

**IN THE INCOME TAX APPELLATE TRIBUNAL
“I” BENCH, MUMBAI**

**BEFORE SHRI AMIT SHUKLA, JM &
SHRI AMARJIT SINGH, AM**

आयकरअपीलसं./ I.T.A. No. 2952/Mum/2010
& Cross Objection No. 09/Mum/2011
(निर्धारणवर्ष / Assessment Year: 2006-07)

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आयकरअपीलसं./ I.T.A. No. 4930/Mum/2014
& Cross Objection No. 61/Mum/2016
(निर्धारणवर्ष / Assessment Year: 2007-08)

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आयकरअपीलसं./ I.T.A. No. 4931/Mum/2014
& Cross Objection No. 62/Mum/2016
(निर्धारणवर्ष / Assessment Year: 2008-09)

DCIT(IT)-2(1)(1), 1 st floor, Scindia House, Ballard Pier, N. M. Road, Mumbai-400 038	बनाम/ Vs.	M/s Clough Projects International Pty. Ltd. G. C. Srivastava & Associates Adv. 14D, 14 th Floor, Hansalaya Bldg, 15 Barakamba Road, New Delhi – 110001.
स्थायीलेखासं ./जीआइआरसं ./PAN No. AACCC6057C		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)
अपीलार्थीकीओरसे/ Appellant by	:	Shri Purushottam Tripuri, Ld. DR
प्रत्यर्थीकीओरसे/ Respondent by	:	Shri Nishant Thakkar /Hiten Chande, Ld. AR
सुनवाईकीतारीख/ Date of Hearing	:	10.05.2022
घोषणाकीतारीख / Date of Pronouncement	:	30.05.2022

आदेश / O R D E R

Per Amit Shukla, Judicial Member:

The scope of the aforesaid appeals is in pursuance of the Hon'ble High Court vide judgment and order dated 17th Nov, 2021 in Writ Petition No. 3357, 3358 & 3359 and in Income Tax Appeal No. 2656, 2657 and 2658 of 2019, wherein the Hon'ble High Court has set aside the entire matter to the Tribunal to consider the appeal filed by the revenue as well as Cross Objections filed by the assessee and to pass fresh order in accordance with law.

2. In these appeals, the main issue raised by the revenue is, taxing of the receipts from offshore activity carried out side India for installation project which has been executed in India u/s 44BB of the Act. The other controversy with regard to whether there was any PE under Article 5(2)(a) or 5(2)(j) or 5(2)(k) of India Australia DTAA.

3. The facts in brief are that, the assessee, Clough Projects International Pvt. Ltd. (CPIL) is a public limited company incorporated under the laws of Australia and is a tax resident of Australia. It has entered into an agreement with BG Exploration & Productions India Ltd. ("BG Exploration") for:

- a. engineering, procurement, installation and commissioning of 3 wellhead platforms (PH, PJ and STD); and
 - b. modifications to the existing platforms and interfiled pipelines in the Panna, Mukta and Tapti fields located at Mumbai.
4. As per the AO, it was turnkey project for project management, engineering, procurement, fabrication, transportation, installation, pre-commissioning and commissioning assistance for installation and assembly of 3 new platforms and modification of 3 existing platforms and a 30 km long inter field pipelines, off the western coast of India. The contract envisaged work to be carried out outside India as well as inside India. The AO had observed that CPIL has bifurcated the receipts from BGIL into two parts: (i) receipts from onshore operations in India; and (ii) receipts for management, engineering, procurement, fabrication which as per assessee pertained to operations earned outside India (offshore) for the above project which was being executed in India. According to AO, the project constituted PE as per 5(2)(f)/ 5(2)(j) of the Indo-Australia DTAA with regards operations of installation and commissioning of 3 wellhead platforms carried out in India and

entire receipts is taxable in India and even those carried outside India were taxable in India. The AO in his order u/s 143(3) among others, held as follows:-

- i) The assessee had Permanent Establishment (PE) in India under Art 5(2)(f) and 5(2)(j) of the DTAA.
- ii) After rejecting the assessee's books of accounts, the AO held that the provisions of Section 44BB are attracted in the assessee's case.
- iii) Holding the contract to be a composite contract, the AO brought to tax the entire receipts including the receipts pertaining to off shore supply u/s. 44ABB of the I.T. Act

5. In other words, the AO has treated the entire receipts on the contract taxable u/s 44BB including receipts pertaining to offshore supply. The relevant conclusion of AO reads as under:-

20. Accordingly in view of the above discussion, the profit rate of 10% shall be deemed to be profits on the aggregate payments received for the year under consideration. The assessee has received aggregate payment of Rs. 671560235/- (inside India operations) plus Rs. 2414568949/- (outside India operations) aggregating to Rs. 3086129184/-. Accordingly, profit of the assessee is computed at Rs. 30,86,12,918/- which is considered for charging of tax as per provisions of Act.

Accordingly, the AO taxed the entire receipts and the rate of 10% as profit alongwith surcharge and education cess.

6. Ld. CIT(A) held that, *firstly*, the assessee carried out installation project, therefore it would PE under Article 5(2)(k) and not Article 5(2)(f) as applied by the AO, because that applies to production actually pertaining to mine, oil or gas well, quarry for any other place of extraction of natural resources. Since, the assessee has no right on gas or oil well which belongs to BG and the the assessee carried out installation of platform only. In so far as offshore supply which was brought to tax by the AO u/s 44BB, the Ld. CIT(A) strongly relied on the decision of Hon'ble Supreme Court in the case of **Ishikawajima Harima Heavy Industries Co. Ltd. (288 ITR 408) (SC) and Hyundai Heavy Industries Co. Ltd. (2007) (291 ITR 482) (SC)** and held that the same is to be excluded from taxability u/s 44BB because the same cannot be said to be attributable under Article 7(1) of India Australia DTAA. Thus, he directed the AO to include the income from Indian operations only to be taxed @ 10% u/s 44BB.

7. Ld. CIT(A) however upheld the action of AO in so far as rejecting the books of accounts is concerned and in favoring the provisions of 44BB and also rejected the claim of the assessee that it has no PE.

8. Aggrieved by the order of Ld. CIT(A), revenue has filed the appeals as well as assessee has also filed the cross objections. The Tribunal in the first round vide consolidated order for the AY 2006-07, 2007-08 and 2008-09 dated 06.10.2017 has observed and held as under:-

16. We find merit in the submissions made by Ld A.R with regard to the recomputation of income. We have noticed that the assessee had computed income by considering the receipts relating to Indian operations. Now the assessee has agreed with the view taken by the AO that the receipts relating to operations carried outside India relating to the project carried on in India also requires to be taken into account for determining the income of the assessee. In this view of the matter, the whole scenario relating to computation of income gets changed from the point of view of the assessee. However, we decline to give any direction to the AO in this regard with regard to the manner of computation of income and we leave it to the wisdom of the AO. The Ld A.R also submitted that the assessee would be in a position to furnish the accounts to the

satisfaction of the AO. Hence, in the interest of natural justice, we are of the view that the assessee may be provided with an opportunity to represent its case relating to determination of income before the AO. Accordingly we set aside the order passed by Ld CIT(A) on the issues relating to rejection of books of account and determination of income and restore them to the file of the AO with the direction to examine the same afresh. The assessee is also directed to furnish the financial statements and other documents as required under the law. After affording adequate opportunity of being heard to the assessee, the AO may decide the issues in accordance with the law.

17. We shall now take up the appeal filed for AY 2007-08 by the revenue. In this year also, the Ld CIT(A) held that the receipts relating to operations carried out outside India is not required to be considered for determining the income. We have set aside identical decision rendered by Ld CIT(A) in AY 2006-07 on the basis of the statement made at bar by Ld A.R in the preceding paragraphs. Consistent with the view taken in AY 2006-07, we set aside the order passed by Ld CIT(A) on this issue and confirm the view taken by the AO that the receipt relating to operations carried out outside India is required to be considered for determining income of the assessee.

18. The revenue has also taken a ground in not considering the foreign exchange gain as part of gross receipts. We notice that the Ld CIT(A) did not adjudicate the same, since he had held that the

receipts relating to operations carried outside India is not required to be considered. Now we have held that the receipts relating to operations carried outside India is required to be considered. Accordingly the foreign exchange gain relating thereto is also required to be taken into account for determining the income of the assessee. Accordingly we confirm the view taken by the AO on this issue.

19. The assessee has filed cross objection for AY 2007-08, wherein it is challenging the order of the AO in confirming the rejection of books of account and in estimating income u/s 44BB(1) of the Act. Identical issue was considered by us in AY 2006-07 in the preceding paragraphs and both the issues have been restored to the file of the AO for the reasons discussed therein. Consistent with the view taken therein we restore these issues to the file of the AO with similar directions.

20. We shall now take up the appeal filed by the revenue for AY 2008-09. In this year also, the Ld CIT(A) held that the receipts relating to operations carried out outside India is not required to be considered for determining the income. We have set aside identical decision rendered by Ld CIT(A) in AY 2006-07 on the basis of the statement given by Ld A.R in the preceding paragraphs. Consistent with the view taken in AY 2006-07, we set aside the order passed by Ld CIT(A) on this issue and confirm the view taken by the AO that the receipt relating to operations carried out outside India is required to be considered for determining income of the assessee.

21. The revenue has also taken a ground in not considering the foreign exchange gain as part of gross receipts. We notice that the Ld CIT(A) did not adjudicate the same, since he had held that the receipts relating to operations carried outside India is not required to be considered. Now we have held that the receipts relating to operations carried outside India is required to be considered. Accordingly the foreign exchange gain relating thereto is also required to be taken into account for determining the income of the assessee. Accordingly we confirm the view taken by the AO on this issue.

22. The assessee has filed cross objection for AY 2008-09, wherein it is challenging the order of the AO in confirming the rejection of books of account and in estimating income u/s 44BB(1) of the Act. Identical issue was considered by us in AY 2006-07 in the preceding paragraphs and both the issues have been restored to the file of the AO for the reasons discussed therein. Consistent with the view taken therein we restore these issues to the file of the AO with similar directions.

9. However, the assessee filed the Writ Petition before the Hon'ble Bombay High Court and also appeal u/s 260A and the Hon'ble High Court has observed as under:-

1. Heard Mr. Chande and Mr. Chanderalpal. The main ground in this petition is that the Income Tax Appellate Tribunal (ITAT) had passed an order on 6th October, 2017 in the appeal filed by

Revenue and cross objections had also been filed by petitioner wherein concession made by petitioner has been recorded. Against this observations petitioner had file Miscellaneous Application which came to be rejected by an order dated 10th July, 2019. Mr. Chande pointed out to this court that in the written submissions that was filed by petitioner before the ITAT in the appeal filed by Revenue, petitioner had made submissions which would show that no concession as recorded in the order of ITAT was ever made. Against the order of ITAT separate appeals have also been filed on merits. Mr.Chandernal as an officer of the court left it to the wisdom of the court.

2. Mr. Chande for petitioner also submitted that the ITAT has not considered the cross objections filed by petitioners.

3. Both the counsel to a query posed by the court stated that if the court is inclined to remand the matter to ITAT only to consider the limited issue on the concession of petitioner recorded and the cross objections, there would be overlapping arguments which would also have a bearing in the appeals filed by petitioner in this court. Therefore, in our view, interest of justice will be meet if the order dated 6th October, 2017 be set aside and the entire matter be remanded to ITAT where the ITAT would consider afresh the appeal filed by the Revenue alongwith cross objections and pass such orders as it deems fit in accordance with law.

4. In view of the above, the order dated 6th October, 2017 in the Appeal and order dated 10th July, 2019 in the Miscellaneous

Application are set aside. The ITAT is requested to re-hear the appeal as well as the cross objections and dispose of the same on or before 31st January 2022.

5. *We also clarify that we have not considered or made any observation on the merits of the case.*

Since the Writ Petition was disposed of, Income Tax Appeals were permitted to be withdrawn.

10. Now before us, Ld. Counsel for the assessee Mr. Nishant Thakkar submitted that in so far as the issue raised in Cross Objections, the same are not pressed and this has also been stated in the written synopsis. In so far as the revenue's appeals, both the parties admitted that only issue is, whether the income from offshore supply can be brought to tax u/s 44BB (1) on gross basis.

11. The total income computed by the AO for taxing the same u/s 44BB is as under:-

(a) Onshore (India) operations

i) Revenue received Rs. 51,82,95,992

ii) AS 7 adjustment Rs. 15,32,64,234

67,15,60,235

(b) Offshore supply (addition)

2,41,45,68,949

12. Before us, Ld. DR referred various observations of the Tribunal wherein the Tribunal has held that receipts relating to operations carried outside India is required to be considered to be taxed u/s 44BB including the foreign exchange gain. He further submitted that there is no dispute with regard to following facts that:-

- i) a composite agreement was signed to execute the project on turnkey basis
- ii) entire liability is cast on the assessee for execution of the project
- iii) to suit its convenience, the assessee has split the work, one part of the work prepared 'inside India' and the other 'outside India'.

13. Therefore, according to him the entire composite contracts and receipts is to be taxed in India and the assessee has artificially created bifurcation of the receipts and has split work so as to seek exemption from taxation of operations outside India. The reliance was also placed on ITAT Mumbai decision in the case of Orpak systems which followed the Madras HC decision in the case of **Ansoldo Energia (310 ITR 236)**, wherein it was held that splitting

had to be ignored in a composite agreement if the same suited the contractors convenience and entire responsibility for execution of the project was on the contractor.

14. Before us, Ld. Counsel for the assessee submitted that now this issue has been covered by the decision of Hon'ble Apex Court in the Case of **Hyundai Heavy Industries Co. Ltd. (supra)** which has been followed by Ld. CIT (A) and strongly referred to the specific argument taken by the department as incorporated in para 9 and conclusion given in para no. 11 of its order.

15. Ld. Counsel also pointed out that in AY 2005-06, the Tribunal had decided this issue in favour of the assessee specially the issue of PE in India i.e. installation PE under Article 5(2)(k) and not under Article 5(2)(f).

16. We have heard the rival submissions and also perused the relevant material placed before us. The facts in all the 3 assessment years i.e. AY 2006-07, 2007-08 and 2008-09 are identical and similar reasoning of AO and Ld. CIT(A) are permeating in all the years. Even the Tribunal has considered all the 3 years in combined manner looking into the identical issues. Though, we have

discussed the facts and observations given in AY 2006-07, however our findings will apply mutatis mutandis for other 2 assessment years i.e. 2007-08 & 2008-09 also.

17. Now before us, the only issue is, whether the operations carried outside India for offshore supply can be brought to tax u/s 44BB. During the course of hearing, we have asked for the copy of contract and also the scope of work outside India and inside India. The scope of outside India work as per the contract was stated to be as under:-

a. The 3 platforms namely, PH, PJ & STD were to be designed and fabricated outside India and were in fact manufactured at the fabrication yard situated in UAE.

b. After the fabrication was completed, Warranty Surveyor appointed by BG Exploration would certify the same fit for transportation to the installation site - viz. Panna (PH&PJ) and Tapti (STD).

c. The timeline for completion of the offshore fabrication has been prescribed in Exhibit C to the Contract as under:

i. PH Platform

1. Jacket and Platform Mechanical Completion and Warranty Surveyor certification for Sail away (See Milestone no.4A)

2. *Date of completion - 31 December 2005*

ii. *PJ Platform*

1. *Jacket and Platform Mechanical Completion and Warranty Surveyor certification for Sail away (See Milestone no.4B)*

2. *Date of completion -16 January 2006* iii. *STD Platform*

1. *Jacket and Platform Mechanical Completion and Warranty Surveyor certification for Sail away (See Milestone no.10)*

2. *Date of completion - 25 January 2006*

18. Annexure A contains the key milestone for release of the payment, which are as under:-

d. The title to the 3 platforms and its designs would be pass outside India to BG Exploration as per the following clause of the Contract:

CLAUSE 24 - TITLE AND PASSING OF RISK

24.2 Title in the WORK or any part thereof including but not limited to all drawings, files, documents, calculations, software, data, information, plant, goods, equipment, materials and other items shall pass to COMPANY as soon as prepared, incorporated Into or used for the WORK, delivered to the SITE or paid for by the COMPANY (whichever shall first occur) and shall be clearly marked (where possible) as COMPANY'S property by CONTRACTOR.

e. Consideration for the offshore work was negotiated and provided in the contract as under:-

<i>ITEM</i>	<i>TOTAL OUTSIDE INIDA – USD</i>
<i>1.0 – Project Management (including as Built Deliverables)</i>	<i>11,320,306</i>
<i>2.0- Engineering and Detailed Design</i>	<i>5,697,752</i>
<i>3.0- Equipment and Materials</i>	<i>50,687,333</i>
<i>4.0- Fabrication</i>	<i>20,588,119</i>
<i>5.0- Installation</i>	<i>8,553,490</i>
<i>6.0- Hook Up & Commissioning</i>	<i>-</i>
<i>7.0- As Built Deliverables</i>	<i>Included in Project Management item 1.0 above</i>
<i>TOTAL CONTRACT PRICE AT AWARD</i>	<i>96,847,000</i>

19. Annexure – ‘C’ contains the bifurcation of receipts outside India and inside India where the scope of Inside India work is as under:-

a. *After delivery at the installation site, viz. at Panna and Tapti the Assessee was to complete installation, host platform modification, pipe lay, hook up and commissioning of:*

i. *the PH platform by 31 December 2005,*

ii. *PJ platform by 12 April 2006 and*

iii. *the STD platform by 23 April 2006.*

b. The contract separately provided for consideration of the onshore installation and commissioning

<i>ITEM</i>	<i>TOTAL INSIDE INIDA – USD</i>
<i>1.0 – Project Management (including as Built Deliverables)</i>	<i>2,893,806</i>
<i>2.0- Engineering and Detailed Design</i>	<i>-</i>
<i>3.0- Equipment and Materials</i>	<i>2,430,461</i>
<i>4.0- Fabrication</i>	<i>-</i>
<i>5.0- Installation</i>	<i>25,570,925</i>
<i>6.0- Hook Up & Commissioning</i>	<i>4,926,808</i>
<i>7.0- As Built Deliverables</i>	
<i>TOTAL CONTRACT PRICE AT AWARD</i>	<i>35,822,000</i>

20. For the Assessment Year 2006-07, the assessee received Rs. 241,45,68,949 for the work performed outside India and Rs. 67,15,60,235 was received for the installation activities carried out within India. The Assessing Officer just like in the previous year held that the agreement executed between the assessee and BG Exploration was an indivisible contract and therefore the amount received by the assessee even for work done outside India formed

part of the composite contract and taxable under section 44BB of the Act @ 10%.

21. Now so far as whether there is PE in terms of Article 5(2)(k) or 5(2)(f) of India Australia DTAA, the same stands covered by decision of the Tribunal in assessee's own case for AY 2005-06. Otherwise also Ld. CIT (A) has rightly held that it is installation PE under Article 5(2)(k) as the same applies to production actually pertaining to mine, oil or gas well, quarry for any other place of extraction of natural resources. Since, the assessee has no right on gas or oil well which belongs to BG and the assessee carried out installation of platform only activity of assessee was part of installation of platforms of oil well. Therefore, this ground raised by the revenue is dismissed. Though, the Tribunal in first round as noted above held that receipts for work done outside India is taxable u/s 44BB, but the Tribunal has now been set aside by the Hon'ble High Court to be decided afresh. Thus, we are deciding this issue independently.

22. There is no dispute that Rs. 241,45,68,949 was for the work done outside India. Not only has the Assessing Officer himself accepted this position in the assessment order, but the Ld. CIT(A)

has also accepted that receipts of Rs. 241,45,68,949/- was for the work done outside India. The claim of the assessee is that, since purchase of material used for installation of platform was done outside India, the same is not attributable to the PE which is an installation PE for installation and commission of platforms for 3 well oil platforms for BGIL. The contention of the assessee before us has been that offshore supply cannot be taxed in the hands of Permanent Establishment as the PE comes into existence only after the oil well platforms were delivered to the PE in India for installation. Therefore, income of Rs. 241,45,68,949/- received by the assessee for offshore supply is not taxable in the hands of the PE as the same is not attributable to the installation activities carried out by the PE. The income attributable to offshore supply thus does not become taxable merely because the contract is an indivisible contract.

22. First of all, once it is accepted fact that there was an installation PE, then it needs to be seen, whether the offshore supply used for commissioning and installation of platform can be said to be attributable to the PE. Before us, heavy reliance placed to

the judgment of Hon'ble Apex Court in the case of **CIT Vs. Hyundai Heavy Industries Co. Ltd. (supra)** wherein the facts were as under:-

The assessee, a non-resident company, incorporated in Korea, had entered into an agreement with ONGC for designing, fabrication, hook-up and commissioning of some platform in Bombay High. The said contract was in two parts. One was for fabrication of platform hi Korea and the other was installation and commissioning of said platform in Bombay High. The assessee filed its return declaring nil income and during the assessment proceedings submitted, inter alia, that it did not have a Permanent Establishment (PE) in India and, therefore, it was not assessable to tax hi India; that its Indian operations consisting of installation and commissioning of the platform were completed within the duration of less than nine months; that it was entitled to exemption under article 7 of the Convention for Avoidance of Double Taxation (CADT); that in the alternative, it was liable to be assessed on the basis of the accounts annexed to the returns, which were based on the completed contract method in its worldwide accounts; that the contract in question was divisible into two types of operations, one being fabrication in Korea and the other consisting of installation in India and therefore any income arising from the activity of fabrication in Korea was not assessable to tax in India and to that extent, the revenues receivable under the said contract in respect of said fabrication activity should be excluded from the profit and loss

account together with the expenditure relating to that fabrication activity. The Assessing Officer held that as duration of the project consisting of installation and commissioning extended beyond nine months, the project constituted a PE of the assessee in India in terms of article 5(3) of CADT; that in any event the office of the assessee in Bombay constituted a PE under article 5(2)(c) and, therefore, the claim of the assessee for exemption under article 7 of the CADT was not maintainable. Therefore, the Assessing Officer held that the profits attributable to the PE were liable to be taxed in India in accordance with article 7. The Assessing Officer also rejected the Completed Contract Method as well as the accounts submitted by the assessee on the ground that the assessee had failed to produce the relevant books of account that it had refused to produce books of account maintained in Korea; and that it had failed to produce the accounting details pertaining to the activities/operations carried out by its PE in India. For the said reasons, the accounts were rejected by the Assessing Officer. On the question of quantum of assessment, the Assessing Officer held that income from designing, fabrication, procurement of material, etc., was partly attributable to the PE of the assessee in India on the ground that designing, fabrication and procurement of material were activities having nexus/linkage to the ultimate activity of installation and commissioning of platform in Bombay High and, therefore, income to that extent from the Korean operations was taxable in India. According to the Assessing Officer, the contract was not divisible; the contract was in respect of the Turnkey

Project; that the consideration in the contract was of lump sum price; that even when the fabricated structure was delivered for transportation to the representative of ONGC the accounts between the parties remained to be settled; and since designing and fabrication of the platform had an application in Bombay High (where the platform was to come into operation), a part of the profits arising even from Korean operations was taxable in India as such portion of the profits was attributable to the work of installation and commissioning of the platform in Bombay High. Accordingly, the Assessing Officer taxed the entire revenue relatable to the Indian operations after estimating the net profit under the contract at 20 percent of the gross receipts and he also taxed 2 per cent of the contract revenue in respect of Korean operations.

23. Before the Hon'ble Supreme Court, one of the key arguments raised by the revenue which has also been taken before us were as under:-

9. Now, coming to the present case, the main argument advanced on behalf of the Department was that the assessee was in receipt of consideration which formed part of execution of Turnkey Project with ONGC; that there was one integrated contract; that the contract was not divisible in terms of separate activities and, therefore, the Tribunal had erred in holding that profits accruing to the assessee from activities performed outside India were not

chargeable to tax in India. According to the Department, the work of designing and fabrication under the Turnkey Project was totally interlinked with installation and commissioning and, therefore, there was no merit in the assessee's claim in respect of receipts attributable to the activities performed outside India as not chargeable to tax in India. According to the Department, the assessee was required to execute turnkey work, that is, to supply certain equipments and install the same in India. According to the Department, the supply of fabricated platform was essentially linked to installation of the platform in the Bombay High. Thus, according to the Department, there was a business connection and the supplies were linked to the Project in Bombay High. For this reason, according to the Department, the consideration received by the assessee for supplies from outside India were taxable in India in terms of [Section 9\(1\)](#) of the Act. On the other hand, the assessee placed reliance on [Article 7](#) of the CADT and submitted that on completion of the work of fabrication of platforms the same were handed over to the Agents of the ONGC in Korea and, therefore, the assessee was not liable to be taxed in respect of the profits attributable to the operations of designing and fabrication in Korea. In this connection, the assessee placed reliance on [Article 7](#) of CADT.

24. Thereafter, the Hon'ble Apex Court observed and held as under:-

11. On reading [Article 7](#) of the CADT, it is clear that the said Article is based on OECD Model Convention. Para (1) of [Article 7](#) states the general rule that business profits of an enterprise of one Contracting State may not be taxed by the other Contracting State unless the enterprise carries on its business in the Other Contracting State through its PE. The said para 91) further lays down that only so much of the profits attributable to the PE is taxable. Para 91) of [Article 7](#) further lays down that the attributable profit can be determined by the apportionment of the total profits of the assessee to its various parts OR on the basis of an assumption that the PE is a distinct and separate enterprise having its own profits and distinct from GE. Applying the above test to the facts of the present case, we find that profits earned by the Korean GE on supplies of fabricated platforms cannot be made attributable to its Indian PE as the installation PE came into existence only after the transaction stood materialized. The installation PE came into existence only on conclusion of the transaction giving rise to the supplies of the fabricated platforms. The Installation PE emerged 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. There is one more reason for coming to the aforestated conclusion. In terms of para (1) of [Article 7](#), the profits to be taxed in the source country were not the real profits but hypothetical profits which the PE would have earned if it was wholly independent of the GE.

Therefore, even if we assume that the supplies were necessary for the purposes of installation (activity of the PE in India) and even if we assume that the supplies were an integral part, still no part of profits on such supplies can be attributed to the independent PE unless it is established by the Department that the supplies were not at arm's length price. No such taxability can arise in the present case as the sales were directly billed to the Indian Customer (ONGC). No such taxability can also arise in the present case as there was no allegation made by the Department that the price at which billing was done for the supplies included any element for services rendered by the PE. In the light of our above discussion, we are of the view that the profits that accrued to the Korean GE for the Korean operations were not taxable in India.

25. The aforesaid principle and ratio laid down by the Hon'ble Supreme Court is clearly applicable to the facts of the present case also wherein it was held that profits of offshore supply cannot be said to be attributable to the PE because the sale were directly billed to the Indian Customer. Here in this case, the sales were directly billed to BG and the material purchased outside India cannot be said to be attributable to the operations which can be said to be taxable in India by holding it to be attributable to PE. In the case of **Hyundai Heavy Industries Co. Ltd. (supra)**, it was the case of composite contract which has been harped on by the

revenue, in case of composite contract of offshore supply is also part of activities carried out in India. Thus, we hold that Ld. CIT(A) has rightly followed the ratio of **Hyundai Heavy Industries Co. Ltd. (supra)** and the receipts of offshore supply cannot be taxed in India by invoking the section 44BB. Therefore, the order of Ld. CIT(A) is upheld and the grounds of revenue's appeal are dismissed. In so far as revenue's ground no. 3 relating to interest charge u/s 234B is concerned, the same is not covered by the judgment in the case of **DIT vs. Mitsubishi Corporation India Ltd. (supra)**, wherein it has been held as interest u/s 234 is not revivable while tax is deductible at source u/s 195 of the Act. Therefore, ground no. 3 is also dismissed.

26. Thus, the appeal of the revenue and Cross objection of the assessee for AY 2007-07 is dismissed.

27. Similarly, the appeal of the revenue and Cross Objections of the assessee for AY 2007-08 & 2008-09 are exactly the same grounds, therefore these appeals and cross objections of both the assessment years are also dismissed.

28. In the result, all the appeals filed by revenue and CO's filed by the assessee are treated as **dismissed**.

Orders pronounced in the open court on 30th May, 2022

Sd/-
 (Amarjit Singh)

Accountant Member

Sd/-
 (Amit Shukla)

Judicial Member

मुंबई Mumbai; दिनांक Dated : 30th May, 2022

Sr.PS. Dhananjay

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./ Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai