IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATE: 12-01-2009
CORAM:
THE HONOURABLE MRS. JUSTICE PRABHA SRIDEVAN
AND
THE HONOURABLE MR. JUSTICE K. K. SASIDHARAN
Tax Case No.1303 of 2007
M/s. Ansaldo Energia SPA
Represented by its Authorised Signatory
Mr. Lorenzo Pesenti
TPL House, II Floor
No.3, Cenotaph Road
Teynampet, Chennai 600 018 ... Appellant

Vs.

1. The Income Tax Appellate Tribunal
Chennai Bench "A"
Shastri Bhavan
Haddows Road
Chennai 600 006

2. The Commissioner of Income Tax (Appeals) XI
Uttamar Gandhi Salai
Nungambakkam
Chennai 600 034

3. The Assistant Director of Income Tax
International Taxation
121, Uttamar Gandhi Salai
Chennai 600 034 ... Respondents

Tax Cases (Appeal) filed under Section 260-A of the Income Tax Act 1961 against the order of the Income Tax Appellate Tribunal (Chennai Bench "A") in I.T.A.No.411/Mds/2006 dated 25-05-2007.

For petitioner : **Mr. N.Venkataraman, Senior Counsel**
For respondent : Ms. Pushya Sitaraman
Senior Standing Counsel for Income Tax

JUDGMENT
(PRABHA SRIDEVAN,J.)

The assessee is a non-resident Company; its business consists inter alia of selling and setting of power plants. In 1995, with the necessary statutory approvals the assessee set up a company in India called Ansaldo Services Private Ltd. (ASPL hereafter). In

1997, the Neyveli Lignite Corporation (NLC in short) floated a single-bid tender for its expansion plan of setting up two thermal plants at Neyveli. The assessee applied for the bid in response to NLC's advertisement. It did so as a single bidder.

2. According to the assessee, it had communicated to NLC right from the beginning that NLC should award the Indian portions of the turnkey contract to other legal entities to be selected by the assessee. According to the assessee, this condition was imposed since the assessee had no business persons in India. ***The assessee assured NLC that it would take the overall responsibility of the entire turnkey contract in its capacity as a single bidder. After the technical and financial evaluation of the bids, NLC awarded the turnkey contract to the assessee on a single bidder basis.***

3. Thereafter, the contract was divided into four contracts. ***Contract I dealt with the off shore supply of equipments along with designing and engineering (Contract price DM 224,40028). Contract II dealt with the offshore services of supervision of erection, testing and commissioning (Contract price DM 197,900.00). Contract III dealt with the onshore supply of equipments executed by ASPL (contract price Rs.270,08,46,700/-). Contract IV Civil Construction, Erection, Testing and the Commissioning. (Contract price Rs.277,53,29,495/-).***

4. ***Contract III and Contract IV which dealt with the on-shore supply and on-shore services were loss making contracts. The income on Contract II has been offered to tax at 20%. With regard to Contract I, the income on designing and engineering has been offered to tax at 20%. This appeal is therefore restricted to the taxability of the income on offshore supply of equipments.***

5. The assessing officer treated the receipts as fees for technical services and quantified the tax accordingly. On appeal, the Commissioner of Income-Tax (Appeals)-XI (CIT in short) found that the consideration under Contract I was intended to provide a cushion; and to achieve this, the value of each contract was unilaterally fixed by the assessee; and that neither NLC nor ASPL had any say in the matter. ***CIT (Appeals) found that "the entire nature of the contract, the terms involved and the conduct of the parties clearly show that only for the tax purposes, the contract was split up." He found that there is uniformity of control in respect of all the four contracts, and that the price of Contract I and II is likely to be loaded higher, to take care of the other responsibilities and risks of the assessee with respect to Contract III and IV on account of the single bidder responsibility.*** The CIT (Appeals) found that there was a "permanent establishment" and also that there was a "business connection". The CIT (Appeals) estimated the profits on the entire project taking into consideration the losses of contract III and IV and also profit attributable to Permanent Establishment('PE' in short).

6. The aggrieved assessee went before the Tribunal. ***The Tribunal took the view that the contract in question was a composite contract, that the assessee had a common site in the premises of ASPL and had absolute control and management for all contracts and that, there was a permanent establishment in India, and also "that there existed a business connection with ASPL." The Tribunal held that,***

"Taking into consideration the entire conspectus of the case, we are of the opinion that ASPL was a facade created for the purpose of taxation ex consequent its corporate veil be lifted for consolidating the four contracts."

The Tribunal, however, did not agree with CIT in its estimation of profits. ***The Tribunal held that for the activities which are not conducted in India, tax cannot be levied in India***. The Tribunal agreed with the estimation made by the CIT that only 25% of activity could have been done outside India particularly in view of the various clauses of contract I indicating that many plant and equipment were fabricated in India also. ***Then by taking into account the profit margins of similar companies for the year 2002, the Tribunal directed that the profit shall be taxed at 7% in the context of contracts I, III and IV and that with regard to contract I, 7% profit shall be taken in relation to 75% receipts only, as balance receipts can be attributed towards activities conducted outside India. This order is under challenge here.***

7. The substantial questions of law that arise for consideration in this tax case (appeal) is as follows:

"1. Whether on facts and circumstances of the case, the Tribunal erred in not applying the ratio of the Honourable Apex Court in the case of IHHI case especially when the tests laid down by the Apex Court namely (a) passing of property outside India (b) payment of consideration outside India have been clearly satisfied?

2. Whether on facts and circumstances of the case the Tribunal is right in holding that the 75 percent of the offshore supply activities have happened in India given the fact that the entire manufacturing activity has happened outside India which has not been disputed by the ITAT?

8. The learned Senior Counsel appearing for the assessee would submit that in view of 2007 (288) ITR 408 (SC) (Ishikawajima-Harima Heavy Industries Ltd., Vs. Director of Income-tax, Mumbai (IHHI in short), all the questions must be answered in favour of the assessee. He submitted that factually there is no evidence that there is "a business connection" or "a permanent establishment in India". When contracts III and IV are loss making contracts the whole contract cannot still be estimated for profits**.** ***The learned senior counsel submitted that the finding that ASPL is a facade or a dummy company is incorrect***. It had entered into contracts with other parties even prior to the contract with NLC. ***The clause relating to transfer of title in the present case is identical to the one in IHHI . The fact that the contract was entered into in India is not relevant. What is relevant is when the title to the goods supplied offshore passed to NLC. When the supply was effected outside India and the consideration was paid outside India, the ratio in IHHI case would clearly apply. The learned Senior Counsel submitted that if ASPL is only a facade, then there could be no business connection. As in IHHI , the different components of the contract had been segregated and compartmentalised, so only that income that arose in India can be taxed. There is absolutely no finding that the business connection or the permanent establishment had any role to play insofar as contract I is concerned. The learned Senior counsel submitted that the consideration in the other three contracts could not have been loaded on to Contract I, nor could Contract I be so drafted as to provide a cushion, since NLC is a statutory corporation and subject to audit and it cannot enter into sham***

transactions. In any event, when dealing with a statutory corporation like NLC the appellant cannot fix the value of the contract unilaterally ***and there is no scope for manipulation of the prices.*** Each contract was signed by the parties to the contract. ***The learned Senior Counsel relied on Section 114 of the Evidence Act for raising the presumption regrding official acts.***

9. The learned Senior Standing Counsel submitted that the Tribunal was right in its findings. She submitted that the CIT had on the basis of the evidence concluded that "there was a permanent estab lishment" and a "business connection". These factual findings cannot be lightly disturbed. ***She also submitted that there are major differences on facts between IHHI and this case. There, the Contractor was a consortium consisting of several equal players and the consideration was fixed by the consortium. Here the second contractor namely ASPL had no independent say in settling contract III and IV and it had "signed on the dotted lines" as directed by the assessee. What was conceived was a single contract. There was only a single bidder. There would have been only a single contract with, may be sub-contractors, but for tax purposes or other reasons, it was split up into four contracts.*** While discounts were given for contracts II, III and IV no discount was given to contract I. The learned Senior Standing counsel relied on [2007] 291 ITR 482 (Commissioner Income-Tax and another Vs. Hyundai Heavy Industries Co. Ltd.). ***The learned Senior Standing Counsel submitted that there is no doubt that for the income on offshore supply outside India no tax could be levied. In this case, because of the permanent establishment and business connection, a percentage of the profits on contract fell under Section 9 of the Income Tax Act and were held to be 'deemed income'. So the authorities made an estimate of this. The learned Senior Standing Counsel also submitted that the clause in this contract relating to passing of title was different from the clause in IHHI case.*** The learned Senior Standing Counsel submitted that no substantial question of law arose for consideration. ***Written submissions were also filed by both sides.***

10. Article 5(j) of DTAA defines what "permanent establishment is,

(i) For the purpose of this convention, the term Permanent Establishment means a fixed place of business through which the business of the enterprises is wholly or partly carried on

(ii) The term Permanent Establishment includes especially

(a) to (l).....

(j) a building site or construction, installation or assembly project or supervisory, activities in connection therewith, where such site, project or activities (together with other such sites, project or activities, if any) continues for a period of more than 6 months or when such project or supervisory activity, being incidental to sale of machinery or equipment, continues for a period not exceeding 6 months and the charges payable for the project or supervisory activity exceed 10% of the sale price of the machinery and equipment."

11. As regards 'business connection' Section 9(1)(i) of the Income Tax Act states that "all income accruing or arising, through or from any business connection in

India is to be subjected to tax under the Act." ***That is there should be (a) a business in India (b) a connection between the assessee and the business (c) the assessee must have directly or indirectly earned income by virtue of or through that connection.***

12. Since the IHHI case was relied on, we will extract the relevant paragraphs.

"The appellant there was a Company incorporated in Japan, a resident of the country, and assessed to tax in that country. It was engaged, inter alia, in the business of construction of storage tanks as also engineering etc. It formed a consortium along with other Corporations and entered into an agreement with Petronet LNG Limited for setting up a LNG storage and degasification facility at Dahej. The role and responsibility of each member of the consortium was specified separately. Each of the members of the consortium was also to receive separate payments. The project was to be completed in 41 months. The contract indisputably 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 dollars, whereas for onshore supply and also onshore services and construction and erection partly in US dollars and partly in Indian rupees. .....Before the Authority the issue raised was not with regard to the on-shore components but only with regard to the off shore components. The Authority held that the amount that is receivable from Petronet in respect of off shore supply of equipment, materials, etc., is liable to tax in India under the provisions of the Income-tax Act, 1961. The matter was taken to the Supreme Court. .....

One of the crucial factors that has to be decided relates to passing of title to the goods supplied in the following terms:

22.1. Title to equipment and materials and contractor s equipment Contractor agrees that title to all equipment and materials shall pass to owner from the supplier or sub-contractor pursuant to Section E of Exhibit H (General Project Requirements and Procedures). Contractor shall, however, retain care, custody, and control of such equipment and materials and exercise due care thereof until (a) provisional acceptance of the work, or (b) termination of this contract, whichever shall first occur. Such transfer of title shall in no way affect owner s rights under any other provision of this contract.

Notes

General

1. * * *

2. Offshore supply (Exhibit D-2.1) is the price of equipment and material (including cost of engineering, if any, involved in the manufacture of such equipment and material) supplied from outside India on CFR basis, and the property therein shall pass on to the owner on high seas for permanent incorporation in the works, in accordance with the provisions of the contract.

32. The contract indisputably was executed in India. By entering into a contract in India, although parts thereof will have to be carried out outside India would not make the entire income derived by the contractor to be taxable in India. .....

34. It is not in dispute that title in the equipments supplied was to stand transferred upon delivery thereof outside India on high-sea basis as provided for in Article 22.1. Similarly, Article 13.1 provides for a lump sum contract price, whereas Article 13.3.2 specifically refers to the cost of offshore supplies. The provisions with regard to offshore supplies and offshore services were to be read with the provisions contained in Ext. D which formed the basis of customs duty. Clause 13.4 refers to Ext. D as the basis for price escalation. ...

39. Territorial nexus doctrine, thus, plays an important part in assessment of tax. Tax is levied on one transaction where the operations which may give rise to income may take place partly in one territory and partly in another. The question which would fall for our consideration is as to whether the income that arises out of the said transaction would be required to be proportioned to each of the territories or not. ...

40. Income arising out of operation in more than one jurisdiction would have territorial nexus with each of the jurisdiction on actual basis. If that be so, it may not be correct to contend that the entire income accrues or arises in each of the jurisdiction. The Authority has proceeded on the basis that supplies in question had taken place offshore. It, however, has rendered its opinion on the premise that offshore supplies or offshore services were intimately connected with the turnkey project. ...

62. In CIT v. Mitsui Engg. and Ship Building Co. Ltd.16 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.

63. 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.

64. The principle of apportionment is also recognised by clause (a) of Explanation 1. Thus, if submission of the learned Additional Solicitor General is accepted that the contract is a composite one, then offshore supply would be of equipment designed and manufactured in one territory (Japan), and then sold in another tax territory, leading to division of profits arising in two tax territories, which is not envisaged under our taxation law.

65. It gives rise to the question as to what would be the meaning of the phrase business connection in India . Mere existence of business connection may not result in income of the non-resident assessee from transaction with such a business connection accruing or arising in India....

79. Since the appellant carries on business in India through a permanent establishment, they clearly fall out of the applicability of Article 12(5) of DTAA and into the ambit of Article 7. The Protocol to DTAA, in para 6, discusses the involvement of the permanent establishment in transactions, in order to determine the extent of income that can be taxed. It is stated that the term directly or indirectly attributable indicates the income that shall be regarded on the basis of the extent appropriate to the part played by the permanent establishment in those transactions. The permanent establishment here has had no role to play in the transaction that is sought to be taxed, since the transaction took place abroad.

80. Clause 1 of Article 7, thus, provides that if an income arises in Japan (contracting State), it shall be taxable in that country unless the enterprise carries on business in the other contracting State (India) through a permanent establishment situated therein. What is to be taxed is profit of the enterprise in India, but only so much of them as is directly or indirectly attributable to that permanent establishment. All income arising out of the turnkey project would not, therefore, be assessable in India, only because the assessee has a permanent establishment. ...

84. The distinction between the existence of a business connection and the income accruing or arising out of such business connection is clear and explicit. In the present case, the permanent establishment s non-involvement in this transaction excludes it from being a part of the cause of the income itself, and thus there is no business connection.

85. Article 5.3 provides that a person is regarded as having a permanent establishment if he carries on construction and installation activities in a contracting State only if the said activities are carried out for more than six months. Para 6 of the Protocol to India-Japan Tax Treaty also provides that only income arising from activities wherein the permanent establishment has been involved can be said to be attributable to the permanent establishment. It gives rise to two questions, firstly, offshore services are rendered outside India; the permanent establishment would have no role to play in respect thereto in the earning of the said income. Secondly, entire services having been rendered outside India, the income arising therefrom cannot be attributable to the permanent establishment so as to bring within the charge of tax. ...

87. In cases such as this, where different severable parts of the composite contract are 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, it is essential to determine the taxability of various operations.

88. Therefore, in our opinion, the concepts of profits of business connection and permanent establishment should not be mixed up. Whereas business connection is relevant for the purpose of application of Section 9; the concept of permanent

establishment is relevant for assessing the income of a non-resident under DTAA. There, however, may be a case where there can be overlapping of income; but we are not concerned with such a situation. The entire transaction having been completed on the high seas, the profits on sale did not arise in India, as has been contended by the appellant. Thus, having been excluded from the scope of taxation under the Act, the application of the Double Taxation Treaty would not arise. The Double Taxation Treaty, however, was taken recourse to by the appellant only by way of an alternate submission on income from services and not in relation to the tax of offshore supply of goods."

Finally, we have the Supreme Court's conclusion with regard to offshore supply which alone is relevant to us.

"(A) Re: Offshore supply

(1) That only such part of the income, as is attributable to the operations carried out in India can be taxed in India.

(2) Since all parts of the transaction in question i.e. the transfer of property in goods as well as the payment, were carried on outside the Indian soil, the transaction could not have been taxed in India.

(3) The principle of apportionment, wherein the territorial jurisdiction of a particular State determines its capacity to tax an event, has to be followed.

(4) The fact that the contract was signed in India is of no material consequence, since all activities in connection with the offshore supply were outside India, and therefore cannot be deemed to accrue or arise in the country.

(5) There exists a distinction between a business connection and a permanent establishment. As the permanent establishment cannot be said to be involved in the transaction, the aforementioned provision will have no application. The permanent establishment cannot be equated to a business connection, since the former is for the purpose of assessment of income of a non-resident under a Double Taxation Avoidance Agreement, and the latter is for the application of Section 9 of the Income Tax Act.

(6) Clause (a) of Explanation 1 to Section 9(1)(i) states that only such part of the income as is attributable to the operations carried out in India, is taxable in India.

(7) The existence of a permanent establishment would not constitute sufficient business connection , and the permanent establishment would be the taxable entity. The fiscal jurisdiction of a country would not extend to the taxing of entire income attributable to the permanent establishment.

(8) There exists a difference between the existence of a business connection and the income accruing or arising out of such business connection.

(9) Para 6 of the Protocol to DTAA is not applicable, because, for the profits to be attributable directly or indirectly , the permanent establishment must be involved in the activity giving rise to the profits."

13. In (***2007) 291 ITR 482(SC) (cited supra) a non-resident foreign company incorporated in South Korea entered into an agreement with ONGC for designing, fabrication, hook-up and commissioning of certain facilities in Bombay High. The contract was inter alia in two parts one was the fabrication of the platform and the other was installation and commissioning of the said platform. In that case also, the assessee contended that it did not have a permanent establishment (PE in short) in India and therefore, the income was not taxable in India and that if Indian operations consisting of installation commenced in India on November 1st 1986 and got***

completed on April 12, 1987, the duration was less than nine months. All the contentions were rejected by the Assessing Officer. Before the Supreme Court, the question that needed to be answered was, what are the profits reasonably attributable to the assessee's PE in India. The Supreme Court on a reading of the entire scheme of the Act held that,

"7. Under Section 4 of the Act it is the total income of every "person" which is taxable. A foreign company which is not wholly controlled or managed in India is a non-resident so far as its residential status is concerned. Section 5(2) of the Act lays down that as far as a non-resident assessee is concerned the scope of total income of such an assessee is confined to income which accrues or arises in India or is deemed to accrue or arise in India and which income is received or deemed to be received by such foreign company. Therefore, it is clear that under the Act, a taxable unit is a foreign company and not its branch or PE in India. A non-resident assessee may have several incomes accruing or arising to it in India or outside India but so far as taxability under Section 5(2) is concerned, it is restricted to incomes which accrue or arise or is deemed to accrue or arise in India. The scope of this deeming fiction is mentioned in Section 9 of the Act. Therefore, as far as the income accruing or arising in India, an income which accrues or arises to a foreign enterprise in India can be only such portion of income accruing or arising to such a foreign enterprise as is attributable to its business carried out in India. This business could be carried out through its branch(s) or through some other form of its presence in India such as office, project site, factory, sales outlet etc. (hereinafter called as "PE of foreign enterprise"). It is, therefore, important to note that under the Act, while the taxable subject is the foreign general enterprise (for short, "GE"), it is taxable only in respect of the income including business profits, which accrues or arises to that foreign GE in India. The Income-tax Act does not provide for taxation of PE of a foreign enterprise, except taxation on presumptive basis for certain types of income such as those mentioned under Section 44BB, 44BBA, 44BBB etc. Therefore, since there is no specific provision under the Act to compute profits accruing in India in the hands of the foreign entities, the profits attributable to the Indian PE of foreign enterprise are required to be computed under normal accounting principles and in terms of the general provisions of the Income-tax Act. Therefore, ascertainment of a foreign enterprise's taxable business profits in India involves an artificial division between profits earned in India and profits earned outside India. ***The Income Tax Act, 1961 is concerned only with the profits earned in India and, t***herefore, a method is to be found out to ascertain the profits arising in India and the only way to do so is by treating the Indian PE as a separate profit centre vis-`-vis the foreign enterprise (the Korean GE, in the present case). This demarcation is necessary in order to earmark the tax jurisdiction over the operations of a company. Unless the PE is treated as a separate profit centre, it is not possible to ascertain the profits of the PE which, in turn, constitutes profits arising to the foreign GE in India. The computation of profits in each PE (taxable jurisdiction) decides the quantum of income on which the source country can levy the tax. Therefore, it is necessary that the profits of the PE are computed as independent units. However, in a case where the Government of India has entered into a tax treaty with a foreign country (Korea, in the present case) then in relation to an assessee on whom such tax treaty applies, the provisions of the Act shall

apply only to the extent to which the provisions thereof are more beneficial to the assessee.

12. ...***Therefore, unless the PE is set up, the question of taxability does not arise - whether the transactions are direct or they are through the PE. In the case of a Turnkey Project, the PE is set up at the installation stage while the entire Turnkey Project, including the sale of equipment, is finalized before the installation stage. The setting up of PE, in such a case, is a stage subsequent to the conclusion of the contract. It is as a result of the sale of equipment that the installation PE comes into existence.*** However, this is not an absolute rule. In the present case, there was no allegation made by the Department that the PE came into existence even before the sale took place outside India. Similarly, in the present case, there was no allegation made by the Department that the price at which ONGC was billed/invoiced by the assessee for supply of fabricated platforms included any element for services rendered by the PE. ... ...We reiterate, in the circumstances, not all the profits of the assessee company from its business connection in India (PE) would be taxable in India, but only so much of profits having ***economic nexus*** with PE in India would be taxable in India.

13. ....Therefore, since there is no specific provision under the Act to compute profits accruing in India in the hands of the foreign entities, the profits attributable to the Indian PE on foreign enterprise are required to be computed under normal accounting principles and in terms of the general provisions of the Income-tax Act. Therefore, ascertainment of a foreign enterprise's taxable business profits in India involves an artificial division between profits earned in India and profits earned outside India."

14. ***So in IHHI case, "the permanent establishment s non-involvement in this transaction excludes it from being a part of the cause of the income itself, and thus there is no business connection.". This is the reason why the profits of offshore supply was not taxed. This is also clear from what the Supreme Court held in Hyundai that, Therefore, unless the PE is set up, the question of taxability does not arise - whether the transactions are direct or they are through the PE. In the case of a Turnkey Project, the PE is set up at the installation stage while the entire Turnkey Project, including the sale of equipment, is finalized before the installation stage. The setting up of PE, in such a case, is a stage subsequent to the conclusion of the contract. It is as a result of the sale of equipment that the installation PE comes into existence. However, this is not an absolute rule.***

15. Let us look at this contract. **The contract was awarded only to the assessee**. **The assessee, and not NLC, selected ASPL to execute Contract Nos.III & IV**. ***Therefore, though NLC entered into Contract Nos.III and IV with ASPL it was only at the instance of the Assessee. ASPL was the assessee's subsidiary company. At least as far as this Project was concerned ASPL is virtually the "assessee's presence" in India***. **The assessee controlled and managed ASPL for quality ensuring, maintenance of time schedule, quality control, progress of work etc. It is Mr. Zara; Project Manager of assessee who signed all the periodical reports**. On the basis of materials

available the CIT (Appeals) and the Tribunal concluded that the entire profits of the offshore supply can not be excluded from taxation.

(ii) Some extracts from the order of the CIT (Appeals) are reproduced hereunder to show how the matter has been considered.

a) "The entire machinery supplied, systems involved were manufactured or fabricated to suit the purpose. During the course of erection and installation depending on requirements at the site, several parts, tubes, linings were to be designed freshly engineered or fabricated or imported or got manufactured abroad and supplied so as to fit them to the requirements. This is a continuous on-going process. This is the reason why contract I referred to of that 'portion of machinery , which is to be designed, fabricated, manufactured and sent from abroad. Associated Engineering Services are also to be supplied from abroad**. The turnkey responsibility is with the appellant till local parts and foreign parts are fused together."**

b) **There is the assessee's letter dated 08-08-1997 by which this splitting up of contracts into four contracts was first suggested by the assessee, which in the same breath, also guaranteed the satisfactory execution of the contract as if it was one single contract.**

c) There is a letter dated 01-09-1998 which reads as follows:

"***Ansaldo Energia confirms and guarantees that Ansaldo Services (P) Ltd., will execute the contracts with full knowledge and expertise for the proper and timely implementation of the works, under Ansaldo Energia management control and full financial support."***

d) NLC's letter dated 26-09-1998 reads as follows:

"***As desired by Ansaldo Energia, four separate contracts shall be concluded, encompassing the complete scope of work, namely contract numbers I and II between NLC and Ansaldo Energia Spa Contract Nos.III and IV between NLC and Ansaldo Services P. Ltd., III floor, Gupta Towers, 50/1 Residency Road, Bangalore 506 025, a subsidiary company of Ansaldo Energia, selected for the purpose by Ansaldo Energia. "***

(Emphasis supplied)

e). In the letter of award, NLC indicates to the assessee,

"You shall be solely responsible and liable for all technical, management and all other services required to complete the entire scope of work detailed in tender specification."

f). Paragraph 15.10 and 16.2 of CIT (Appeals)'s order, reads as follows:

"Now it would be sufficient to note at this stage that the entire contract was a single turnkey package contract which was split after awarding to a single person i.e.

Appellant. **No separate tenders were called for and procedures followed.** However, for all practical purposes, the documents show that NLC safeguarded its interest by including the clause fixing the overall responsibility for the completion of the whole work only on the appellant though contracts were divided**. The consideration for each contract was fixed by the appellant and simply accepted by NLC**...."

g) "**Thus, there is interlacing of all the contracts. The consideration received by the appellant covers much more scope of work than what is picturised by the appellant. The entire contract appears to be a composite contract split up for tax purposes. It would not be fair to say that the contracts are disjoint."**

h) The appellant-company submitted performance guarantee test reports and handed over the machines finally. Site office of 20,000 square metres were occupied by both the parties together. The appellant also used the site office whole through the contract. Even in January 2005, personnel of the appellant-company were residing at NLC. They were also present at the site office.

i) "There is no marked separation between the appellant company and the subsidiary company with regard to the execution of the contracts. The Project Manager and the Site Manager were from the appellant company who controlled the entire situation and got the contracts executed. It also shows that appellant company had a site office and its staff stayed at the NLC over the period of contract. "

j) Then the CIT (Appeals) has extracted some questions and answers elicited during the enquiry. Some of the samples:

"A:18: There was day to day inter action between the staff Ansaldo, Italy and the staff of Ansaldo, Bangalore.

A.31: M/s.Ansaldo, Italy took charge of affairs such as supervision, Testing and Commissioning. They were present at site along with the staff of M/s.Ansaldo, Bangalore.

A.54: M/s. Ansaldo, Italy carried out the Testing, Commissioning & Performance Tests-NLC & MECON witnessed the above.

Ans: M/s. Ansaldo, Italy and M/s. Ansaldo Bangalore utilised the site office.

Ans: The Principal Contractor used this site office."

k)"23.6. Thus all these clearly establish that there was a Permanent Establishment with respect to the contract of the appellant. No doubt, the appellant disputed the existence of Permanent Establishment. It is interesting to note that the appellant in the later submissions stated that Permanent Establishment" (if any)" existed for the purposes of supervisory functions only. This shows the change in the stand of the appellant. This concept of limited Permanent Establishment is a strange argument now put forth by the appellant for the first time. Appellant has not substantiated this argument with support of case law nor the legal provisions under which such claim is made. Either a PE exists or it does not exist. There cannot be an intermediate situation.

l) 23.8. Managerial activities lead to the inference of a permanent establishment. Controlling and Coordinating centres also lead to the inference of a permanent establishment. A complete management is not necessary but where important and top-level management decisions are taken, there is a permanent establishment. It is already seen that the project manager and the site manager of the appellant only carried out management and other activities at the site."

m) 24.10. In this case, it cannot be denied that majority of the holding in the subsidiary company is owned by the appellant. Control and management and the financing part of the subsidiary company are in the hands of the appellant. On the basis of the guarantee given by the appellant only, the banks in India have lent to the subsidiary company. Even to obtain cash credit for ASPL, the appellant only gave bank guarantee unless the Indian contractor also performs, the contract cannot be completed and onus is on the appellant to see that the entire contract is completed. Thus, with regard to this entire contract the subsidiary company itself is a business irrespective of this, with regard to the Indian contractee (NLC), the contract spread over a period of 5 years establishes continuity as well as intimate and real relationship."

So the above extracts/exhibits are field-markers to indicate the nature of the contract and how this case is not identical to IHHI Case where the different parts of the contract were "clearly demarcated and cannot be held to be a complete contract that has to be read as a whole and not in parts." ***The above extracts/exhibits demonstrate that the reasoning of the CIT (Appeals) was based on materials on record, and we do not find any palpable unreasonableness or misconstruction of the evidence, which warrants outright rejection.***

16. One of the main planks of the appellant's case is that when title had passed overseas and when according to IHHI case that is the sole factor to decide taxability, the profits of Contract No.I cannot be taxed. The clause in Contract No.I that deals with passing of title reads thus:

"Title of ownership and property to all important equipment, materials (including imported components to be further processed in India), drawings and documents to be delivered by the Contractor in terms of the Contract shall pass to the purchaser in accordance with the INCOTERMS 1990 and transfer of ownership and property to the Purchaser shall be simultaneous at the time of delivery to the carrier, provided however, such passing of title of ownership and property to the purchaser shall not in any way absolve, or dilute of diminish the responsibility and obligations of the Contractor under this Contract including loss or damage and all risks, which shall vest with the Contractor till the successful commissioning as per this Contract. "

According to the assessee the clauses relating to passing of title in Clause 10.55.1 is identical to the clause relating to passing of title in IHHI in Ex-D, Clause 2.1, and the words "the contractor shall retain care, custody and control used in the IHHI contract means the same as the terms used in the present case which relate to loss, damage and risks. According to the learned Senior Counsel, when Parliament had not determined the situs where title got transferred for fixing taxability, one has to rely only on judge-made law and that IHHI lays down the law that passing of title alone fixes the situs for deciding the taxability and for this referred to 20th Century

Financial Corporation Ltd., and another Vs. State of Maharashtra (2000 119 STC 182).

17. The above case was with regard to the controversy as regards the power of the State Legislature to levy sales tax under Clause 29(A)(d) of Article 366. The Supreme Court said in the 20th Century Finance Corporation Case that,

21. It may be noted that the transactions contemplated under sub-clauses (a) to (f) of clause (29-A) of Article 366 are not actual sales within the meaning of sale but are deemed sales by legal fiction created therein. The situs of sale can only be fixed either by the appropriate legislature or by judge-made law, and there are no settled principles for determining the situs of sale. There are conflicting views on this question. One of the principles providing situs of sale was engrafted in the explanation to clause (1)(a) of Article 286, as it existed prior to the Constitution (Sixth Amendment) Act, which provided that the situs of sale would be where the goods are delivered for consumption. The second view is, situs of sale would be the place where the contract is concluded. The third view is that the place where the goods are sold or delivered would be the situs of sale. The fourth view is that where the essential ingredients, which complete a sale, are found in majority would be the situs of sale. There would be no difficulty in finding out situs of sale where it has been provided by legal fiction by the appropriate legislature. In the present case, we do not find that Parliament has, by creating any fiction, fixed the location of sale in case of the transfer of right to use goods. We, therefore, have to look into the decisional law.

18. IHHI does hold that since in that case the entire transaction took place outside India no taxable event took place in India, but it said so after looking at the entire contract and the terms of the contract, necessary to determine whether all parts of the offshore transaction took place offshore and it did so after looking into whether the PE in India had anything to do with the offshore supply and also whether the contract was split up or a composite contract. It was in that context in IHHI case, the Supreme Court had said that all parts of the transaction in question that is transfer of properties in goods as well as payment were carried on outside the Indian soil and therefore, the transaction could not have been taxed in India and that, even though the contract was signed in India that is of no material consequence since all activities in connection with off-shore supply were outside India. The Supreme Court also held that the contract is not a complete one which has to be read as a whole and not in parts. It also held that the PE had no role to play in the transaction. *So it was not only the situs of transfer of title which was the sole criterion to determine taxability. So though we are of the opinion that the clause relating to passing of title in IHHI, Further the words care and custody used in the IHHI contract and the words loss, risk and damage used in this contract have different connotation and are not identical, we are not going into it since on other grounds; we find this case differs from IHHI case.*

19. We again go back to the IHHI case. The Supreme Court said in Clause 1 of Paragraph 99 that only such part of the income, as is attributable to the operations carried out in India can be taxable. The Supreme Court referred to the judgment of the Delhi

High Court in CIT v. Mitsui Engineering and Ship Building Co. Ltd. [2003] 259 ITR 248 (Delhi) where in fact it was held that the price paid to the assessee was the total contract price which covered all the stages involved in the supply of machinery and that it was not possible to apportion the consideration for design on one part which evidently took place outside the country and the other activities on the other part. The Supreme Court held in IHHI case that Mitsui case was clearly distinguishable on facts, because in IHHI the price for the supply of goods offshore and onshore 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.

(ii) Therefore, what follows is, if a contract is a composite contract in spite of the apparent demarcation into separate parts, the mere fact that for off-shore supply the title passed outside India alone will not decide taxability. In IHHI, both the title and consideration passed outside the taxable territory and very importantly, it was found that it was not a composite contract, nor was there any involvement of the PE in the transaction.(underlined for emphasis) It was further factually found that the contract was a divisible one segregating the supply segment and service segment, and that by agreement the parties had decided when title passed.

(iii) Let us also look at the Hyundai's case. ***There the contract was in two parts. One was fabrication of the platform and the other was installation and commissioning of the said platform.*** Thereto, the department contended that it was an integrated contract which was divided in terms of separate activities. The Supreme Court held that "***the installation PE came into existence only after the contract with ONGC stood concluded. It emerged only after the fabricated platform was delivered in Korea to the agents of ONGC. Therefore, the profits on such supplies of fabricated platforms cannot be said to be attributable to the PE". Further the Supreme Court held in Hyundai, that no part of the supply of fabricated platforms could be attributed to the independent PE unless the Department had proved that the supplies were not at arm s length price. Further sales were directly billed to the Indian customer (ONGC) and above all there was no allegation that the price at which billing was done included any element for the services rendered by the PE and in view of all these facts, the Supreme Court held that the profits that accrued to the Korea GE for the Korean operation no tax could be levied.***

(iv) The following facts distinguish Hyundai from the present case.

a) ***In Hyundai, the platform itself was delivered in Korea to the agents of ONGC. Here, the ASPL acted as clearing agent.***

b) The Department did not establish that the supplies were not at arm's length price.

c) ***There was no allegation that the price at which billing was done for the supplies included the services rendered by PE.***

Whereas here the Revenue had made clear allegations regarding price fixation and price imbalance.

22. In Hyundai, the finding of the authorities was that there was no allegation that the price at which billing was done for the supplies included any

element in the services rendered by the PE. In this case there is a specific allegation made by the Department that the price of Contract No. I was loaded to take in a portion of the contract price for contract Nos.II to IV and while discount was offered for Contract Nos.II to IV, with regard to Contract No. I no discount was offered. ***There is also a specific finding that when the value of the Contract Nos.III and IV is much less than the value of the entire contract put together it does not make any business sense for the assessee herein to take out the insurance for the whole value of the contract and pay premium.***

23. **The ASPL and the assessee did not form a consortium of equal players as in the case of IHHI.** ***The facts show that even though the assessee requested NLC to separate the single contract into distinct contracts, NLC did not agree initially, but did so only after making certain stipulations. ASPL came into the picture, at the instance of the assessee.*** ASPL is there only so that the single contract could be made into four and there would be an entity which will execute Contracts III and IV with NLC. The NLC contract was with the Assessee alone. The fact that separate price had been given to each of the contract would not make a difference. In IHHI also there is a clause which refers to the total price, yet, the Supreme Court held that the price for each component was compartmentalized and so for the supplies made on high seas there was no tax liability. ***But, in IHHI, there was no factual finding that there was price imbalance in the four contracts and it was skewed in favour of the off-shore supply contract, nor was there any finding that the entity which executed the contracts for the on shore supply and the on shore services were mere facades. In this case these are all factual findings for which there is basis on the materials on record***.

24. In (2007) 291 I.T.R. 278 [C.I.T. vs. P. Mohanakala] it is held as follows:

25. Whether the High Court was justified in interfering with the concurrent findings of fact arrived at by all the authorities including the Tribunal? The assessing officer found that all the so-called gifts came from Ariavan Thotan and Suprotoman. The assessees did not declare that they are the aliases of Sampathkumar. It is only as an afterthought that they have come forward with the said plea. The assessing officer also found that the gifts were not real in nature. Various surrounding circumstances have been relied upon by the assessing officer to reject the explanation offered by the assessees. The Commissioner of Appeals confirmed the findings and conclusion drawn by the assessing officer. The Tribunal speaking through its Senior Vice-President concurred with the findings of fact. The findings in our considered opinion are based on the material available on record and not on any conjectures and surmises. They are not imaginary as sought to be contended.

27. No question of law much less any substantial question of law had arisen for consideration of the High Court. The High Court misdirected itself and committed error in disturbing the concurrent findings of fact.

25. In this case too, the findings are based on materials available on record, and we are not persuaded to disturb the concurrent findings. ***The Tribunal has not in fact ignored IHHI, on the contrary it has applied IHHI to the extent it is applicable.***

We reiterate that while in IHHI, the Supreme Court had held that since all parts of the transaction namely the passing of title and passing of consideration had taken place outside India the transaction cannot be taxed in Para 99(1) of IHHI, this conclusion cannot be understood in isolation or torn from its context. Earlier in Para 63 Supreme Court had distinguished the case from Mitsui Engineering on the ground that in Mitsui the entire contract was one transaction whereas in IHHI it was not. So, obviously there are situations where profits from offshore supply of machinery cannot be totally excluded from tax. Similarly, in Para 67 of IHHI, the Supreme Court distinguished the facts in Mazagaon Dock Ltd v. CIT and Excess Profits Tax (1958) 34 ITR 368 (SC), and observed that in that case there was an ***extremely close connection*** between the resident and non-resident and therefore, the transaction was taxable. So, this is another situation where taxability would arise. In the same vein in Para 59 of IHHI, the ***Supreme Court distinguished Anglo-French Textile Co. Lid v .CIT(1954) 25 ITR 27(SC) on the ground that in that case there was continuity of relationship.*** So this is yet another situation which will decide the question of taxability. So the passing of title is not the sole determinant to decide taxability. To quote from IHHI And the transaction of sale and supply of goods off-shore has not taken place with the involvement of the permanent establishment, therefore, excluding this transaction from the scope of taxation in India".

26. The word "business connection" is too wide to admit any precise definition. From the various judgments of the Supreme Court some of which will be cited infra we find that, it includes close, real, intimate relationship and commonness of interest between the non-resident and the Indian person and where there is control of management or finances or substantial holding of equity shares or sharing of profits by the non-resident of the Indian person, the requirement of principle (iii), i.e., the existence of close, real and intimate relationship and commonness between the non-resident and Indian person, is fulfilled.

27. The learned Senior Counsel appearing for the assessee repeatedly submitted that in IHHI the Supreme Court had held that the concept of permanent establishment is totally different from the concept of business connection; and that in this case the CIT (Appeals) had totally confused the two concepts. We have already extracted the relevant portions. ***We cannot reject the findings regarding the close relationship, the finding that the supplies were an ongoing process and so on. The ASPL has no doubt been in existence before this Contract. But its involvement in this whole project is only at the behest of the assessee. The findings indicate that ASPL was the equivalent of an alter ego of the assessee as far as this NLC package is concerned***.

28. We will now look at some judgments on " business connection"

a) In (1965) 56 ITR 20 (SC) CIT Vs. R.D. Agarwal & Co. it was held that a business connection involves a relation between a business carried by a non-resident which yields profit or gains and some activity in the taxable territories which contributes directly or indirectly to the earning of those profits or gains***. It postulates a real and***

intimate relation between trading activity carried on outside the taxable territories the relation between the two contributing to the earning of income by the non-resident in his trading activity.

29. ***In (1979) 119 ITR 986 (AP)(Bharat Heavy Plate & Vessels Ltd., v. Addl. Commissioner of Income-tax, A.P) the Andhra Pradesh High Court considered whether M/s. Skoda Export had business connection in the taxable territory through the Bharat Heavy Plate & Vessels Ltd.,*** which is a Govt. of India Undertaking. Agreements were entered into between the non-resident company and the GOI undertaking, which involved (1) rendering of consultancy services for the construction of the plant, (2) deputation of design experts to India, (3) assigning of production rights, general and assembly drawings, technical information and other documentation, (4) continual exchange of information about the promise of deliveries and erection of works, and (5) supply of personnel who were in the pay roll of the foreign company and also training of local personnel.

30. On the question whether there was a business connection between the Indian Company and the non-resident foreign company, the Andhra Pradesh High Court held that,

"even though the sale of machinery, equipment etc., took place outside India, the fulfillment of above obligations established real and intimate connection between the assessee Indian company and the non-resident foreign company and the relationship amounted to a business connection of the foreign company in India. It is thus seen in the case of the present recipient, foreign company that the activities rendered by it under contract I and other three contracts are inextricably linked and integral part and parcel of the activity of the business of construction, erection and testing and commissioning of the Power Station in India. Accordingly, it has a direct business connection in India. , and also that," It is no doubt true that so far as the machinery. Equipment and instruments etc; are concerned the sales took place outside India..... But on a combined reading of both the agreements there is a business connection between the non-resident and the assessee., ...through or from which income accrued or arose to the non-resident."

Therefore, it is not just where the title passed, but also whether there was a crucial and intimate relation, whether there was an element of continuity between the business of the non-resident and the activity within the taxable territories, such transaction not being stray or isolated. Therefore, the argument that ASPL had entered into contracts with third parties before this Project with NLC is neither here nor there. In the Bharat Heavy Plate & Vessels case, the business connection was found to exist between a non-resident and a GOI undertaking, notwithstanding that the purchase of machinery took place offshore.

31. ***In 1981 (128) ITR 27 (Commissioner of Income-tax Vs. Fried Krupp Industries) this Court held,***

"that there were no operations in India which were attributable to the foreign Company which could give rise to any profits being earned in India. The terms of the agreement made it clear that none of the three types of activities of the foreign company resulted in business connection in India:

(i) The supply of machinery was to be on f.o.b. Terms. The part played by the foreign company ended with putting the machinery on board and there was no operation by that company in India so as to envisage a business connection;

(ii) The supply of spare parts was also to be on f.o.b. terms, and, as in the case of machinery, there was no operation by the foreign company in India to constitute business connection; and

(iii) So far as the deputation of the foreign personnel for erection of machinery is concerned, such personnel became employees of the Indian company and the foreign company was not responsible for the erection of the machinery as such. It was not like a turnkey project where the responsibility of the foreign company would continue till the machinery is actually run and proves its performance,

Thus, there was absolutely no operation in India which would give rise to a tax liability in India as far as the foreign company was concerned and the Tribunal was, therefore, right in its conclusion."

32. ***In this case, the part played by the foreign company did not end with putting the machinery on board. Even the supplies under Contract I was an ongoing process, unlike Hyundai where with the supply of the fabricated platform in Korea, the offshore supply stood concluded. The assessee continued its operations in India. Its Manager Mr. Zara was very much on site, the offshore supply continued for several months and the machinery so supplied was modulated to suit the need on site in India and as regards the foreign personnel they did not become the employees of ASPL. They continued to be the employees of the assessee and the assessee was solely responsible for the erection of the machinery and its responsibility continued till the entire project was set up and actually run.***

33. In IHHI case, the Supreme Court categorically held that the concepts of profits of 'business connection' and 'PE(permanent establishment)' should not be mixed up and that while the concept of business connection is relevant for the purpose of application of Section 9, the concept of PE is relevant for assessing the income of non-resident in DTAA. In that case, they held that the entire transaction was completed at the high seas and the profit on sale did not arise in India. In Hyundai case the Supreme Court held that unless a PE is set up, the question of taxability does not arise and that, it was as a result of the sale of equipment, that the installation permanent establishment came into existence and that for the sale in Korea the PE had no role to play. ***The Supreme Court made it clear that this is not an absolute rule. So obviously, the question of taxability will depend on the facts.***

34. In IHHI the Supreme Court referred to ***Instruction NO 1829 issued by CBDT dated Sept 21 1989, which interalia states that:, (in turnkey execution) One of the companies would for this purpose act as leader to ensure supervision and co-ordination of inter-related tasks. But here the assessee is not just the leader of the two companies which executed the contracts viz; assessee and ASPL, the ASPL just speaks the Master s Voice . The contract continued for several months. It was found that there was a permanent establishment. The clause relating to transfer of title has also been extracted and it is not identical with the terms relating to transfer of title***

in IHHI case. In Mitsui the delivery of the goods was taken by the agents of ONGC. Here the clearing agent was ASPL which had no prior experience, so the Authorities were of the opinion that this too was done only at the instance of the assessee.

35. The CIT (Appeals) also found that there is interlacing of all the contracts and the consideration received by the assessee appears to cover more scope of work than what is ostensibly projected by the assessee. The site office of 20,000 sq. metres was jointly occupied by the assessee and the ASPL. The ASPL appears to have been in existence one year before the contract and entered into several contracts with several parties even without the aid and blessing of the assessee, but as far as this project is concerned, there was virtually no difference between the activity of ASPL and the foreign company. There was a continued connection. The assessee had used this site office throughout the contract. The performance reports were obtained only from the assessee. The proof regarding monthly progress report and performance guarantee test reports were enclosed by the assessee. Therefore, the CIT(Appeals) found that the assessee was not divested off its responsibilities till the plant and machineries was handed over.

36. The Tribunal s factual findings also are in favour of the Revenue as regards the contract being a composite one, ASPL being a mere fagade, existence of close relationship between the foreign person and the Indian operations.

37. Another submission was that NLC being an authority for the purposes of Article 12 of the Constitution of India, all actions taken by it must be presumed to be done in accordance with law relying on Section 114 of the Evidence Act. We do not think that this test can be applied. Even if NLC is State for the purpose of Art.12, the contract entered into by it is not an act done in its official capacity, and this is not an instance where the presumption will apply. The single bidder namely the Assessee requested NLC to apportion the contract price in a certain manner amongst the four contracts and NLC agreed to this. In any event, NLC had protected its flanks well. It had deducted tax at source on all the payments made under the four contracts. It had secured the due performance of the whole contract by insisting that the assessee should guarantee its performance even if the contract was split up into four contracts, NLC did not stand to lose since the value of the contract was fixed even from the beginning. It must be remembered that it was open only for a single bidder. It was only for the convenience of and at the instance of the assessee that it was divided into four. Therefore, the question as to whether NLC would have agreed to such a course of action is really not relevant. NLC did not suffer in any way by splitting up and NLC was bound to pay the entire payment regardless of whether it was equally distributed among all the four contracts or whether the price was loaded on to Contract I or II.

38. ***Taking into account all these cumulative factors, the Tribunal agreed with the view of the CIT that only 25% of the activity could have been done outside India particularly in view of the various clauses of contract indicating that many plant and equipment were fabricated in India. The Tribunal had asked the assessee to file the profit and loss account in respect of the subsidiary but all that they supplied was the chart showing the net profit margin. The Tribunal concluded on the basis of***

IHHI case that activities which were not conducted in India cannot be taxed in India and on the basis of profit margins of similar companies directed the Assessing Officer to tax the profit at 7% in the context of Contract Nos.II to IV and with regard to Contract No.I 7%, profit shall be taken in relation to 75% of the receipts only.

39. In view of the above, we do not think that the Tribunal has ignored the decision in IHHI's case. On the other hand, it has applied the ratio in that case, but, has held, for reasons given in its order that the entire profits of Contract No.I cannot be segregated and dealt with as if they arose outside India.

40. For the reasons given above, we confirm the findings that,

a) the foreign company and the activities rendered by it under contract No.I and the other three contracts are inextricably linked and it was a composite contract,

b) all responsibility from the beginning to the end rested on the assessee,

c) there is an intimate, real and continuous relationship with the subsidiary company and

d) that the price of the other contract was loaded on to Contract No.I.

In these circumstances, we do not think that the first question arises for consideration.

41. As regards the second question it is purely a question of fact. The Tribunal held that only 25% of the profits of Contract No.I can be said to have arisen off-shore and outside the taxable territory. The Tribunal did not take note of and could not have taken note of the fact that 20% of the profits of Contract No.I has been offered to tax, since that is an event that took place subsequent to the order of the Tribunal. We find in Paragraph No.51 in the order of the Tribunal, that the Tribunal had asked the assessee to give certain figures. But the assessee did not do so. The Tribunal then confirmed the conclusion of CIT (Appeals) that 75% of the profits of Contract I is taxable. No reason has been given for fixing the percentage. So we are remitting the matter to the Tribunal to assess the percentage of taxable profit properly, bearing in mind the findings we have confirmed. Both the parties may be heard and documents received for the limited purpose of enabling the Tribunal to work out the percentage. The Tribunal after hearing the submissions shall fix the percentage and give reasons therefor and pass appropriate orders, on any date, within a period of 4 weeks from the date of receipt of a copy of this order.

42. The tax case (appeal) is partly allowed to that extent.

(P.S.D.,J.) (K.K.S.,J.)
12-01-2009
Index: Yes/No
Internet: Yes/No
glp

To

1. The Income Tax Appellate Tribunal
Chennai Bench "A"
Shastri Bhavan
Haddows Road
Chennai 600 006

2. The Commissioner of Income Tax (Appeals) XI
Uttamar Gandhi Salai
Nungambakkam
Chennai 600 034

3. The Assistant Director of Income Tax
International Taxation
121, Uttamar Gandhi Salai
Chennai 600 034

PRABHA SRIDEVAN,J.
and
K.K. SASIDHARAN,J.
glp

Pre-delivery Order in
Tax Case No.1303 of 2007

12-01-2009