to ship and Bill of Lading etc are delivered to the nominated bank. With such delivery of bill of lading and other relevant documents, the properly in goods passes to the Indian party and thus the sale of equipment is complete outside India. The case of the assessee is that the consideration of 2,08,53,039 US$ is only for the supply of equipment to BPL and at the same time the installation was to be carried out by Siemens India Limited in their independent capacity. The Assessing Officer has laid a lot of stress on the non-cooperative altitude of the assessee by mentioning that no information was furnished. The ld. DR has also reiterated the same position before us. On the contrary we find that it is not the case of a non-supportive assessee as has come up from the assessee's letter dated 15.3.2000 which has cleared the dust over such allegations. This letter, a part of which has been reproduced in the assessment order, unequivocally states that the local activity with respect to the installation was carried out by Siemens India Limited in their independent capacity. Apart from that it is also mentioned in this letter that the copies of invoices raised by the assessee were duly furnished and the copies of contract with Siemens India Limited was already with the A.O. Thus it cannot be said that the

assessee had not furnished any information enabling the Assessing Officer to determine the correct income. It is settled legal positron that the primary onus to produce the desired details/information, necessary for the assessment, is on the assessee. Once the needful is done and such information etc. is supplied, then the onus shifts on the assessing authority to controvert the assessee's stand. It becomes his duty to make out a case contrary to what has been stated, if he is not agreeable with the submissions and evidence advanced before him. Thereafter he cannot allege the existence of a fact contrary to record without specifically disproving the material before him. Coming back to the facts of the instant case, it is noted that the assessee specifically stated, on the basis of contract with BPL, copy of which was available with the AO, that the local activity with respect to the installation was the duty of Siemens India Limited in their independent capacity. The learned Senior A.R. stated at the Bar that the consideration received by Siemens India Limited was duly offered for taxation by them in their return of income, which has been accepted by the Revenue. Neither the A.O. nor the learned DR has adversely commented on this submission. Further no material has been brought on record to demonstrate that the position so stated is not correct. Thus it becomes clear that the assessee only had supplied the equipment to BPL for the stated consideration offshore and no part of it relates to any onshore supply or onshore services.

10. It will be relevant to consider the judgment of the Hon'ble Supreme Court in the case of *Ishikawajma Harima heavy Industries Ltd. Vs. Director of Income Tax [(2007) 288 ITR 408 (SC)]* = ***(2007-TIOL-03-SC-IT).*** which has been heavily relied on behalf of the assessee. In this case the assessee was a resident of Japan. It was to develop, design, engineer and procure equipments and material supplies etc. to erect and construct storage ranks of 5 MMTPA capacity. The project was to be completed in 41 months. The contract involved (i) offshore supply, (ii) offshore services, (iii) onshore supply, (iv)

onshore services and (v) construction and erection. The price was payable for offshore supply and offshore services in US dollar and that of onshore supply and onshore services and construction and erection partly in US dollar and partly in Indian rupees. It filed an application before the Authority for Advance Rulings for determination of its tax liability with reference to *"offshore supply and offshore services"*. No issue was raised as regards the liability to pay Income-tax on onshore supply and onshore services and its activity relating to construction and erection. It was contended before the Authority that the contract was a divisible one and hence there was no liability to pay tax in regard to offshore supply and offshore services. The Authority opined that the assessee was liable to pay direct taxes by considering the provisions of section 5 r.w.s. 9 as well as DTAA. The Hon'ble Supreme Court held that the onshore supply and onshore services together with construction did contain element of income and hence tax was payable in India which was not disputed by the assessee as well. However as regards the taxation of the price of goods supplied by way of offshore supply and consideration for rendition of services, the Hon'ble Court opined that the contract was a composite arrangement. It noted that price was given differently for each of these segments. Even though it was a composite contract, the Hon'ble Supreme Court held that the offshore supply of equipments and the offshore services rendered by the assessee did not fall within the purview of section 9(1)(vii) since the entire services were rendered outside India. It was further held that the permanent establishment of the assessee had no role to play in the transaction.

11. Reverting to the facts of the instant case we find that Article 15 of the contract dated 10.03.1995 with title *'Ownership of equipment'* unequivocally states as under:

15.01 Without prejudice to the PURCHASER'S rights and remedies under this Contract, each item acquired by she VENDOR and or allocated by the VENDOR to the Equipment

orders placed under this Contract, shall west in and become absolute property of the PURCHASER free from all encumbrances when it is delivered to the Carrier at the port of shipment"

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 cots 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 slates that Subject to the provisions of B.5, bear all risks of lots 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 stales 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.'

13. 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 the when the assesses 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 low 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 Summit Court in *Seth Pushalal Mansighka (P) Ltd. VS. CIT (1967) 66 ITR 159 (SC).* 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.

14. Now let us examine if there is an deemed receipt or accrual of income to the assessee in India. Clause (a) of section 5(2) encompasses the income which is 'received or is deemed to be received in India' in the relevant year. The expression 'Income deemed to be received' in India has been defined in section 7 of the Act, which refers to the annual accretion in the previous year to the balance at the credit of an employee participating in a recognized provident fund etc. It is apparent that the nature of amount under consideration is quite distinct from the items specified in this section. Then clause (b) of sub-section (2) talks of income which 'accrues or arises or is deemed to accrue or arise in India'. Section 9 enlists certain items of incomes which are 'deemed to accrue or arise in India'. Sub-section (1) has clauses from (i) to (vii). The amount for the supply of

offshore equipments cannot be in the nature of salaries', dividend, interest, royalty or fees for technical services, which items of income have been specifically dealt with in clauses (ii) to (vii) of section 9(1). Hence we are left with examining the applicability or otherwise of clause (i) of section 9(1). This provision states that all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India or through or from any asset or source of income in India or through the transfer of a capital asset situated in India shall be deemed to accrue or arise in India. As it is the case of sale of equipment to the Indian party, possibly only the "business connection' needs to be probed in as the applicability of the other components of clause (i) is manifestly ruled out. Now we will concentrate on examining if the assesses, as a result of this transaction, can be said to have any business connection in India so as to attract section 9(1). At this stage it will be pertinent to mention, even at the cost of repetition, that the assesses received the payment in the previous year relevant to the assessment year under consideration only towards supply of equipment and no part of it relates to indigenous or offshore services. We have to decide whether such offshore sale of equipment by non-resident attracts any taxability on that count. It is true that the assessee sold the equipment to on Indian party. But this in itself is not sufficients prove that the assessee had a 'Business connection' in India and thus the profit from the sale should be brought to tax. Here is a case in which the offshore supply of the equipment was made and thus the property in goods passed to the buyer in the foreign country; payment was received by the assessee in foreign country. It is correct that the business connection is a commercial connection, but all the commercial connections are not necessarily business connections unless the commercial connection is really and intimately connected with the business activity of the non resident in the taxable territories. In our considered opinion the mere fact that the assessee effected sale of equipment lo an Indian party, in itself, cannot be construed

as resulting into any business connection in India. The Hon'ble Supreme Court considered almost similar circumstances in *CIT VS. R.D. Aggarwal & Co. & Anr (1965) 56 ITR 20 (SC)* **= (2002-TIOL-581-SC-IT-LB).** It was held by their Lordships that there was no business connection, it has been explained that "business connection" predicates an element of continuity between the business of the non-resident and the activity in the taxable territories. A stray or isolated transaction has been held to be not normally regarded as business connection Where contract for sale of goods took place outside the taxable territories, the price received by the non-resident Indian outside that taxable territories and the delivery was given also at the outside taxable territories, the Hon'ble Supreme Court held that this would not result into business connection. Where there is a transaction of sale between two parties on principal to principal basis, it cannot be held that there is any business connection which would attract the deeming provisions of section 9(1)(i).

15. Further Explanation 1(a) to section 9(1) provides that for the purposes of this clause, in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India. From this Explanation, it is further amply clear that even if there is a business connection of the non-resident in India, then also only that part of the income shall be deemed to accrue or arise in India which is relatable to the operations carried out in India. So even if we presume for a moment, with which we do not agree, that there was any business connection of the assessee in India, still in the absence of any operations carried on by the assessee in India in this regard, there cannot be any question of brining the case within the ambit of section 9(1). It is pertinent to mention that the assessee categorically stated before the A.O. that the local activity with reference to

installation was carried out by Siemens Limited in their independent capacity, it has further been claimed that income from such services has been duly offered for taxation by the Indian company, which has not been disputed by the learned D.R.

16. We, therefore, hold that no part of the income as relatable to the sale of assessee in India within the meaning of section 9.

17. This position has been accepted by the CBDT also vide Circular No.23 dated 23.7.1969. Para 3 of the Circular reads as under:-

"3. The following clarifications would be found useful in deciding questions regarding the applicability of the provisions of s. 9 in certain specific situations:

I. Non-resident exporter selling goods from abroad to Indian importer. - (i) No liability will arise on accrual basis to the nonresident on the profits made by him where the transactions of sale between the two parties are on a principal to principal basis. In all cases, the real relationship between the parties has to be looked into on the basis of an contract existing between then but where:

(a) the purchases made by the resident are outright on his own account.

(b) the transactions between the resident and the non-resident are made at arm's length and at prices which would be normally chargeable to other customers.

(c) the non-resident exercises no control over the business of the resident and sales are made by the latter on his own account, or

(d) the payment to the non-resident is made on delivery of documents and is not dependent in any way of the sales to be effected

if can be inferred that the transactions are on the basis of principal to principal.

(ii) A question may arise in the above type of cases whether there is any liability of the non-resident under s.5(1) of the IT Act, 1961, on the basis of receipt of sale proceeds including the profits in India. If the non-resident makes over the shipping documents to a bank in his own country which discounts the documents and sends them for collection to the bankers in India, who present the sight or usance draft to the resident importer and deliver the documents to him against payment or acceptance by the latter, the non-resident will not be liable to tax on the profit arising out of the sales on receipt basis. Even if the shipping documents are not discounted in the foreign country, but are handed over in India against payment or acceptance, no portion of the profits will be chargeable to tax under the IT Act, if this is the only operation carried on in India on behalf of the nonresident. "

18. Circular No. 786 dated 7.2.2000 further clarifies the position qua commission and charges payable for services rendered outside India. It has been explained that no tax is deductible u/s.195 on the export commission and other related charges payable to non-resident for services rendered outside India. In this Circular the afore-noted Circular no. 23 dated 23.7.1969 has also been duly considered.

19. On going through the above Circular and legal position it is clearly borne out that a sum of Rs.74.57 crores represents the consideration for the exclusive supply of offshore equipment, which cannot be considered as leading to any taxable income resulting in the hands of the assessee. As regards the other alleged receipt of Rs.10 crores considered by the A.O. we find that the assessee categorically stated before the Assessing Officer that there was no such other contract from which business income could be said to have been earned by the assessee. The reference to three contracts is in respect of fees for

technical services which was separately offered for taxation voluntarily by the assessee. The AO went to estimate the further receipt at Rs. 10.00 crores without any material, worth the name, in his hands to indicate, even remotely, that the assessee did earn any income from other contracts. The view of the ld. CIT(A) in ignoring Rs. 10.00 crores is, therefore, upheld. As far as the remaining amount of Rs. 74.57 crores is concerned, we have noted above that no income on this score is received or is deemed to be received or accrues or arises or is deemed to accrue or arise in India to the assessee. Hence there cannot be fastened any tax liability on the assessee as it is outside the scope of total income as per section 5(2).

20. The other contention of the ld. DR that the assessee had its presence in India through TAC 2 (Technical Assistance Centre) organization in Bombay, is primarily material for determining whether or not the assessee has P.E. in India. As we are examining the case on the basis of taxability under the IT Act, 1961, there is no need to examine it further. Be that as it may, in order to provide completeness to the order, we will deal with this contention also. The ld. DR has relied on clause 2.1 of the contract with BPL, which is as follows :-

"2.1 Procedure

Customer shall identify the unit alleged to be defective, replace it by on operable module from the spare parts pool and ship it to the TAC 2 organisation in Bombay, packed in a manner to prevent damage. In order to avoid any delay of the repair procedure a completed dispatch note with a detailed fault description shall be attached.

Siemens shall at its discretion either repair or replace any defective boards.

Manufacture repaired or replacement boards and modules will be returned to the VENDOR and will be ready for shipment ex works within forty (40) working days of receipt at the repair centre."

21. The ld AR, in reply, stated that the assessee was supplied spare parts with additional specific charge as per the contract and the reference to TAC 2 is not for carrying out any repair in India but the office of the sister concern and that too only for the purposes of shipment in India. From the contract with BPL, we have seen that there is additional charge for the spare parts to ensure that the work of the customer does not come to halt, in case there arises some technical problem with any of the parts of the equipment. Further as is evident from the above clause that the TAC is not there to carry out any repair on behalf of the assessee. Its role is to accept the defective parts from BPL and then ship it back to the assessee for replacement or repair as the case may be. Further it has been stated that the TAC is no organization of the assessee but in fact part of Siemens Ltd., the Indian concern, which has the obligation to render the services to BPL for consideration as per their separate contract. Thus it is seen that the assessee cannot be said to have any P.E in India through the TAC 2 Bombay.

22. Since the assessee is not liable to tax in the instant case in respect of offshore supply of equipments as par the regular provisions of the IT Act, 1961, in out considered view there is no need to ascertain or fix any taxability as per DTAA.

23. This ground is, therefore, not allowed.

24. The second ground taken by the Revenue is against the chargeability of interest u/s. 234B. The Assessing Officer charged interest under this section. The learned CIT(A) held that the assessee could not be subjected to interest as it was not liable to pay

advance tax. After considering the rival submissions and perusing the relevant material on record we observe that section 195 provides that any person responsible for paying to a non-resident, any sum chargeable under the provisions of this Act, shall at the time of credit of such income to the account of the payee or at the time of payment thereof, deduct income-tax thereon at the rates in force. The assessee in the instant case is a non-resident and hence any person responsible for paying to it is under obligation for deducting tax at source if income is chargeable to tax under the Act. Section 208 provides that the advance tax shall be payable during a financial year in every case where the amount of such tax payable by the assessee during that year is five thousand rupees or more. Section 209(1)(d) states that the income-tax calculated under clauses (a) to (c) shall be reduced by the amount of income tax which would be deductible at source during the said financial year under any provision of this Act from any income. By virtus of section 195 all the payments made to the assessee are subjected to deduction of tax at source. Under these circumstances, the assessee cannot be said to have committed any default in not paying the advance tax for which the liability to pay interest u/s 234B could be fastened on it. Our view is fortified by the Special Bench order of the Tribunal in *Motorola Inc. Vs. DCIT [(2005) 95 ITD 269 (Del.) (SB)* = ***(2005-TIOL-103-ITAT-DEL-SB),*** which stands impliedly affirmed by the Hon'ble jurisdictional High Court in *D.I (International Taxation) Vs. NGC Network Asia Ltd. (2009) 222 CTR 86 (Bom)* = ***(2009-TIOL-43-HC-MUM-IT).*** Respectfully following the precedent, we accept the opinion of the learned CIT(A) on this count in ordering to delete the levy of interest u/s.234B. This ground, also fails.

25. The first ground or the assessee's cross objection is that if the department ground No.1 is allowed, then the learned CIT(A) be directed to deal with the alternative

contentions raised before him. Since we have already dismissed Ground No.1 of the Revenue's appeal, this ground becomes infructuous.

26. Ground No.2 is against the bringing to tax the tees for technical services on accrual basis. The assessee disclosed the fees for technical services on receipt basis. The A.O. has recorded that the royalty and tees for technical services was to be recognized on accrual basis. The learned CIT(A) observed that the Special bench of the Tribunal in assessee's own case in assessment year 1980-81 had held that the such income should be taxed on accrual basis. Therefore, he did not accept the assessee's contention that paragraphs 3 and 4 of Article VIIIA of the DTAA require the taxation on receipt basis. The view of the Assessing Officer was, therefore, upheld.

27. We have heard the rival submissions and perused the relevant material on record. It is noted that in assessment year 1980-81 the Tribunal decided the issue against the assessee by holding that royalty and fees for technical services should be accounted for on accrual basis. Thereafter the language employed by Article VIIIA of DTAA was considered which implied that the royalty and fees for technical services should be reckoned for taxation only when it is received and not otherwise. Considering this position the Tribunal in assessee's own case for assessee's favour by holding that royalty and fees for technical services was to be assessee's favour by holding that royalty and fees for technical services was to be considered on receipt basis and not accrual basis. Recently the Tribunal in assessee's own case for assessment year 2001-2002 has reiterated the same view by following the afore-noted earlier year's order in assessee's favour. The order of the learned CIT(A), being not in conformity with the latter view of the Tribunal, needs to be overturned. We, therefore, direct that the fees for technical services should be taxed only on receipt basis as offered by the assessee and not on accrual basis. This ground is allowed.

28. In the result, the appeal of the Revenue is dismissed and the cross objection of the assessee is allowed.

(Order pronounced on this 30.6.2009)