IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E", NEW DELHI
BEFORE SHRI A.D. JAIN, JUDICIAL MEMBER
AND
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
I.T.A. No. 5168/Del/2010
A.Y. : 2007-08

M/s National Petroleum Construction Company, C/o Pricewaterhouse Coopers Pvt. Ltd., Building NO. 10, Floor 17, Tower-C, DLF Cyber City, Gurgaon – 122002 (PAN: AAACN7799J)	vs.	Addl. Director of Income Tax (Intl. Taxation), Dehradun, 13-A, Subhash Road, Dehradun
(Appellant)		**(Respondent)**

Assessee by	:	Sh. C.S. Agarwal, Sr. Adv., Sh. R.P. Mall, Adv., Sh. Nitin Vaid, Sh. Anuj Kansal, Sh. Sandeep Nagpal
Department by	:	Sh. Ashwani Kumar Mahajan, C.I.T.(D.R.)

ORDER

PER SHAMIM YAHYA: AM

This appeal by the Assessee is directed against the order of the Assessing Officer dated 26.10.2010 pertaining to assessment year 2007-08 passed under section 143(3)/144 of the I.T. Act, 1961.

2. The grounds raised read as under:-

1. That the learned ('Ld') Assessing Officer ('AO') has grossly erred both on facts and in law, in computing the income of the appellant company at Rs. 164,52,67,897/- against the declared income of Rs. 10,77,98,1661/-.
2. That in framing the assessment, the Ld. AO has erred in holding that the appellant had entered into a turnkey project, and as such is to be assessed on

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the gross turnover and the net taxable income is estimated by him @ 25% of such gross turnover. In doing so, he has failed to appreciate that, the income of the appellant, a Tax Resident of the United Arab Emirate ('UAE'), is to be computed in accordance with the provisions of the Double Taxation Avoidance Agreement ('Treaty') entered between India and UAE and only so much of the income, as is attributable to the purported construction Permanent Establishment ('PE') could alone be taxed in India.

3. That the Authorities below have failed to appreciate that, the appellant could not be held to have any PE in India within the meaning of Article 5 (1) of the treaty.

4. That learned A.O. has failed to comprehend that in fact, in the preceding assessment years too since A Y 1997-98, there had been no finding that the appellant had any PE when it had entered into a similar contract with ONGC, and as such in the absence of surfacing any fresh evidence or material the learned A.O. exceeded in his jurisdiction in holding that the appellant has a P.E. in India and the entire receipts even for the activities undertaken and completed outside India could be taxed in India and that too by arbitrarily estimating such an income @25% of the gross value of supplies made from outside India.

5. The findings recorded by the Ld. A.O. and that too, without giving any show cause notice or confronting any fresh material according to law, is untenable and thus the conclusion that the appellant has a P.E. in India or that the purported/alleged project office of the appellant can be regarded as a P.E., is vitiated finding both on facts and in law and could not be regarded as any valid basis for framing the assessment.

6. That the Ld. A.O. has failed to appreciate that there is a distinction between 'construction PE' within the meaning of Article 5(2)(h) and the PE as defined under Article 5(1) of the Treaty, and as such only such income as is attributable to the construction PE could only be assessed to tax as had been assessed in the preceding years.

7. That the Ld. DRP could not validly have upheld the proposed assessment without either appreciating and correctly comprehending grounds NO.2, 3 & 4 of the grounds of objections raised before it and despite the fact that the Delhi Bench of the Income Tax Appellate Tribunal ('ITAT') in identical circumstances in the case of C.I.T. vs. M/s Hyndai Heavy Industries Co. Ltd. reported in 31 SOT 482 has held that merely, where an appellant is engaged in installation of platform at High Seas (as is the case of appellant hereto), it could not be held

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that the appellant had a PE in India in the form of project office in India, and it can only have an installation PE as per the specific provisions of Article 5(2)(h) which override the general provisions of Article 5(1) of the treaty, subject to fulfillment of the duration test of 9 months which is not satisfied in appellant's case.

8. That the authorities below erred in holding that the appellant has a dependent agent PE in India in the form of M/s Arcadia Shipping limited ('Arcadia') without appreciating the fact that Arcadia was an independent consultant, and not an agent of the appellant, and also that contract awarded by ONGC was under the International competitive biddings, awarded to lowest bidder which cannot be negotiated, secured, concluded by any person.

9. That in framing the impugned assessment the learned AO has arbitrarily ignored the provisions of Article 7(1), 7(2), 7(3) and 7(6) of the treaty and also the principles laid down in the judgments of the Apex Court in the case CIT vs. Hyundai Heavy Industries Co. Ltd. reported in 291 ITR 482 and also in the case of Ishikawajima Harima Heavy Industries Vs. DIT reported in 288 ITR 408, so as to conclude that any further income, more than what the appellant has disclosed in the return of income, accrued to it.

10. That the Ld. AO had no valid justification on relying on the purported statement (where in fact there was no statement recorded) of Shri S.K.Sachdeva, DGM (E) - PC 4WPP-11 and that too without producing him for the appellant's cross examination, in the absence of which the purported statements cannot be a basis for recording adverse finding to conclude that the contract is not a divisible contract and the revenues pertaining to outside India operation are taxable in India.

11. That without prejudice and in the alternative, the Ld. AO has failed to comprehend that even assuming that the appellant had delivered the platform in India (but constructed by it outside India) the same could not be made the basis to hold that any income accrued to it in India by mere fact that the platform was supplied in India and for the work done outside India.

12. That the Ld. AO has erred in holding that since the appellant had (under the same agreement under which it had supplied the platform erected by it), installed the platform on Mumbai High Seas, an income arose even in respect of value of supplies received by the appellant for the construction of the platform erected by it outside India. In fact, no income in respect of supplies made could be held to be an income which is taxable under the provisions of the Treaty other than such income as may be attributable to the alleged PE.

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13. That the Ld. AO has failed to appreciate that the appellant had completed the Fabrication and erection of the platform supplied by it to INGC outside India and that it had installed the said platform at Mumbai High, under the terms of contract entered by it on 28.12.2005 and further that such a contract had partially been executed in the financial year 2005-06, relevant to the assessment year 2006-07, and partially executed in the instant year, against which appellant company had received an amount of USD 14,68,22,480 in the instant year and as such the adverse findings recorded are in disregard of the factual matrix so as to hold that the appellant was liable to be assessed @ 25% of the gross receipts, which presumptive rate of profit applied was without providing any basis whatsoever and was thus perverse.

14. That the Ld. AO has further overlooked that, since the assessment year 1997-98 (being the first assessment year), the appellant was being assessed to tax under presumptive regime of taxation i.e. 10% of the net value of receipt for work done in India (after claiming TDS verifiable expense) and 1 % of gross receipt of work done outside India and as such there could be no justification to hold that the appellant is liable to be assessed @ 25% gross receipt in India in the instant year, more particularly when issuing a certificate under section 197 of the Act, it was directed that the income of the appellant be estimated at a rate much lower than 25%.

15. That the Ld. AO has grossly erred in framing the assessment on the basis that the appellant had handed over the platform in India and as such the entire income accrued in India, overlooking the factual substratum and the provisions of the treaty and the provisions of the contract entered by the appellant with ONGC. The Ld. AO has grossly erred in reading the contract as a whole and went wrong in construing a part of the contract and that too wrongly.

16. The Ld. A.O. has further erred in holding that the contract entered into by the appellant was a turnkey project, and as such, the entire income accrued to the appellant in India. The aforesaid concept is contrary to the provisions of Treaty which provide only as much income as is attributable to PE in India could be brought to tax, even on an assumption which is without prejudice, that the appellant had a P.E. in India.

17. That the authorities below grossly erred in ignoring the principles of taxation laid down by the Hon'ble Apex Court in the case of Ishikawajrna Harirna's : 288 ITR 408 (SC) in respect of taxability of turnkey contract where different parts of the contract are to be carried out in different tax jurisdictions.

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18. That the Ld. AO has failed to appreciate that (having regard to the facts and circumstances that it could not be disputed, indeed it has not been disputed that the entire work of fabrication of platform supplied was completed outside India) no such income in respect of work of fabrication of platform which was completed outside India, could be brought to tax as provided in Article 7 of the Treaty.
19. That the Ld. AO failed to appreciate that out of the total receipts of USD 14.68.22.480 a sum of USD 13,02,19,878 was specifically receivable in respect of the construction, fabrication and erection of the platform supplied by it to ONGC and as such no portion of such part of receipt included in the contract could *have been brought to tax and no income could have arbitrarily been estimated on such value of contract.
20. That the Ld. AO has further erred in failing to appreciate that the appellant had offered to be assessed @ 1 % of such value of contract, even if it is held that the mere activity of handing over of the 'physical possession' could be held to have resulted in to an accrual of income in India, despite the fact in law no income accrued, (which was the basis adopted in the preceding assessment years), there was no basis to adopt arbitrarily a rate of profit of 25% on such gross receipts or change the method. The findings of the AO were not only arbitrary but were highly perverse and were contrary to facts and law.
21. That further the Ld. AO had grossly erred in arbitrarily estimating a profit rate of 25% of the entire value of the work as income accruing and taxable in India and no basis whatsoever for such an arbitrary rate of profit had been either stated or confronted for its rebuttal to the appellant, thus the assessment made is highly arbitrary and untenable.
22. That further the learned Dispute Resolution Panel CORP') while approving such a rate of profit has further erred in supporting the rate of profit adopted without confronting to the appellant for its rebuttal any material and otherwise too without prejudice, the comparables or the basis stated by DRP in its order of approval which is highly arbitrary and is wholly perverse. The comparables stated by the learned DRP in its 'directions' are entirely and wholly inapplicable and projects the mindset and perverseness of the Ld. DRP. Besides, in fact, no attempt whatsoever had been made to determine profit attributable to the purported PE on the basis of functions, assets and risk analysis and further the data furnished by the appellant in the form of 'PE

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Attribution Study' before the learned DRP has also been arbitrarily brushed aside and ignored.

23. That the Assessing Officer has erred in holding that the consideration towards design and engineering is covered as 'fee for technical services' without appreciating the fact that the provisions of the treaty treats fee for technical services as business profits taxable under Article 7 of the Treaty.

24. Without prejudice and not admitting the existence of PE in the alternative, the Ld. Assessing Officer /DRP ought to have applied section 44AB in respect of the activities towards inside India activities i.e. installation of platform in India, as held in the judgement of Hyndai Heavy Industries Co. Ltd. reported in 291 ITR 482.

25. That the directions of the Ld. DRP to the proposed order of assessment is not only arbitrary but is also erroneous both on facts and in law. The DRP has completely glossed over and has erred in disregarding the proposed written submission and the written arguments, and thus gave directions to assess the income at ₹ 164,52,67,897/- against the income declared of ₹ 10,77,98,165/- without application of mind.

26. That in any case and without prejudice, it is being undisputed that it was ONGC who was the payee under the contract and was liable to deduct tax at source and therefore no interest u/s. 234B of the Act, was leviable as has been held by the jurisdictional High court in its judgement in Sedco Forex International vs. DCIT (reported in 264 ITR 320) and as such no interest could be held as leviable.

27. That the Assessing Officer and the DRP have failed to appreciate that the judgement of Apex Court in the case of Anjum M.H. Ghaswala reported in 252 ITR 1 has absolutely no application in a case of tax resident outside India whose income was subject to deduction of tax at source and as such interest levied u/s. 234B of the Act (which has not even been specified) is unsustainable in law. The levy of such interest which remains unspecified otherwise too deserves to be deleted.

28. That likewise, no interest u/s. 234C and 234D could have been levied.

29. That in fact there being no default u/s. 234C there could be no basis either to hold the levy of interest or directing the same to be levied and as such, unspecified interest deserves to be vacated, and more particularly when due taxes were already deducted at source on returned income and interest is leviable only on returned income.

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30. That in fact there being no default u/s 234D there could be no basis either to hold the levy of interest or directing the same to be levied and as such, unspecified interest deserves to be vacated, and more particularly when no refund was granted to the appellant either under section 143(1) or 143(3) of the Act.

31. That the Ld. AO has failed to appreciate that, having granted a certificate to ONGC to deduct tax at lower rate, i.e. 0.84% for outside India revenues and 4.39% for inside India revenues, it could not have applied a rate of profit of 25% and levy interest under section 2348 of the Act or any other provision of the Act.

32. That the appellant could not have been fastened with a liability of interest as the deductor had been granted the certificate to deduct at the lower rate of tax i.e. @ 4.39% based upon the 10.50% of the gross revenue for work done inside India and 0.84% based upon the 1 % of the gross revenues for work done outside India and as such the interest levied of Rs. 31,55,74,162 is entirely unwarranted in law.

Prayer:

It is therefore prayed that:

I. The assessment made on the directions by the learned ORP is not in accordance with law but is arbitrary also.

II. In the alternative and without prejudice, no income could be said to have been accrued or was taxable in India, in respect of supplies made of platform erected and constructed by the appellant outside India.

III. That the application of net rate of profit @ 25% is highly arbitrary.

IV. That it was not a case of turnkey project and even assuming the same no income arose, such value of contract which had been undertaken outside India.

V. That no interest under any provision of section 234B, 234C or 234D of the Act was leviable.

The above grounds of appeals are without prejudice to each other.

That the appellant craves leave to add, alter, amend or withdraw all or any grounds or add any further grounds as may be considered necessary either before or during the hearing of these grounds."

3. The brief facts of the case are stated as under:-

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In this case return of income was filed on 31-l0-2007 for A.Y. 2007-08 declaring total income at Rs. 10,77,98,165/-. The nature of business is shown in the return as "Fabrication and Installation of Onshore and Off-shore Oil facilities and Sub-marine pipelines and pipelines quoting". The assessee has, during the year, executed the following project:

- MR/OW/MM/NHBS4WPP dated 28.12.2005.

However, in the return of income from the above projects, the assessee has, as in earlier years, taken the plea that their contracts with ONGC have two different and distinct components-one, for designing, fabrication and supply of material and the other for installation and commissioning of the project. According to the assessee, the work relating to the former is carried out exclusively in Abu Dhabi, and hence no income relating to receipts for that part of the contracts is liable to tax in India as the same is not attributable to the PE in India. Later on, the assessee has taken the plea in its written submission that they do not have a P .E. in India. Assessee further contended that the PE for the installation and commissioning also lasted for less than 9 months. Therefore, in terms of DTAA between India and U.A.E. no income can be attributed to India. The returned income was, therefore, restricted to attributions related to only installation and commissioning of the project in India However, for the outside India work claimed by the assessee, they have paid taxes after calculating 1 %

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deemed profit rate on the alleged outside India revenues. Assessee placed heavy reliance on the decision of the Hon'ble Apex Court in the case of M/s Hundai Heavy Industries for AYs. 87-88 and 88-89 and also on the decision of the ITAT for earlier years in the case of M/s Hundai Heavy Industries.

Assessing Officer further noted that assessee company opened its office in India in 1990's and since then they are regularly undertaking the execution of various projects in India most of which have been related to the projects of ONGC on seas. The office of NPCC is located in India and is approved only as a project office. The assessee has an agent in India by the name of M/s Arcadia Shipping Co. with whom they have a contract since Dec. 26, 1994. As per the assessee M/s Arcadia was an independent agent that does not fit into the parameters of dependent agent PE. Assessing Officer further opined that the decision of Hyndai Heavy Industries Ltd. relied upon by the assessee was not applicable on the facts of the present case. In the background, the Assessing Officer opined that following issues arises for consideration:-

(i) Whether the Mumbai office of NPCC constitutes a PE?

(ii) Whether Arcadia Shipping Ltd. is a Dependent Agent PE;

(iii) Whether the Project P.E. lasted for less than 9 months and not during fabrication and procurement of material?

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(iv) Whether the fabricated material was sold to ONGC in Abu Dhabi before the PE in India came into existence?

(v) Whether the contract was divisible into two parts ,one for supply of material and the other for installation and commissioning?

Assessing Officer further referred to the agreement in this regard in detail. Assessing Officer opined that the scope of work detailed above clearly shows that the National Petroleum Construction Company work under the contract begins not with installation but pre-engineering and pre construction surveys. Assessing Officer further noted that in the said contract there is no stipulation of any sale or supply of material to ONGC. The design, engineering, procurement and fabrication etc. are part of the overall project. Assessing Officer further referred the clauses of the contract which provide that the assessee contractor would seek approval of the Company before start of every work including fabrication and the Company would monitor rate of progress through monthly progress reports. The contract further stipulates that all Material, plant and labor will be provided by the assessee contractor and the manner of execution of work will be to the satisfaction of the company. The contract further provides that from the time of commencement of the work to the time of issue of certificate of completion and acceptance work the assessee contractor shall be fully responsible for all works or any part of them. The loss or damage, if any, shall be the responsibility of the contractor.

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From the above, Assessing Officer opined that this clearly indicates that till the issue of completion certificate, entire risk for the entire project or its any part shall lie with the assessee. Assessing Officer further observed that the terms of the clause clearly indicate that the milestone payments are only provisional payments and these do not suggest that the contract is divisible in as many parts as the payment schedule is broken into. Assessing Officer further observed that the clause of customs duty clearly shows that the payment of Customs Duty by the assessee is on its own account. The clause of the agreement further stipulated that ownership of material shall be transferred to the ONGC, upon issue of certificate towards part completion or completion and acceptance of entire work.

Assessing Officer observed that the main thrust of the argument of the assessee is that it was not having any PE in India before the work of fabrication got completed and the fabricated material was imported in India. The installation PE was having the limited task of installation and commissioning of the project. Thus, the assessee's claim was that no part of profits in respect of off shore supplies can be brought to tax in India. Assessing Officer noted that the contention of the assessee was that it has a project office in Mumbai since 1990, but it has been opened at the instructions of ONGC because it was a mandatory requirement for the execution of the contract. Assessing Officer opined that the crucial fact is that the assessee has an office in India which is a project office and therefore, clearly as per the Treaty between India and UAE, the assessee has a P.E. in India.

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Assessing Officer further observed that it was for the assessee to prove that the activities of the Project Office are ancillary and auxiliary so that the same can be taken in the exception clause of the Treaty. Assessing Officer opined that by no stretch of imagination, a Project Office can be involved in ancillary and auxiliary activity. Assessing Officer further observed that in this case the project was in existence even prior to the signing of the contract with ONGC and after signing of the contract, the assessee intimated RBI that it has a Project Office for the execution of this contract. Assessing Officer further referred to his enquiry with ONGC and certain documents were collected from them. Referring to these documents, Assessing Officer observed that it indicated that the assessee's Mumbai office and M/s Arcadia the dependent agent Permanent Establishment has also participated in biding process and was involved in negotiation and finalization of the contract. Further, Assessing Officer observed that these documents are not mere correspondence but these indicate definite involvement of the Mumbai Office and Arcadia Shipping Ltd. in the process of negotiation of the contract. Further, Assessing Officer observed that right from the stage of submission of tender document to the date of kick off meeting when the technical work commences, Mumbai office and Arcadia were actively involved in the process. These can not be held to be a mere preparatory and auxiliary activities as contended by assessee in his reply to the show cause notice. Assessing Officer opined that marketing is a core business function and it can not be termed as auxiliary activity. The contract between the assessee and Arcadia Shipping Ltd.

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itself says that Arcadia will provide assistance in obtaining works and active representation, promotion and support of the principal's activities in India and assistance in obtaining services and facilities in India. Assessing Officer opined that it cannot be said that assessee has no P.E. in existence other than the Project Office. The Assessing Officer opined that assessee has a project office for its project in India and also the dependent agent M/s Arcadia. That it also has a PE in terms of article 5(2)(h) of Indo UAE Treaty i.e. construction and installation PE. Assessing Officer further observed that it was immaterial that the assessee has one single PE for all the business functions or different PE's for different functions.

Assessing Officer observed that assessee has wrongly advanced claim in earlier years that its PE in India was only an installation PE and therefore it fell within the meaning of para 3 of article 5. Assessing Officer opined that fact of the matter was that the assessee company undertook a business operation of carrying out certain work for ONGC on turnkey basis which included pre engineering surveys, designing, fabrication, procurement, installation and commissioning etc. as defined in the scope of work incorporated in the terms of the contract. The project office was involved in installation and commissioning but that was only a part of the business operation. Assessing Officer opined that the other items of work were also executed by the assessee in India through one agency or the other. The pre engineering surveys and designing etc. were also done by the Project office which operated through fixed place of business in India. The

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surveys and designing were also done by persons located in India. The assessee has undertaken detailed pre-engineering surveys which was the first step after the contract was awarded and the Project Manager had requested for N.E.D. passes for their employees to execute that work.

Assessing Officer observed that the monitoring by ONGC was so strong that the assessee company had to submit the periodical progress reports to the ONGC and their officials approved every stage of survey and designing. Assessing Officer further observed that the PE of assessee by way of project office for the project also lasted for more than 9 months. Assessing Officer further referred to the date of contract and the completion /hand over of the project and observed that project lasted for more than the period stipulated in the DTAA. Therefore, the assessee had a PE within the meaning of treaty.

Assessing Officer further observed that the procurement and fabrication of material took place during the existence of the PE in India. The terms of contract with ONGC do not stipulate any sale of material to them. The preamble to the agreement as also the scope of work stipulate manufacturing of platforms on a turnkey basis. There may be various stages in executing the work like survey, designing, fabrication procurement, and installation and commissioning but these are mere stages of the total project. The ONGC does not purchase any material from the assessee. ONGC takes over the completed platform when all parts of the work are executed.

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In this regard, Assessing Officer referred to the clarification given by the ONGC in their letter dated 11.12.2009. Referring to the said letter the Assessing Officer observed that the documents brings out in unequivocal terms that the ownership of the fabricated material remains with the assessee contractor till the completed project is handed over to the ONGC. The assessee has been mainly relying upon the schedule of milestone payments stipulated in the agreement where value of each item of work is indicated, the currency in which the payment is to be made is also indicated and the state of payment is equally stipulated. As clarified by ONGC these milestone payments are in the nature of 'provisional progressive payments' pending completion of the whole work.

Assessing Officer observed that the clause relating to insurance, payment of custom duty, reimport in the case of loss / damage etc. only reinforce the view. The assessee does the fabrication work in Abu Dhabi but gets it transported at its own cost to India and uses the same in the work undertaken by the it in terms of the contract. Assessing Officer opined that it is no different than using one's own material in an erection or construction project. Assessing Officer further observed that there was no sale of any material. The ownership of the material got transferred only on the completion of the work which was also in India. The deployment of men and material was in India. The import was made by the assessee on its own account and the customs duty was also paid by them on their own account. The entire transportation was done at their own risk. Assessing

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Officer further observed that assessee has not produced any evidence of transfer of ownership to ONGC outside India.

From the above Assessing Officer observed that it is evident from the above that the work relating to fabrication and procurement of material was very much a part of the contract for execution of work assigned by ONGC. The work was wholly executed by PE in India and it would be absurd to suggest that PE in India was not associated with the designing or fabrication of materials. In fact designing is completely covered as Fees for Technical Services. But since the assessee has undertaken it through PE and it is part of consolidated contract, no separate treatment is done and the same is taxed as one consolidated contract under the head 'business income'.

Assessing Officer further observed that company has undertaken contract in India on turnkey basis and has executed the contract in India. The title in goods as well as the constructed platform is transferred once the Indian company accepts the project as complete. This case has no comparison to a case of an isolated supply contract which has been done outside India. This is a clear cut case of a works contract executed in India where the assessee has also obligation of fabricating and procuring certain material to be used in the works. This is not a case of ONGC purchasing material from the assessee but it is a turnkey project where procurement of material is a part of the Contract which has been done by the assessee who has brought it to India and used it in the project where the material has been used is handed over to ONGC after the completion of the project.

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Assessing Officer further observed that there is absolutely no basis for the suggestion that the works contract could be divided into two parts, one for the supply of the material and the other for installation and commissioning. This contract in question was neither divisible nor can consideration for any activity under the contract is liable for separate treatment. The assessee is seeking to deny the role of its PE but has no answer to the fact that right from survey to bidding to negotiation to signing to execution and till acceptance test it has a presence in India through its employees and a fixed place of business was available to it in the form of a project office as well as the dependent agent M/S Arcadia Shipping Ltd.

In view of the above, Assessing Officer held that the assessee has executed the projects with ONGC on a turnkey basis, The scope of the project included works relating to pre-engineering surveys, designing, fabrication, procurement, installation and commissioning of the project of laying of the pipelines. All these obligations were part of "works", the scope of which is well defined in the contract. The contract was not divisible. The obligations and the risk· of the assessee continued till the completion of the work and grant of completion certificate by ONGC. The PE in India existed for the entire duration of the project which commenced with the Kick Off meting and ended with the completion of the work. The dependent agent M/s Arcadia acted as PE for the initial part and later the operational part was executed by the project office and also by Arcadia Shipping Ltd. The title in the goods passed in India and PE in India utilized the material on its own account and on its own behalf.

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Thus, the entire profits from the work under the contracts arise in India and are liable to tax as such.

Assessing Officer further observed that it will not be out of place to mention that business of the assessee was not covered by the provisions of section 44BB of the Income Tax Act, 1961. Sec. 44BB is applicable where the services are rendered in connection with prospecting for or extraction and exploration of mineral oil. The project is neither for prospecting of mineral oil nor the assessee is rendering any service in the exploration of mineral oil. What the assessee is doing is constructing a platform which may be used by the contractee for exploration of oil but as far as the assessee is concerned they are not rendering service in connection with the exploration of mineral oil. Thus the provisions of section 44BB are clearly inapplicable and the profit is to be computed in accordance with the accounts maintained for India operations and keeping in view the applicable provisions of the Income Tax Act. Thereafter, Assessing Officer concluded as under:-

> "Various notices were issued to the assessee to give the details of expenses incurred for the Project undertaken by the assessee in India. The assessee has neither got its accounts audited nor has furnished any audited account. Therefore, penalty proceedings under Sec. 271B are hereby initiated. It has also not furnished the details of any expenses. It 'has created its own method of computation of income where it has bifurcated its revenues into two parts one is for inside India

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and another for outside India. From the inside India revenue, sub-contractor cost has been deducted and then, a 10% deeming profit rate has been arrived. This method has no legal basis and therefore, is hereby rejected. For work outside India, they have taken 1% as the profits attributable to India. This also has no legal basis and therefore, is rejected. During the course of assessment proceedings, time and again, the assessee was asked to come forward with the details of expenses incurred, which the assessee did not produce. Even on the last date of hearing, no details are furnished. In view of this, the taxable income of the assessee was proposed to be computed at Rs. 164,52,67,900/-.

The above action of the Assessing Officer was upheld by the DRP who held that in absence of account, Assessing Officer is justified in estimating the profit of the assessee at 25% of gross receipts (including inside and outside India revenue).

4. Against the above order the Assessee is in appeal before us.

5. We have heard the rival contentions in light of the material produced and precedents relied upon.

6. Ld. Counsel of the assessee, at the outset submitted that in the pending appeal the assessee has formulated following 'Broad issues' for consideration and determination, which have been summarized as under:-

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i) Whether, the appellant has a permanent establishment in India, in the form of:

   a) Fixed place PE in the form of 'office', as defined under Article 5(2)(c) of the Double Taxation Avoidance Agreement between India and UAE; or

   b) "Installation PE" for the installation activities carried out in India, as defined in Article 5(2)(h) of the said DTAA: or

   c) Whether M/s Arcadia Shipping Ltd., an independent consultant engaged in providing support service under an agreement dated 26.12.1994 constitutes on 'dependent agent PE' under Article 5(4) DTAA?

   ii) If it is held that, appellant has a PE in India as aforesaid i.e. either under Article 5(2)(c), 5(2)(h) or 5(4) of the DTAA, then what would be the income attributable to PE to the assessed in India (since appellant company is permanently domiciled in UAE and is a tax resident of UAE? In other words, even if appellant is held to have PE in India, how much income could be held to be attributable under the terms of DTAA to be assessed in the hands of the appellant under Article 7(1) and 7(2) of the DTAA?

   iii) Whether the tender floated and executed by the assessee company was a turnkey contract despite the fact that it cannot be regarded as a turnkey project and even if it was a turnkey contract, whether the entire income as estimated by the Revenue could be assessed to tax in India and not only as much income

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as is attributable to its alleged permanent establishment.

iv) Whether without prejudice to the aforesaid, computation of tax by the learned Assessing Officer is correct and, in accordance with law?

v) Whether any interest u/s. 234B of the Act is leviable on the appellant company especially where the revenue had granted lower withholding tax order directing ONGC to withhold tax at lower rate, i.e. 0.84% for outside India revenues and 4.39% for inside India revenues?

7. Further submissions of the Ld. Counsel of the assessee are as under:-

"It is submitted that the appellant company has a project office since 1997 in India. It is further submitted that, it is an undisputed fact that this project office was stated to be a PE for assessment years 1997-98 to 2007-08. However, it is respectfully submitted that this office was only used as a communication channel and, is thus not a PE as defined in Article 5 (2) read with Article 5(1) of the DTAA.

It is submitted that, it is not denied that, appellant is involved in installation and commissioning of a fabricated platform in India and if, in respect of a project the period of installation activity exceeds beyond nine months, it would be regarded as an Installation or Construction PE. However, since the activity of the appellant in India in respect of 4WPP project lasted only for four and a half months, it cannot be said to have

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even an Installation PE in India within the meaning of Article 5(2)(h) of the DTAA.

Furthermore, the appellant cannot be said to have dependent agent PE as the consultant appointed by the appellant in India, M/s Arcadia Shipping Limited constitutes a dependent agent PE in India is not an agent at all: Even if it is assumed that M/s Arcadia is an agent, it is an agent of independent nature, as per Article 5(5) of the DT AA, M/s Arcadia is independent from the appellant legally and economically because Arcadia was acting in the normal course of its business and receiving an arm's length remuneration directly from ONGC. It is thus submitted that, M/s, Arcadia cannot be held to be a dependent agent as per Article 5(4) of the DT AA. In fact, neither it has authority to conclude or negotiate contracts on behalf of the appellant, nor, it habitually secures orders for appellant because appellant is dealing with ONGC which is a public sector undertaking awarding contracts under the International Competitive Bids only and not based on negotiations

It is also submitted that, despite the fact that, the subject contract may be construed as an umbrella contract, yet it is a divisible contract, since under the same contract, the consideration for various activities have been stated separately (Schedule C to the 4WPP contract at pages 1063 to 1081. Furthermore, there is a complete bifurcation of the activities to be carried out under the contract with consideration for each specific activity (i.e. designing, procurement, fabrication supply, installation and commissioning) assigned by ONGC which is an independent party (and even a Government of India

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undertaking). It is thus submitted that, for the purpose of attribution of income, the contract cannot be regarded as a composite contract leading to attribution of entire contract revenues.

Not a Turnkey Contract

At the outset, it is submitted that the taxability of the contract revenues depends upon the activities carried out in India and not whether the contract is a turnkey or other contract, yet the appellant submits that the relevant contract with ONGC, though fashioned as turnkey but not a turnkey contract in spirit and substance.

It is respectfully submitted that on a study of the 4WPP contract, it would be appreciated that ONGC may terminate the contract as per clause 8.2, 7.5.5 and or 7.4, and in the event of termination of the contract under clause 8.3.1, it may be seen that the appellant shall be eligible for the following amounts as per clause 8.3.2.

> "8.3.2 In the event of termination of the contract under clause 8.3.1, the company (i.e. ONGC) shall pay to the contractor (i.e. appellant) the following amount:
>
> (a) The Contract price properly attributable to the parts of the Works executed by the Contractor in accordance with the Contract as at the date of Termination.
>
> (b) The costs incurred by the Contractor in protecting the Works pursuant to paragraph (a) of clause 8.3.1 above as mutually agreed.
>
> (c) Reasonable demobilization charges as may be ascertained by the Company if contractor has

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Constructional Plant and Equipment at offshore site at the time the termination becomes effective.

(d) Cost of any materials or equipment already purchased and/or ordered by the Contractor, the delivery of which the Contractor must accept, such materials or equipment will become property of the Company upon payment by the Company of the actual Cost of the materials or equipment.

(e) All reasonable cost of cancelling/terminating any subcontract(s)

(f) All reasonable cost on cancellation or orders for material, etc., which the Contractor may have committed for the project." (Emphasis supplied)"

From the aforesaid, it could be seen and appreciated that it is the discretion of ONGC to take only the platform erected by the appellant in Abu Dhabi as it has a right to terminate on its own volition without having installation thereof. The appellant, in such an event, will not be entitled for any amount towards installation and commissioning but will only be entitled for the contract price properly attributable to the erection of fabricated platform (i.e. design & engineering, material procurement and fabrication) actually carried out by the appellant in accordance with the Contract i.e. the pricing schedule (Schedule C) and milestone payment formula (Schedule E) given in the contract. Furthermore, it is significant to be noted that, should the appellant contractor likewise abandons the contract at any stage, it would not be bound to refund any amount so received by it from ONGC in

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respect of the work already executed by. it. In fact, had it been a case of turnkey project, the appellant contractor would be entitled to the entire value of contract, whether executed or remains to be executed, if there was any termination on the violation of the company i.e. ONGC. Likewise, in case the appellant contractor abandons the contract suo motto or otherwise, it would be liable to refund the amount received by it from the company i.e. ONGC. It is submitted here that there is a difference between a project on turnkey basis. Though in the submission of the appellant, it would have no effect when an income is to be attributed having regard to Article 7(2) of DTAA which reads as under:

> " .... where an enterprise of an contracting state carries on business in other contracting state through a permanent establishment situated therein, there shall in each contracting state be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment. "

The Hon'ble Apex Court in Ishikawajma-Harima Heavy Industries Ltd. V. DIT reported in 288 ITR 408 has also held that:

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"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. "

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

In support of the aforesaid submissions, the appellant begs to clarify that, the appellant fabricated the platform in Abu Dhabi and after fabrication, said platform is brought to India with the help of its barges and is then the possession is handed over to ONGC. It is significant fact to be noted that before sailing the platform after fabrication, the same is certified by ONGC through it's approved surveyor (Refer to clause 4.9.6 of the contract. Hon'ble Bench's kind

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attention is also invited to the fact that, as per the insurance clause (7.1), the insurance policy though to be taken by the appellant but ONGC is the joint beneficiary in the policy. Besides, the insurance policy also demonstrates that ONGC is the principal and NPCC is the contractor. Furthermore, the insurance policy also exhibits that, in case there is a loss suffered in the course of transportation the payee of the insured amount would be ONGC and in case of any damage or loss of work, the insurance claim can be made by the assessee only if ONGC gives NOC in this regard. These facts clearly show that ONGC had all times vested interest in the work executed by the appellant notwithstanding the ownership in the fabricated material, even prior to bringing the material in India. It is thus clear that so far the activities of construction of platform is concerned, though physically the same is sailed through barges, but the same is completed in and is constructively handed over to ONGC in Abu Dhabi and as such the mere physical handing over cannot be stated to be one where an income could be attributed to the PE as alleged i.e. even if there is a PE. The submissions of the appellant therefore is that ONGC became defacto owner since the appellant company erected the platform only to be delivered to ONGC in respect of which it is also entitled to receive separate consideration from ONGC, as is otherwise supported by Annexure C of the contract. It is thus submitted that under the contract, there are different phases of execution of contract. The first phase was completed when it was

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fabricated, erected and brought to India through its barges to be physically supplied. The same was physically supplied although the same was constructively supplied by it in Abu Dhabi as is evident that the insurance premium was to be borne by ONGC, who was the principal under the terms of the Insurance policy.

It is also submitted that, since in the instant case, the contract was not terminated when the fabricated platform was ready to sail to India, same was installed by the appellant in India. Thus in view of Article 7(1) and 7(2) of the India UAE DTAA, only such income as is attributable to PE (i.e. income pertaining to work executed by the PE in India) could be brought to tax in India and no more.

Article 7 reads as under:

"1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and

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separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

In other words the profits have to be attributed between the two enterprises, one which carried on business outside India and another which carries business in India.

In the instant case really there is no element of profit because it is only a case of mere delivery.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.

4. In so far as it has been customary in a Contracting State to determine the profits to be attributed to a permanent establishment on the basis of an apportionment of the total profits of the enterprise to its various parts, nothing in paragraph 2 shall preclude that Contracting State from determining the profits to be taxed by such an apportionment as may be customary ; the methods of apportionment adopted shall, however, be such that, the result shall be in accordance with the principles contained in this Article.

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5. No profits shall be attributed to a permanent establishment by reason of the mere purchase by the permanent establishment of goods or merchandise for the enterprise.

6. For the purposes of the preceding paragraphs, the profits to be attributed to the permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary."

In nutshell the revenue's case is only that contract is completed when installed platform is delivered at site in India; assuming that to be so, it is submitted that all activities prior to installation and commissioning of the platform are carried out in UAE and thus having regard to Article 7 of the DTAA, no income can be attributed to the alleged PE in India. In other words, income attributable to the alleged PE in India could not extend to the activities carried outside India and had to be therefore confined to incomes from activities carried out from the alleged PE. It is reiterated that, even assuming that, the appellant has a PE, the same cannot be in respect of erecting and fabricating the platform in Abu Dhabi but could only be in respect of installation and commissioning activities, which even otherwise cannot be the case, since the period of installation activities is less than 9 months in India.

The appellant in this context places strong reliance on the following decisions Hyundai Heavy Industries Company Limited reported in 291 ITR 482 (SC):

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"The installation permanent establishment came into existence only on conclusion of the transaction giving rise to the supplies of the fabricated platforms. The installation permanent establishment emerged only after the contract with the ONGC stood concluded. It emerged only after the fabricated platform was delivered in Korea to the agents of the ONGC Therefore, the profits on such supplies of fabricated platforms cannot be said to be attributable to the permanent establishment."

Hyundai Heavy Industries Company Limited (ITA No 2290 & 2291 of DEL/2002 (ITAT) read with ITA No 42 of 2007 (Utt High Court) following the Supreme Court judgement reported in 291 ITR 482.

> "It has been noted by the Hon'ble Apex Court that the installation PE emerged only after the contract with the ONGC stood concluded. It is also noted that it emerged only after the fabricated platform was delivered in Korea to the agents of ONGC and therefore, the profits on such supplies were fabricated platforms cannot be said to be said to be attributable to P E. Thereafter, it is noted by the Hon'ble Apex Court that there is one more reason for coming to this conclusion. As per Their Lordships, in terms of para 1 of Article I, 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 and therefore, even if, it is assumed that supplies were necessary for the purpose

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of installation (activity of P E in India) and even is it assumed that the supplies were integral part, still no part of profit on such supplies can be attributed to the independent P E unless it is established by the department that the supplies were not at Arm's Length Price and this is the basis on which it was held by the Hon'ble Apex Court that the profits that accrued to the Korean GE for the Korean operations were not taxable in India. In the present two years also, nothing has been brought on record to show and establish that supplies were not at Arm's length price. Hence, even after considering this argument of the Ld. DR of the revenue that P E was in existence through out these two years, we are of the considered opinion that as per this judgement of Hon'ble Apex Court in the case of the assessee itself for the assessment year 1987-88 and 1988-89, no profit is taxable on account of Korean operation (designing and fabrication) because profits, if any, from the Korean operations arose outside India. In the present two years also, the only dispute is with regard to payments made to non resident company outside India for the work done outside India, as per composite contract for designing, fabrication, installation and commissioning of installation on a turn key basis. As per above discussion, after considering clause (a) of para-15 of the judgement of Hon'ble Apex Court per directions of Hon 'ble Uttrakhand High Court, we hold that in the facts and circumstances of the

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case, profit, if any, from the Korean operations (designing and fabrication) is not taxable in India because the same has been arisen outside India. Regarding clause (b) of para 15 of the judgement of Hon'ble Apex Court, we find that in the previous two years, there is no dispute regarding quantum of profit embedded in the Indian operation attributable to Indian P E of the assessee and hence this clause of para 15 is not applicable in the present two years which are before us. We, therefore find no reason to interfere in the order of Ld CIT(A) in both these years.".

The aforesaid proposition has also been followed by the Mumbai Tribunal Roxon OY Vs DCIT (103 TTJ 891 (Mum).
"As far as art. 7(I)(a) is concerned, the profits attributable to the supplies under the turnkey contract can be brought to tax in India only when we are to hold that the profits attributable to P E will include the profits on supplies under the turnkey contract. In our humble understanding, such an interpretation will be incorrect, for several reasons. Firstly, a profit earned by an enterprise on supplies which are to be used in a construction or installation P E for such supplies, cannot be said to be attributable to the P E because P E comes into existence after the transaction giving rise to supplies materialized. The installation or construction P E, in such a case, is a stage posterior to the conclusion of transaction giving rise to the supplies. Such an installation

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or construction P E can come into existence after the contract for turnkey project, of which supplies are integral part, is concluded."

Further more the Hon'ble Supreme Court had also affirmed the above proposition in the case of Ishikawajma-Harima Heavy Industries Ltd. vs DIT reported in 288 ITR408

" .... The fact that it has been fashioned as a turnkey contract by itself may not be of much significance. The contract may also be a turnkey contract, but the same by itself would not mean that even for the purpose of taxability the entire contract must be considered to be an integrated one so as to make the assessee to pay tax in India. The taxable events in execution of a contract may arise at several stages in several years. The liability of the parties may also arise at several stages. Obligations under the contract are distinct ones. Supply obligation is distinct and separate from service obligation. Price for each of the component of the contract is separate. Similarly offshore supply and offshore services have separately been dealt with. Prices in each of the segment are also different.

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

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

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derived by the contractor to be taxable in India "
(Emphasis supplied)

Further the facts of cases before the Apex Court and in the case of the appellant are identical and therefore, the ratio of these judgements squarely applies to appellant's case as well.

It is humbly submitted that despite the fact that under the law, the appellant's income cannot be taxed in India in view of the beneficial provisions of the DT AA as it has no PE in India due to aforesaid reasons, the appellant, however, keeping in mind the past trend where presumptive rate of profit was applied and accepted by the appellant and the revenue, the appellant, in the interest of revenue, agreed to be taxed for the relevant assessment year as in the past. It is submitted that the facts and circumstances as prevalent in preceding years have remain unchanged and, therefore applying the
rule of consistency, the income declared may be assessed and, no more. Reliance in support of the aforesaid proposition is placed on the judgement of Hon'ble Apex Court in the case of Radha Saomi Satsang v CIT reported at 193 ITR 321. This view has also been expressed in the following cases:

- (2001) 1 SCC 748 State of Andhra Pradesh v A.P. Jaiswal
- 266 ITR 99 (SC) CIT v Berger Paints
- 217 ITR 4 (Gau) DhansiRam Aggarwalla v CIT

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- 158 ITR 3 (Del) CIT V Shree Ram Memorial Foundation
- 245 ITR 492 (Del) CIT v Neo poly Pack
- 249 ITR 219 (SC) VOI v Kuomidini Narayan Dalal and Another
- 249 ITR 221 (SC) VOl v Satish Panna Lal Shah
- 156 ITR 835 (MP) CIT v Godavari Corporation Ltd
- 260 ITR 417 (P&H) CIT V. Girish Mohan Ganeriwalia
- 308 ITR 161 (SC) CIT v J.K. Charitable Trust
- 2011-TIOL-48-HC-DEL-IT CIT vs Rajasthan Breweries Ltd (see page 1118 -1121

We respectfully invite Hon'ble Bench's kind attention to a recent judgement dated 31 st May, 2011 of the Hon'ble Delhi Bench of the ITAT in the case of Hyundai Heavy Industries Company Limited [ITA No, 2086 & 2087/Del/2009] to support our submissions ,that even if it is assumed (without admitting) that the appellant has PE in India, it could only be held to be taxable only to the extent profits attributable to PE in India as per Article 7(1) & 7(2) read with Article 7(6) by following the consistent method of presumptive taxation where only income derived
inside India can be taxed after reducing TDS verifiable expenses and applying 10% presumptive profit rate on the balance inside India receipts. In other words the profit attributable to the activity of installation and commissioning can alone be taxed and the income though declared by the assessee even @ 1 % of the revenues generated outside India on the fabrication of platform could not be taxed. The

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appellant also places a reliance on the order of Hyundai Heavy Industries ltd (ITA No 2086 & 2087/Del/2009) where similar view has been adopted.

It may be stated here that the agreement entered by the assessee and that by Hyundai Heavy Industries are absolutely identical and as ONGC enters into only standard agreements, In other words terms of the agreement entered by the assessee and the terms of agreement entered by Hyundai Heavy Industries are absolutely identical. In the case of the assessee, the situation is better as it has no PE in India, whereas in the case of Hyundai a PE was established in India.

It is respectfully submitted that the Hon'ble Bench would appreciate that the aforesaid Hyundai Heavy case involved similar issues where Hyundai had similar contract with ONGC for fabrication of platform in Korea and installation thereof in India on a turnkey basis. Under such contract, Hyundai was offering inside India revenues under presumptive income regime by reducing TDS verifiable expenses and applying 10% presumptive income rate to the balance inside India receipts. The assessment under section 143(3) was also been completed by accepting this consistent method of attribution and computation. The Director of Income tax, however, invoked power under section 263 by holding that the assessment was erroneous and prejudicial to the interest of revenues because the contract under consideration was a turnkey contract and

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the presumptive method has no legal basis. The Hon'ble IT AT keeping in view the facts of the case (similar to the appellant) and observing the consistent method of presumptive regime of taxation, held that the power exercised by the DIT under section 263 are bad in law because as per Article 7(5) of India-Korea treaty the profits attributable to PE shall be determined by the same method followed from year by year i.e. on consistent basis.

It is submitted that the appellant has also filed its return of income by following the presumptive method of taxation as applied by the revenue authorities consistently from the very beginning. Therefore, even if it is assumed (without admitting) that the appellant has PE in India, only its inside India revenues can be said to be attributable to PE in India by applying the consistent presumptive method as per Article 7(6) (synonymous to Article 7(5) of the India-Korea DTAA) which is being used by the revenue (and accepted by the appellant) from year to year.

It is also submitted that in the aforesaid Hyundai's case, the revenues in respect of fabrication of platform i.e. outside India activities was not offered to tax by Hyundai on the ground that it is not attributable to PE in India. The DIT while exercising its powers under section 263 also sought to tax the outside India revenues as attributable to PE in India because it was a turnkey contract completed in India. The Hon'ble Bench however relied upon the judgement of Hon'ble Supreme court in Hyundai's own case (291 ITR 482) and the Delhi ITAT judgement in Hyundai's own case for AY

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1994-95 & 1995-96 [ITA No. 2290 & 2291/Del/2002] and held that even if there could be a PE, nothing out of outside India activities i.e. design & engineering, material procurement, fabrication and transportation, can be attributable to PE in India.

In view of the above judgement which is squarely applicable to the facts of the appellant, it is submitted that under any circumstances appellant's outside India revenues can not be taxed in India. Furthermore, even if it is held that the appellant had PE in India, it could only be directed to pay taxes on income attributable to PE in India which is its inside India revenues based on the consistent presumptive method which the appellant has already offered to tax in its return of income."

8. Ld. Departmental Representative submitted as under:-

"The facts in brief are that the assessee is a company incorporated under laws of UAE and is engaged in the business of designing, engineering, procurement, fabrication and installation of offshore platforms and laying of pipelines etc. The assessee has entered into a contract with ONGC dated 28.12.2005. In return of income filed on 31.10.2007, the assessee has declared its income at Rs. 10,77,98,165/-, wherein receipts from contract have been bifurcated into two components, relating to (i) outside India activity and (ii) inside India activity. The assessee has declared income @ 1% of outside India revenue and 10% of inside India revenue after claiming expenses on which TDS has been made. The assessee has claimed that this formula

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of declaring income was adopted by the AO in A.Y. 1997-98. Subsequent to AY 1999-00, the assessee did not file audited accounts but simply declared the taxable income on the basis of above referred formula. The assessee has given a chart of status of income declared and assessed from A.Y. 1997-98 onward on page 6 of its synopsis. The AO has rejected bifurcation of income into two categories and has worked out taxable income @ 25% of total receipts.

My submissions on various issues involved are as under:

Rule of consistency:

It is seen that the assessee has declared its taxable income with reference to scheme of taxation envisaged u/s 44BB by declaring 10% of receipts after claiming deduction for expenses in respect of which TDS has been made. It is submitted that this approach of assessee is not in accordance with provisions' contained in section 44BB which is presumptive taxation scheme wherein 10% of gross receipts is deemed as taxable income and no deduction for any expense is allowable out of gross receipts. The assessee claims that provisions of section 44BB are applicable to it and income has been declared as per presumptive taxation scheme contained in section 44BB. But this claim of assessee is incorrect. If at all, section 44BB is applicable to assessee's case then no deduction of expenses is allowable even if tax has been deducted at source in respect of those expenses.

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The assessee has contended that the Department should follow the rule of consistency as the assessment has been similarly made since A.Y. 1997-98 onward. But this claim of assessee is not legally tenable because any formula or any agreement whatsoever arrived at between the assessee and department which is against the provision of law is not enforceable under the law. The department is not bound to follow and perpetuate the mistake which has been committed in the past. Reliance is placed upon in the case of Distributor (Baroda) Pvt. ltd., 155 ITR 120 (SC) wherein Hon'ble Apex Court has held that there is not heroism in perpetuating a mistake.

Nature of Contract:

The basic contention of the assessee is that the contract with ONGC is divisible into two parts, (i) outside India activity consisting of designing, fabrication and supply of platform, (ii) inside India activity consisting of installation of said platform. This contention of the assessee is not correct as the contract is composite, turnkey & indivisible contract which is evident from various clauses as mentioned below:

(a) Clause 1.1.2 says certificate of completion and acceptance means certificate issued by the company stating that contractor has satisfactorily performed the entire scope of work under the contract and scope of work

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added subsequently in accordance with provisions of the contract.

(b) Clause 1.1.3 says commissioning means completion of all activities as defined in bidding document.

(c) Clause 2.1.1 is scope of work which shall include in general but not limited to surveys (pre-engineering, pre-construction, pre-installation and post installation), designs, engineering, procurement, fabrication, anti-corrosion and weight quoting and load out, tie down, sea fastening, tow out, sale out, transportation, installation, sub-marine cabling hook up of sub-marine cable, modification of existing facilities, testing pre-commissioning, commissioning of entire facilities as described in bidding document.

(d) 2.2.3 says that prior to taking up fabrication/installation of any major component of work, the contractor shall submit to company his proposed construction sequence and procedures and obtain company's approval in writing.

(e) Clause 2.3.4:1 is regarding programme of work and says that within 21 days after the award of work under this contract or prior to kick of meeting whichever is earlier, the contractor shall submit to the company for its approval a detailed programme showing the sequence procedure and method in which he proposes to carry out the works.

(f) Clause 2.3.5.1 says that the contractor shall supply to the company an organization chart showing proposed organization to be established by him for execution of the work.

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(g) Clause 3.1 says the company shall pay to the contractor in consideration of satisfactory completion of works covered by scope of work under the contract. Contract price of US$ 189409310.

(h) Clause 3.2.1 says pending completion of whole works, provisional progressive payment for part of the works executed by the contractor shall be made by the company on basis of said work completed and certified by the company's representative as per agreed milestone formula. This clause also says that the contractor shall open a project office in India with permission of RBI.

(i) Clause 3.4.1.1 says custom duty for imported material shall be paid and borne by the contractor.

(j) Clause 5.1.7.2 says contractor shall submit to company for review and approval of all layout drawings, detailed construction and approval drawings, designs specification, detailed calculation and project specification etc. for the work and other information required by the company prior to issuance for construction.

(k) Clause 5.1.9.1 says that contractor shall furnish to the company a complete list of all drawings which will be used.

(l) Clause 5.1.10 is regarding purchases and various sub clauses show that company ONGC shall be having complete control and monitoring over purchases made by the contractor.

(m) Clause 5.2 is regarding sub-contracting and it says that contractor shall not, except with prior approval of company, sub-contract any part of the contract.

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(n) Clause 5.2.3 is regarding approval to be obtained by the contractor in respect of vendor list, material and equipment to be purchased.

(0) Clause 5.4.1 is regarding pre-engineering, pre-construction, pre installation service. (p) Clause 5.4.3 is regarding post installation survey

(q) Clause 5.10 says certificate of completion and acceptance of works or part of works shall be issued by the company subject to provisions of clause 5.10.1 to 5.10.5.

(r) Clause 5.11.3.1 says that it shall be sole responsibility of the contractor to get the materials, equipments and other things required for the works to be cleared from all govt. agencies including custom/excise and to pay such duties.

(s) Clause 7.1.1 says ownership of material shall be transferred to the company upon date of issuance of certificate towards part completion or completion and acceptance of works.

(t) Clause 7.3.1 says that contractor will be responsible and liable to take insurance policies against all the risks.

(u) Clause 11.1 says that contractor shall provide detailed planning package, live project data for continuous monitoring by the company.

(v) Clause 11.2 is regarding progress reports to be furnished by the contractor for monitoring by the company.

From the various clauses of the contract it can be reasonably inferred that the contract is composite turnkey contract wherein ONGC wants a fully installed offshore platform. ONGC does not want the assessee to supply

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various components and equipments independently. The contract is not for sale of goods. This contract is for a work which is installation of offshore platform. The assessee has argued that fabrication and supply of platform is separate from installation of the platform and hence the contract can be split into two components, i.e., outside India activity comprising designing, engineering & fabrication of platform and inside India activity comprising installation of such fabricated platform. The assessee has emphasized that price of each and every component has been mentioned and paid as per milestone formula and delivery and ownership of fabricated platform was transferred to ONGC outside India. The assessee has further argued that the fact that it was responsible for paying custom duty and taking insurance policy does not mean that risk did not pass to ONGC. These contentions of the assessee are incorrect. Firstly, the payments made under milestone formula are just provisional progressive payments as mentioned in clause 3.2.1 of the contract and these are not the final price of the items concerned. Such interim payments are made to finance the big contracts so that the contractor does not have financial constraint.

For this, the reliance is placed on Hon'ble Supreme Court's decision in case of Hindustan Shipyard VS. State of Andhra Pradesh 6SCC 579 (SC) (copy attached as Annexure-i). In that case, the assessee was engaged in activity of building ships for different clients. Hon'ble court has discussed various relevant clauses of the agreement. The agreement

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between the builder and the customer Great Eastern Shipping Co. Ltd. talks about the contract price of Rs 5,50,00,000 per vessel to be paid in various installments. Clause 5 of Article 7 laid down that title and risk of the vessels shall pass to the owner upon acceptance when delivery of vessel is affected. Article 15 provides that on payment of first installment property and vessel will pass to the owner. Article 17 provides that builder shall take insurance at its own cost in joint name of the builder and the owner. Hon'ble Supreme Court has held that it is a contract for sale of completely manufactured ship to be delivered after successful trials in all respect and to the satisfaction of the buyer. It is a contract for sale of made to order goods. 65% of the price paid before the trial is intended to finance the builder to share a part of burden involved in the investments made by the builder towards building of ship. It is a sought of advance payment of price. Regarding transfer of property in the vessel, Hon'ble Supreme Court has said that insurance cover is to be obtained by the builder and entire risk remains with the builder which would not have been so if the property in vessel had already passed to the owner. The court further says that Article 15 which talks about passing of property in vessel on payment of first installment is a piece of artistic drafting. Applying the ratio of this decision, it can be reasonably said that the property in platform passed to ONGC only after its successful installation subject to satisfaction of ONGC and provisional payments made under

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milestone formula are in the nature of advance payments only.

Further, Hon'ble Delhi ITAT in the case of Samsung Heavy Industry Co. ltd. VS. AOIT has held on similar facts that contract is of composite nature. The terms of contract in Samsung Heavy Industry case and in the present case are essentially similar. The finding of Hon'ble ITAT is given in para 60 to 65 wherein various clauses of the contract have been examined and ultimately in para 65, Hon'ble ITAT has given a finding that contract obtained by assessee from ONGC is a composite contract.

Further, AAR in a recent decision, namely, Roxor Maximum Reservoir Performance WLL has, following the ratio given by Hon'ble Apex court in Vodafone case, held that contract has to be read as a whole and purpose for which the contract is entered into by the parties is to ascertain from the term of the contract. A similar "look at" rather than "look through" approach has been adopted by the AAR in a subsequent decision in case of Alstom Transport SA. The principle of 'look at' and not 'look through' has been applied by Hon'ble ITAT Kolkata in case of Dongfang Electric Corporation vs DDIT ITA No. 833/Kol/2011 wherein Hon'ble ITAT has gone a step further by saying in para 11 of its order that principle of 'look at' is to be applied in a situation where there are two separate contracts; one for offshore supply of goods and second for onshore services where value assigned to onshore services is unreasonable as compared to value assigned to offshore supplies. In present

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case, there is only one contract and ironically assessee wants to artificially bifurcate it into two components which even ONGC did not want.

Therefore, in view of discussion above, it is submitted that the contract is composite one and not divisible into Outside India activity and inside India activity as claimed by the assessee and transfer of ownership passed from assessee to ONGC in India only after successful installation of the platform.

Section 19 to 23 of Sale of Goods Act 1930 provides rules about the time when property passes from seller to buyer. Section 21 says where there is a contract for sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into deliverable state, the property does not pass until such thing is done and buyer has notice thereof. Definition of specific goods is given in section 2(14) and goods in deliverable state are defined in section 2(3) of Sale of Goods Act. In the present case, contract is for the sale of fully functioning platform. Therefore, unless the assessee installs the various components and makes them a functional platform which is a deliverable state, the property in goods does not pass to ONGC. Therefore, the contention of the assessee that property in goods has passed to ONGC outside India is not legally tenable.

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This position has also been admitted by ONGC as is evident from their letter mentioned on page 36 of assessment order. In point no. 4 and 6, it has been clarified that during progress of work, ownership of goods remained with contractor.

From discussion supra, it is clear that contention of the assessee that transfer of ownership has occurred outside India and only installation activity has been done in India is not correct.

Fixed Place PE:

The AO has dealt with this issue in para 20 of his order. Vide letter dated 24.01.2006, the assessee has intimated RBI about the address of their project office and nature of project undertaken. This letter talks about contract agreement dated 29.12.2005 with ONGC for carrying work of service, design, engineering, procurement, fabrication and anti-corrosion, weight quoting, lead out, tied down, toe out, transportation, installation, hook-up installation, sub-marine pipelines, installation of sub-marine cables, modification on existing platform, testing, pre-commissioning, commissioning. The work under the above contract is due to be completed by April 19.02.2007. Further, the said letter gave address of project office as 07.01.2006, 7th Floor, Midas Sahar Plaza, Kondivila, M.V. Road, Andheri East, Mumbai-110059. The assessee has contended that this project office existed since 1990's and it has been opened at the instruction of ONGC only. The

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above referred letter clearly shows that the assessee company has a project office in Mumbai for the purpose of present contract with ONGC and it is immaterial whether it was a requirement under the contract to open a project office or not. The taxability of assessee is triggered when there is a fixed place PE in India.

It is pertinent to note that contract is dated 28.12.2005 so the first AY was 2006-07 wherein the assessee has accepted the existence of PE and filed its return of income. The assessment year under consideration, i.e., 2007-08 is a second year of the said contract. In this assessment year also, the assessee has accepted in its return of income that there exist a PE in India. Perusal of the chart given by the assessee on page 6 of synopsis indicates that assessee has been filing its return of income accepting that there is a PE in India. In all the earlier assessment years, the return was accepted u/s 143(1). For the assessment year under consideration when the case was selected for scrutiny, the assessee changed its position and contended that there is no PE in India. The facts as mentioned above indicate that it is the assessee who has not followed the rule of consistency as prescribed by Hon'ble Supreme Court in Radha Soami Satsang case 193 ITR 32 (SC).

Under similar facts, Hon'ble ITAT Delhi in case of Samsung Heavy Industry has held that there existed fixed place PE in India. Hon'ble ITAT Delhi has discussed the facts regarding project office in Samsung's case in para 66 to 72. In that case also the assessee company had passed a resolution

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regarding existence of project office in India to which RBI has given its permission. However, in the present case, the requirement of law at the relevant point of time was that the assessee company was required to just give intimation to RBI regarding opening and address of the project office and it amounts to automatic approval of the RBI. The assessee company has given said intimation vide letter dated 24.01.2006.

The assessee has also argued that the nature of activities done through the said project office is just ancillary and auxiliary in nature. In this regard, it is submitted that various clauses of contract showed that there is an absolute monitoring of each and every stage of work by ONGC and for this presence of project office was required. Clauses 2.3.4.1,2.3.5.1,5.1.7.2,5.1.8,5.1.9, 11.1 & 11.2 show that there is a continuous monitoring of ONGC of each stage of work. Exactly similar clauses were there in contract between Samsung Heavy Industry and ONGC. Hon'ble ITAT in para 7 has held that the nature of activities done through project office are vital and essential for carrying out.of a contract and they are not in nature of ancillary and auxiliary activities.

Installation PE:

The AO has discussed the existence of installation PE in para 24 of his order. The main contention of the assessee is that since the installation activity continued for a period of less than 9 months, therefore, there is no installation PE in India. The assessee has calculated the period starting from

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date of entry into India of barges. The article 5 of relevant DTAA has been reproduced on para 30 of synopsis of the assessee. Paragraph 2 of article 5 says that PE includes (h) a building site or construction or assembly project or supervisory activities in connection therewith but only where such site project or activity continues for a period of more than nine months. Here, it is pertinent to note that paragraph 2 gives inclusive definition which means that it gives certain examples which could be treated as PE. This paragraph is not 'notwithstanding' paragraph 1 of article 5 which means that the examples quoted in paragraph 2 have to satisfy the criteria of PE contained in paragraph 1, otherwise it will be absurd to interpret that an office under (c) will be PE without satisfying the parameters of paragraph of article 5. So according to paragraph 2, anything mentioned from (a) to (i) will be fixed place PE if they fulfill conditions mentioned in paragraph 1. In the present case, project office falls in entry (c) which fulfills the parameters of paragraph 1. Further, according to (h) installation site will be PE if it fulfills activity parameter of duration of 9 months. Here, duration test supplements the test provided in paragraph 1. Therefore, it is clear that paragraph 2 does not override paragraph 1. Regarding the duration parameter, guidance can be had from OECD commentary. In paragraph 19 of commentary on article 5 (copy attached as Annexure-V), it has been mentioned that the site exists from the date from which the contractor begins his work, including any preparatory work, in the

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country where the construction is to be established, e.g. if he installs a planning office for the construction. In general, it continues to exist until the work is completed or permanently abandoned. This commentary further says that If an enterprise (general contractor) which has undertaken the performance of a comprehensive project subcontracts parts of such a project to other enterprises (subcontractors), the period spent by a subcontractor working on the building site must be considered as being time spent by the general contractor on the building project. The subcontractor himself has a permanent establishment at the site if his activities there last more than twelve months.

From the above commentary of OECD, it is clear that duration for installation PE has to be considered from the date when the contractor establishes office for the purpose. Here, in this case project office has been established vide letter dated 24.01.2006. Further, the commentary says that if the contractor sub-contract parts of the Project to somebody else, the periods spent by the sub-contractor must be considered as being time spent by the main contractor itself. In the present case, the assessee has sub-contracted pre-engineering and pre-construction surveys. Pre-engineering survey started on 27.02.2006 whereas pre-construction survey started on 25th April 2006. So on the whole, the assessee started working for the contract with establishment of project office and pre-engineering/pre-construction surveys, it has been demonstrated supra that

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the contract is for installation of off-shore platform only and for nothing else. Therefore, it can be concluded that duration of installation PE has to be counted since the establishment of office itself in India which exceeds more than 9 months period prescribed under the article of DTAA.

The assessee has argued that provisions of article 5 relating to installation PE overrides the provisions relating to fixed place PE and has relied upon various case laws. In BKI Ham case, Hon'ble Uttrakhand High Court has held that for installation PE, a minimum prescribed period under article has to be satisfied. However, in that case the issue before Hon'ble High Court was an office under article 5(2) vs. installation PE under article 5(3). In that case, there was no fixed place PE involved. In any case, Hon'ble court has never said that fixed place PE and installation PE cannot co-exist. In GIL Mauritius case, Hon'ble ITAT has held that for installation PE to exist, duration test has to be satisfied. Even in this case, there did not exist fixed place PE as the assessee was working on moving ship which did not satisfy permanence test. Regarding sub-contracting part of the job, the assessee has relied on Pintsch Bamag case. However, in this case, vital facts were that whole of the work was sub-contracted and the main contractor did not do anything and on the basis of these facts AAR held that activities of sub-contractor cannot be counted in the hands of main contractor. In the present case, the facts are totally different as only pre-engineering/pre-construction survey were sub-contracted and rest of the project was undertaken

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by the assessee itself. To this situation, commentary of OECD as referred (supra) applies. In view of discussions (supra), it is evident that installation activity continued in India for more than 9 months and, therefore, installation PE exists.

Applicability of section 44BB

In synopsis from page 99 to 104, the assessee has argued that provisions of section 44BB are applicable to inside India activity of the contract. The assessee has taken ground of appeal no. 24 in this regard. Here, in this regard, it is submitted that section 44BB does not apply to the nature of activities done by the assessee. Section 44BB(1) is reproduced as under:

(1) Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee, being a non-resident, engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, of extraction or production of, mineral oils, a sum equal to ten per cent. of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession":

Provided that this sub-section shall not apply in a case where the provisions of section 42 or section 44D or section 115A or section 293A apply for the purposes of computing

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profits or gains or any other income referred to in those sections.

It is clear that section 44BB applies in two situations,

(i) when non-resident is engaged in the business of providing services or facilities in connection with, OR

(ii) supplying plant and machinery on hire used or to be used, in the prospecting for, of extraction or production of, mineral oils.

The assessee is not in the business of providing services, neither any plant or machinery has been supplied on hire basis. The assessee is under the contract engaged in successful installation of off-shore platform. Even in this case, activity cannot be characterized as facility provided by the assessee. For providing facility, it is pre-requisite that facility should exist, because unless a facility exists, it can not be provided. The assessee is required to install platform as per requirement of ONGC. It is not a case of standard pre-existing platform being provided by the assessee. Therefore, business activity of the assessee does not fall within the purview of section 44BB. Further, the assessee has argued that section 44BB is applicable to inside India activity. Here, it is submitted that section 44BB does not distinguish between inside India activity and outside India activity and it prescribes taxation on gross basis. Section does not provide for any deduction of expenses even if TDS has been made thereon but interestingly the assessee has claimed deduction of such expenses and offered 10% of

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income on the balance receipt which is not as per provisions of section 44BB. Therefore, even assessee has not followed the provisions contained in section 44BB itself.

Attribution of profits to the PE

AO has determined 25% of the total receipts as profits attributable to PE. DRP has considered the profitability of various comparables and came to the conclusion that 25% rate is applied by the AO is reasonable. The contention of the assessee is that contract is divisible into two parts and has offered 1% of revenue pertaining to outside India activity and 10% of revenue pertaining to inside India activity (after claiming expenses w.r.t. which the TDS has been made) as income.

From the discussions supra, it is demonstrated that contract is indivisible turnkey project and the entire receipts are for the purpose of successful installation of off-shore platform. It has also been demonstrated that since section 44BB is not applicable to the assessee, therefore, profits from this contract has to be determined under Rule 10 because the assessee has not produced any books of account. Therefore, approach of the AO is correct. Without prejudice, even if it is argued that section 44BB is applicable then whole of the receipts without allowing deduction in respect of any expenditure has to be considered for presumptive taxation. The assessee has relied upon the CBDT's instruction no. 1767. Here, it is submitted that this instruction applies in a situation where sale takes place outside India. In the present case, it has been demonstrated

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supra that transfer of property has taken place in India. Therefore, this instruction has no application in present case. The assessee has also contended that Explanation 1A to section 9(1)(i) applies to outside India activity component of its contract. Here, it is submitted that without admitting, even if section 44BB is at all applicable in assessee's case, it talks about taxation of gross receipt and, therefore, no portion of receipts can be carved out applying the provisions of above said explanation.

Further, it has been conclusively demonstrated above that sale or transfer of property has taken place in India. Sale is the most vital stage of transaction where profits embedded in goods manufactured are realized. Even if, hon'ble bench is inclined to agree to assessee's contention that substantial activities have been done outside India, yet profits have to be attributed to PE which arise out of sale made in India. Hon'ble Supreme Court in case of Anglo French Textile Co. Ltd. that profits have to apportioned where manufacturing and sale take place in different tax jurisdictions.

Applicability of Hon'ble C-Bench of ITAT Delhi' decision in case of Hyundai Heavy Industries Co. ltd. ITA. No. 5231/Del/2010:

During last hearing, the assessee's counsel has furnished copy of Hon'ble C-Bench of ITAT Delhi' decision in case of Hyundai Heavy Industries Co. Ltd. and contended that ratio of that decision should be applied in present case. In this regard, it is submitted that in case of Hyundai Heavy

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Industries Ltd., section 44BB was applicable. Even this has been admitted by assessee as per para 23.10 of synopsis wherein relevant para from Supreme Court's order in case of Hyundai heavy Industries Ltd. has been reproduced. Further, in para 33, Hon'ble ITAT has held that contract is divisible in Hyundai case. In present case, it has been demonstrated that contract is single, indivisible and turnkey. When Hyundai case was heard by Hon'ble ITAT C-bench, benefit of Vodafone case of Supreme Court and other cases of AAR and ITAT Kolkata was not available. Now, in view of Hon'ble Supreme Court's decision in case of Vodafone, it can not be said that present contract is divisible. Further, in para 36, Hon'ble ITAT in Hyundai case has said that during the year under consideration, the contract has been completed and receipts during the year are just carried over payments. It has been held that since 90% of payments have been taxed earlier as per agreed formula, AO can not assess 10% by adopting a different method. This is not the situation in present case. In present case, major payments have been received during the year under consideration.

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In view of these facts, it is submitted that Hon'ble C-Bench of ITAT Delhi' decision in case of Hyundai Heavy Industries Co. Ltd. is not applicable to present case."

9. We have carefully considered the submissions and perused the records. Our adjudication on the issues raised in the appeal is as under:-

10. Whether the assessee has PE in India.

11. We find that Assessing Officer has observed that the main thrust of the argument of the assessee is that it was not having any PE in India before the work of fabrication got completed and the fabricated material was imported in India. The installation PE was having the limited task of installation and commissioning of the project. Hence, it is the assessee's claim was no part of profits in respect of off shore supplies can be brought to tax in India. Assessing Officer further noted that assessee had a project office in Mumbai since 1990, but the same was claimed to have been opened at the instruction of ONGC, because it was a mandatory requirement for the execution of the contract. Assessing Officer opined that the crucial fact is that the assessee has an office in India which is a project office and therefore, clearly as per the Treaty between India and UAE, the assessee has a P.E. in India. Assessing Officer further observed that it was for the assessee to prove that the activities of the Project Office are ancillary and auxiliary so that the same can be taken in the exception clause of the Treaty. Assessing Officer further opined that by no stretch of imagination, a Project Office can be involved in ancillary and auxiliary activity. Assessing Officer further observed that in this case the

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project was in existence even prior to the signing of the contract with ONGC and after signing of the contract, the assessee intimated RBI that it has a Project Office for the execution of this contract. Assessing Officer has also referred to his enquiry with ONGC and certain documents were collected from them. Referring to these documents, Assessing Officer observed that it transpired that the assessee's Mumbai office and M/s Arcadia the dependent agent Permanent Establishment has also participated in biding process and was involved in negotiation and finalization of the contract. Further, Assessing Officer observed that these documents are not mere correspondence but these indicate definite involvement of the Mumbai Office and Arcadia Shipping Ltd. in the process of negotiation of the contract. Further, Assessing Officer observed that right from the stage of submission of tender document to the date of kick off meeting when the technical work commences, Mumbai office and Arcadia were actively involved in the process. These can not be held to be a mere preparatory and auxiliary activities as contended by assessee. Marketing is a core business function and it can not be termed as auxiliary activity. The contract between the a ssessee and Arcadia Shipping Ltd. itself says that Arcadia will provide assistance in obtaining works and active representation, promotion and support of the principal's activities in India and assistance in obtaining services and facilities in India. Thus, Assessing Officer held that it cannot be said that assessee has no P.E. in existence other than the Project Office. The Assessing Officer opined that assessee has a project office for its project in India and also the dependent agent M/s Arcadia. Further, assessee was found to be having a PE in terms of article 5(2)(h) of Indo UAE Treaty i.e. construction and installation PE.

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Assessing Officer further observed that it was immaterial that the assessee has one single PE for all the business functions or different PE's for different functions. Assessing Officer further observed that project office was not only involved in installation and commissioning but that was only a part of the business operation. Assessing Officer opined that the other items of work were also executed by the assessee in India through one agency or the other. The pre engineering surveys and designing etc. were also done by the Project office which operated through fixed place of business in India. The surveys and designing were also done by persons located in India. The assessee has undertaken detailed pre-engineering surveys which was the first step after the contract was awarded and the Project Manager had requested for N.E.D. passes for their employees to execute that work. Assessing Officer further observed that the PE of the assessee by way of office for the project also last for more than 9 months. He referred to the date of contract and the completion /hand over of the project and observed that project lasted for more than the period stipulated in the DTAA. Hence, he treated the assessee has a PE within the meaning of treaty.

Assessee has claimed that assessee has a project office since 1997 in India. Further, assessee had admitted that this project office was stated to be a PE for assessment years 1997-98 to 2007-08. However, the assessee has claimed that this office was only used as a communication channel and, is thus not a PE as defined in Article 5 (2) read with Article 5(1) of the DTAA. Assessee has further submitted that it is not denied that the assessee is involved in installation and commissioning of a fabricated platform in India and if, in respect of a project the period of installation activity exceeds beyond nine months,

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it would be regarded as an Installation or Construction PE. However, since the activity of the assessee in India in respect of 4WPP project lasted only for four and a half months, it cannot be said to have even an Installation PE in India within the meaning of Article 5(2)(h) of the DTAA. Furthermore, the assessee claimed that assessee cannot be said to have dependent agent PE in the shape of consultant appointed by the assessee in India, M/s Arcadia Shipping Limited. It has been claimed that even if it is assumed that M/s Arcadia is an agent, it is an agent of independent nature, as per Article 5(5) of the DTAA. It has been further submitted that M/s Arcadia is independent from the assessee legally and economically because Arcadia was acting in the normal course of its business and receiving an arm's length remuneration directly from ONGC. Hence, it has been claimed that M/s Arcadia cannot be held to be a dependent agent as per Article 5(4) of the DTAA. In fact, neither it has authority to conclude or negotiate contracts on behalf of the appellant, nor, it habitually secures orders for appellant because appellant is dealing with ONGC which is a public sector undertaking awarding contracts under the International Competitive Bids only and not based on negotiations.

11.1 Upon careful consideration, we find that The assessee itself had shown the Project Office as its PE in India in earlier years as well as in the year under consideration. The assessee has changed its stand that it has no PE in the form of Mumbai Project office during the course of assessment proceedings. Further, assessee has in its letter to RBI stated that the Mumbai Office is its Project Office for the project undertaken with ONGC. The plea of the assessee is that this was done only to comply with the statutory requirement and that the Mumbai office had no role to play in the execution of the present contract.

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Assessing Officer and DRP has given a finding that letter written to the RBI establishes beyond doubt that the Project Office was set up to undertake the project and not to undertake ancillary and auxiliary activity. As per the definition of permanent establishment in the treaty between India and UAE, the Project Office is a PE unless it is involved in ancillary and auxiliary activity. The assessee has not produced any evidence, to stake its claim in the exclusionary clause of the Treaty's provision. In fact, the Project Office has been approved by RBI to undertake the entire project. Before submitting the bid, the assessee has undertaken pre-bid survey of the site. It is important to note that the bid cannot be submitted unless the site is surveyed. The Assessing Officer and DRP had given a finding that assessee had got pre-bid survey conducted through the Project Office which is directly connected with the ONGC project. During the period of negotiation of the contract, employees of assessee company attended the meeting with ONGC. This was a kick off meeting and each and every detail was discussed about the project. The assessee has not disputed that the concerned persons were the employees of its Project Office. Further, we find that assessee is a non-resident and has entered into a contract which has lasted for approximately 2 years. It is not possible that the contract of this magnitude can be executed without the assessee having any fixed place of business in India from where it can manage its work for this period of time. Thus, from the above, it is clear that the project office in India was assessee’s PE.

11.2 The assessee has denied that M/s Arcadia Shipping is an agent of NPCC. It has laid emphasis that Arcadia is a consultant. It has been claimed by the assessee that M/s Arcadia Shipping was involved in gathering the information and assisting the assessee in

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representations, obtaining works, promotion support and services and facilities. In this regard we find considerable cogency in the Assessing Officer's finding that M/s Arcadia is also a PE of assessee as it was actively involved in the project since pre-bidding meetings, hard core marketing and business development and till finalization of the contract. Assessing Officer as well as DRP have given a finding that letters and correspondence indicate M/s Arcadia is an agent. It is further noted from the documents obtained by the Assessing Officer that in the application to the ministry of Home Affairs the address of employees of NPCC was given as ARCADIA Shipping. From the perusal of the documents related to pre-bid meeting gathered by the AO from ONCG, it is noted that the employees of ARCADIA were attending pre-bid conferences and other meetings on behalf of NPCC. We further find considerable cogency in the Assessing Officer's arguments that M/s Arcadia Shipping is wholly and exclusively for work of NPCC, which is a precondition for dependent agent permanent establishment. The AO has supported his argument with some documentary evidence. The Assessing Officer and DRP have also referred to para of the contract between NPCC and ARCADIA. In these documents assessee has categorically been referred to as the principal which automatically implies a principal agent relationship with the person who is authorized to act wholly and exclusively on behalf of the Principal which in this case is Arcadia Shipping. Further, it has been pointed out by the Assessing Officer that in the kick-off meeting dated 16.12.2005, Mr M.N. Shah of ARCADIA attended the meeting on behalf of NPCC. Also ARCADIA received tender documents as agent of NPCC, as per letter dated July 16, 2005. These activities are core business activities. The contract between NPCC and ARCADIA and the minutes of the meeting

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reflecting ARCADIA's presence in core business meetings, show that ARCADIA was engaged in hard core business development activity for NPCC in India and was not merely assisting in collecting of information as claimed by the assessee. In the background of aforesaid discussion, we hold that ARCADIA Shipping Limited a Dependent agent PE.

11.3 The Assessing Officer observed that assessee also has PE in terms of Article 5(2)(h) of Indo UAE Treaty i.e. construction and installation PE. The Assessing Officer further observed assessee has wrongly advanced claim in earlier years that its PE in India was only an installation PE and therefore it fell within the meaning of para 3 of article 5. We find that Assessing Officer has also held installation / construction PE for the following reasons:-

i) Contract was awarded in November, 2005 and completed in April, 2007 which is a period of more than 2 years.
ii) Assessee has project site at its disposal from the very beginning when the contract was awarded.
iii) Duration period starts from survey activity.

11.4 The assessee on the other hand has claimed that assessee has no such PE. Assessee has submitted that assessee carried out and completed the entire fabrication and erection work as the separate part of the contract executed by outside India. It has further been submitted that assessee has constructively delivered the platforms outside India and physically delivered the same in India through its own barges by its employees. Assessee has further contended that even if the assessee carried out installation activities in India, yet to hold an installation PE, the condition that the installation period

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exceeded 9 months need to be satisfied. It has been submitted that the Assessing Officer overlooked the fact that installation activity could only have begun when the erected platform was physically delivered in India and the same was commissioned. Thus, the period to determine whether it was beyond 9 months, would be form the date of physical receipt of platform in India till the same is commissioned and thus the authorities had grossly erred when it had been observed by them that the contract was entered in November, 2005 and completed in April, 2007 and further, the project site was as its disposal from the very beginning since the contract was awarded and the assessee undertook the survey activity. The assessee has claimed that activities of the assessee in India in respect of the project lasted only 4½ months.

11.5 Ld. Departmental Representative submitted that it is the claim of the assessee that installation activity continued for a period of less than 9 months, therefore, there is no installation PE in India. In this regard, assessee has calculated the period starting from date of entry into India of barges. As per Article 5 of the relevant DTAA, it has been mentioned that PE includes (h) a building site or construction or assembly project or supervisory activities in connection therewith but only where such site project or activity continues for a period of more than nine months. Ld. Departmental Representative has referred to OECD Commentary in this regard and has claimed as per the Commentary of the OECD it is clear that duration for installation PE has to be considered from the date when the contractor establishes office for the purpose. Here, in this case project office has been established vide letter dated 24.01.2006. Further, the commentary says that if the contractor sub-contract parts of the Project to somebody else, the

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periods spent by the sub-contractor must be considered as being time spent by the main contractor itself. In the present case, the assessee has sub-contracted pre-engineering and pre-construction surveys. So the assessee started working for the contract with establishment of project office and pre-engineering/pre-construction surveys. Therefore, Ld. Departmental Representative contended that duration of installation PE has to be counted since the establishment of office itself in India which exceeds more than 9 months period prescribed under the article of DTAA.

11.6 We have carefully considered the submissions, we find that assessee's plea is that PE existed only after barges landed in India is not correct. We agree with the contention that PE existed since the notification of award as the site was available to the assessee since then, for surveys at various stages of work progress. We agree with the Revenue's contention that assessee already had a PE in India, even before the notification of award of contract as the site of ONGC was made available for surveys etc. Thus we hold that assessee has a installation PE in India.

12. <u>Whether the contract is divisible? Tax liability of the assessee</u>

13. Assessing Officer has observed that procurement and fabrication of material took place during the existence of PE in India. The terms of contract with ONGC do not stipulate any sale of material to them. The preamble to the agreement as also the scope of work stipulate manufacturing of platforms on a turnkey basis. There may be various stages in executing the work like survey, designing, fabrication procurement, and installation and commissioning but these are mere stages of the total project. Assessing Officer opined that the ONGC

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does not purchase any material from the assessee. ONGC takes over the completed platform when all parts of the work are executed. In this regard, Assessing Officer referred to the clarification given by the ONGC. Referring to the same, the Assessing Officer observed that the documents bring out in unequivocal terms that the ownership of the fabricated material remains with the assessee contractor till the completed project is handed over to the ONGC. Assessing Officer noted that the assessee has been mainly relying upon the schedule of milestone payments stipulated in the agreement where value of each item of work is indicated, the currency in which the payment is to be made is also indicated and the rate of payment is equally stipulated. Assessing Officer found that as clarified by ONGC these milestone payments are in the nature of 'provisional progressive payments' pending completion of the whole work. Assessing Officer further observed that the clause relating to insurance, payment of custom duty, re-import in the case of loss / damage etc. only reinforce the view. Assessing Officer further observed that there is no sale of any material. The ownership of the material got transferred only on the completion of the work which was also in India. The deployment of men and material was in India. The import was made by the assessee on its own account and the customs duty was also paid by them on their own account. The entire transportation was done at their own risk. Assessing Officer observed that it is evident that work relating to fabrication and procurement of material was very much a part of the contract for execution of work assigned by ONGC. Assessing Officer further observed that the assessee company had undertaken the contract in India on turnkey basis and executed the contract in India. The title in goods as well as the constructed platform is transferred

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once the Indian company accepts the project as complete. Assessing Officer further observed that this is a clear cut case of a works contract executed in India where the assessee has also obligation of fabricating and procuring certain material to be used in the works. Assessing Officer further observed that assessee is wrong in stating that the works contract could be divided into two parts, one for the supply of the material and the other for installation and commissioning. He observed that the contract in question is neither divisible nor can consideration for any activity under the contract is liable for separate treatment.

14. In this regard, Ld. Departmental Representative has submitted that the basic contention of the assessee is that the contract with ONGC is divisible into two parts, (i) outside India activity consisting of designing, fabrication and supply of platform, (ii) inside India activity consisting of installation of said platform. Referring to the various clauses of the contract, Ld. Departmental Representative submitted that the contention of the assessee is not correct as the contract is composite, turnkey & indivisible contract. For this purpose, the Ld. Departmental Representative referred to the various clauses of the contract. Referring to these clauses, the Ld. Departmental Representative submitted that it can be reasonably inferred that the contract is composite turnkey contract wherein ONGC wants a fully installed offshore platform. ONGC does not want the assessee to supply various components and equipments independently. Further, the Ld. Departmental Representative referred to the decision of the ITAT in the case of Samsung Heavy Industry Co. ltd. VS. ADIT. He claimed that similar contract was entered into in this case and the ITAT has held that contract obtained by the assessee from ONGC is a

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composite contract right from the surveys of pre-engineering, preconstruction, pre-installation, designs, engineering, procurement etc. Further Ld. Departmental Representative submitted that from the ratio emanating from the Hon'ble Apex Court decision in the case of Vodafone, contract has to be read as a whole and purpose for which the contract is entered into by the parties is to be ascertained from the term of the contract.

15. The assessee in this regard has submitted that the subject contract may be construed as an umbrella contract, yet it is a divisible contract, since under the same contract, the consideration for various activities have been stated separately. Furthermore, there is a complete bifurcation of the activities to be carried out under the contract with consideration for each specific activity. Assessee submitted that though the relevant contract with ONGC, though fashioned as turnkey but not a turnkey contract in spirit and substance. It has been further submitted that on study of the said contract, it would be appreciated that ONGC may terminate the contract, as per clause 8.2, 7.5.5 and or 7.4, and in the event of termination of the contract, assessee shall be eligible for the following amounts:-

(a) Contract price properly attributable to the parts of the Works executed by the Contractor in accordance with the Contract as at the date of Termination.

(b) The costs incurred by the Contractor in protecting the Works pursuant to paragraph (a).

(c) Reasonable demobilization charges as may be ascertained by the Company if contractor has Constructional

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Plant and Equipment at offshore site at the time the termination becomes effective.

(d) Cost of any materials or equipment already purchased and/or ordered by the Contractor, the delivery of which the Contractor must accept, such materials or equipment will become property of the Company upon payment by the Company of the actual Cost of the materials or equipment.

(e) All reasonable cost of cancelling/terminating any subcontracts.

(f) All reasonable cost on cancellation or orders for material, etc., which the Contractor may have committed for the project

From the aforesaid, it has been stated that it is the discretion of ONGC to take only the platform erected by the assessee in Abu Dhabi as it has a right to terminate on its own volition without having installation thereof. The assessee, in such an event, will not be entitled for any amount towards installation and commissioning but will only be entitled for the contract price properly attributable to the erection of fabricated platform, actually carried out by the assessee in accordance with the Contract i.e. the pricing schedule (Schedule C) and milestone payment formula (Schedule E) given in the contract. Furthermore, it has been mentioned that if the assessee contractor likewise abandons the contract at any stage, it would not be bound to refund of any amount so received by it from ONGC in respect of the work already executed by it. In fact, had it been a case of turnkey project, the assessee contractor would be entitled to the entire value of contract, whether executed or remains to be executed, if there was any termination on the

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volition of the company i.e. ONGC. Likewise, in case the assessee contractor abandons the contract suo motto or otherwise, it would be liable to refund the amount received by it from the company. Further, in this regard assessee has referred the Hon'ble Apex Court decision in the case of Ishikawajma-Harima Heavy Industries Ltd. vs. DIT reported in 288 ITR 408. Assessee has further submitted that assessee fabricated the platform in Abu Dhabi and after fabrication, said platform is brought to India with the help of its barges and then the possession is handed over to ONGC. In this regard, it has been submitted that it is significant to note that before sailing the platform after fabrication, the same is certified by ONGC through it’s approved surveyor. Furthermore, as per the insurance policy though to be taken by the assessee but ONGC is the joint beneficiary in the policy. Furthermore, insurance policy also exhibits that, in case there is a loss suffered in the course of transportation the payee of the insured amount would be ONGC. Hence, it was submitted that so far as the activities of construction of plat forms is concerned, though physically the same is sailed through barges, but the same is completed in and is constructively handed over to ONGC in Abu Dhabi. The submissions of the assessee therefore is that ONGC became defacto owner since the assessee company erected the platform only to be delivered to ONGC in respect of which it is also entitled to receive separate consideration from ONGC. It is thus submitted that under the contract, there are different phases of execution of contract. The first phase was completed when it was fabricated, erected and brought to India through its barges to be physically supplied. The

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same was physically supplied although the same was constructively supplied by it in Abu Dhabi. It has further been submitted that income attributable to the alleged PE in India could not extend to the activities carried outside India and had to be therefore confined to incomes from activities carried out from the alleged PE. It has been claimed by the assessee that even assuming that the assessee had a PE, the same cannot be in respect of erecting and fabricating the platform in Abu Dhabi but could only be in respect of installation and commissioning activities. In this regard assessee has relied upon Article 7(1) & 7(2) of India UAE DTAA.

Article 7 reads as under:-

"1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business a aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profit which it might be expected to make if it were distinct and separate enterprise

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engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

16. In this regard, assessee has placed strong reliance on the decisions of the Hyundai Heavy Industries Company Limited reported in 291 ITR 482 (SC) (Supra). Furthermore, it has been submitted that the proposition laid down in the aforesaid case has been followed by the Mumbai, Tribunal in Roxonoy Vs DCIT (103 TTJ 891 (Mum). It has further been submitted that the Hon'ble Apex Court had also affirmed the above proposition in the case of Ishikawajma-Harima Heavy Industries Ltd. vs DIT reported in 288 ITR408. Assessee has further submitted that though the assessee's income cannot be taxed in India in view of the beneficial provisions of the DTAA as it has no PE in India due to aforesaid reasons, the assessee, however, keeping in mind the past trend where presumptive rate of profit was applied and accepted by the appellant and the revenue, the assessee, in the interest of revenue, agreed to be taxed for the relevant assessment year as in the past. It has further been submitted that the facts and circumstances as prevalent in preceding years have remain unchanged and, therefore applying the rule of consistency, the income declared may be assessed and, no more. It has further been submitted that a decision rendered by the ITAT, Delhi on 31st May, 2011 in respect of the Hyundai Heavy Industries Company Limited [ITA No, 2086 & 2087/Del/2009] also supports the assessee's submissions that even if it is assumed that without admitting that the assessee has PE in India, it could only be held to be taxable only to the extent profits attributable to PE in India.

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17. Upon careful consideration, we are of the considered opinion that the contract may be construed as an umbrella contract yet is a divisible contract since under the same contract, the consideration for various activities have been stated separately. Further a perusal of the terms and conditions of the contract reveal that it is the discretion of ONGC to take only the platform erected by the assessee in Abu Dhabi, as it has a right to terminate on its own volition, without having installation thereof. The assessee in such an event, will not be entitled for any amount towards installation and commissioning but will be entitled for the contract price properly attributable to the erection of fabricated platform actually carried out by the assessee in accordance with the contract i.e. the pricing schedule (Schedule C) and milestone payment formula (Schedule E) given in the contract. Further it has been mentioned that if the assessee contractor likewise abandons the contract at any stage, it will not be bound to refund of any amount so received from by it from ONGC in respect of the work already executed by it.

17.1 We agree with the contention that the segregation of the contract revenues into offshore and onshore activities was made and agreed upon between the contracting parties i.e. ONGC and the assessee at the stage of awarding the subject contracts and not after awarding the contract. The contract has been awarded to the assessee by ONGC under International Competitive Bidding (ICB) process based on the contract revenues and its bifurcation. Furthermore, the total contract consideration under the contract has been earmarked towards each of the activities like design and engineering, material procurement, fabrication and installation. The scope of work under the contract involves sequential activities like design and engineering,

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material procurement, fabrication, transportation, installation and commissioning. The contract provides separate payments to the assessee on the basis of work of design, engineering, procurement and fabrication. All these operations have been carried out and completed outside India. Every progress under the contract is inspected and finally accepted by ONGC or its authorized agents outside India, and only then, the assessee received the payments as per specified milestones from ONGC outside India.

17.2 Furthermore, we agree that the bifurcation of revenues as inside India revenues and outside India revenues is also evident from the following:-

i) Consideration for various activities has been mentioned separately in the 4WPP contract as inside India and outside India as is evident from the Annexure-C (Contract price scheduled and rental rates schedule) of the contract.

ii) The scope of work as mentioned in the contract has been clearly bifurcated into the activity carried out in Abu Dhabi and India.

iii) The invoices issued by the appellant to ONGC specifically mention the consideration for outside India activity and inside India activity in accordance with the pricing schedule. Such invoices have been duly accepted / confirmed by ONGC and payment made thereon.

iv) The Annexure-E of the contracts provides milestone payment formula based on which ONGC has made payment to NPCC from time to time.

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v) Insurance cover taken by NPCC on the fabricated platform. The insurance cover explicitly shows that material procurement and fabrication work has been carried out in Abu Dhabi.

vi) The Surveyors report issued at the time of load out of fabricated platform at Abu Dhabi port. These reports amply demonstrate that NPCC had fabricated the platforms in its Abu Dhabi yard.

17.3 We further find that turnkey contracts means where a contractor has to complete the contract as a whole i.e. from the stage of procurement of material, erection, construction, fabrication and supply thereof. However, where the terms of the contract provide that either party can withdraw or abandon the contract, the company or the contractor has not to make entire payments under the terms of the contract or refund the amounts received, which will accrue only on the completion of the contract, cannot be regarded as a turnkey contract. Hence, we agree with the contention that even if the contract is a turnkey contract, it does not lead to taxability of the entire contract revenues in India but only as much of the profits as is attributable to the PE India can be taxed in India.

17.4 We find considerable cogency in the assessee’s submission that the assessee fabricated the platform in Abu Dhabi and after fabrication the said platform was brought to India with the help of its barges and then the possession is handed over to ONGC. In this regard, it is worth noting that before sailing the platform after fabrication, the same is certified by ONGC through it’s approved surveyor. Furthermore, as per the insurance policy though to be taken

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by the assessee, but ONGC is the joint beneficiary. Further, insurance policy also exhibits that, in case there is a loss suffered in the course of transportation the payee of the insured amount would be ONGC. Thus, we find that under the contract there are different phases of execution of contract. The first phase was completed when it was fabricated, erected and brought to India through its barges, to be physically supplied. Thus, we agree with the contention of the assessee that income attributed to PE in India could not extend to the activities carried outside India and had to be therefore confined to incomes from activities carried out from the PE. Thus we opine that assessee did not have a PE in respect of erection and fabricating the platform in Abu Dhabi. The assessee had a PE in respect of installation and commissioning. In this context, the Apex Court decision in the case of Hyundai Heavy Industries Co. Ltd. 291 ITR 482 (SC) is relevant. The same is reproduced hereunder:-

> "The installation permanent establishment came into existence only on conclusion of the transaction giving rise to the supplies of the fabricated platforms. The installation permanent establishment emerged only after the contract with the ONGC stood concluded. It emerged only after the fabricated platform was delivered in Korea to the agents of the ONGC. Therefore, the profits on such supplies of fabricated platforms cannot be said to be attributable to the permanent establishment."
>
> "In cases such as this, where different severable parts of the composite contract is performed in

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> different places, the principle of apportionment can be applied, to determine which jurisdiction can tax that particular transaction. This principle helps determine, where the territorial jurisdiction of a particular State lies, to determine its capacity to tax an event. Applying it to composite transactions which have some operations in one territory and some in others, is essential to determine the taxability of various operations"

In Hyundai Heavy Industries Company Limited (ITA No 2290 & 2291 of DEL/2002 (ITAT) read with ITA No 42 of 2007 (Utt. HC) following the Supreme Court judgement reported in 291 ITR 482 following was held:-

> "It has been noted by the Hon'ble Apex Court that the installation PE emerged only after the contract with the ONGC stood concluded. It is also noted that it emerged only after the fabricated platform was delivered in Korea to the agents of ONGC and therefore, the profits on such supplies were fabricated platforms cannot be said to be said to be attributable to P.E. Thereafter, it is noted by the Hon'ble Apex Court that there is one more reason for coming to this conclusion. As per Their Lordships, 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 PE and therefore, even if, it is assumed that supplies were necessary for the purpose of installation (activity of PE in

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India) and even is it assumed that the supplies were integral part, still no part of profit 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 and this is the basis on which it was held by the Hon'ble Apex Court that the profits that accrued to the Korean GE for the Korean operations were not taxable in India. In the present two years also, nothing has been brought on record to show and establish that supplies were not at Arm's length price. Hence, even after considering this argument of the Ld. DR of the revenue that PE was in existence through out these two years, we are of the considered opinion that as per this judgement of Hon'ble Apex Court in the case of the assessee itself for the assessment year 1987-88 and 1988-89, no profit is taxable on account of Korean operation (designing and fabrication) because profits, if any, from the Korean operations arose outside India. In the present two years also, the only dispute is with regard to payments made to non resident company outside India for the work done outside India, as per composite contract for designing, fabrication, installation and commissioning of installation on a turn key basis. As per above discussion, after considering clause (a) of para-15 of the judgement of Hon'ble Apex Court per directions of Hon'ble Uttrakhand High Court, we hold that in the facts and circumstances of the case, profit, if any, from the Korean operations (designing and fabrication) is not taxable in India because the same has been arisen outside India. Regarding clause (b) of para 15 of

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the judgement of Hon'ble Apex Court, we find that in the previous two years, there is no dispute regarding quantum of profit embedded in the Indian operation attributable to Indian PE of the assessee and hence this clause of para 15 is not applicable in the present two years which are before us. We, therefore find no reason to interfere in the order of Ld CIT(A) in both these years."

The aforesaid proposition has also been followed by the Mumbai Tribunal Roxon OY Vs DCIT (103 TTJ 891 (Mum).

"As far as art. 7(1)(a) is concerned, the profits attributable to the supplies under the turnkey contract can be brought to tax in India only when we are to hold that the profits attributable to PE will include the profits on supplies under the turnkey contract. In our humble understanding, such an interpretation will be incorrect, for several reasons. Firstly, a profit earned by an enterprise on supplies which are to be used in a construction or installation PE for such supplies, cannot be said to be attributable to the PE because PE comes into existence after the transaction giving rise to supplies materialized. The installation or construction PE, in such a case, is a stage posterior to the conclusion of transaction giving rise to the supplies. Such an installation or construction P E can come into existence after the contract for turnkey project, of which supplies are integral part, is concluded. "

Further more the Hon'ble Supreme Court had also affirmed the above proposition in the case of Ishikawajma-Harima Heavy Industries Ltd. vs DIT reported in 288 ITR408

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" .... The fact that it has been fashioned as a turnkey contract by itself may not be of much significance. The contract may also be a turnkey contract, but the same by itself would not mean that even for the purpose of taxability the entire contract must be considered to be an integrated one so as to make the assessee to pay tax in India. The taxable events in execution of a contract may arise at several stages in several years. The liability of the parties may also arise at several stages. Obligations under the contract are distinct ones. Supply obligation is distinct and separate from service obligation. Price for each of the component of the contract is separate. Similarly offshore supply and offshore services have separately been dealt with. Prices in each of the segment are also different.

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

The contract indisputably was executed in India. By entering into a contact 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"

17.5 In our considered opinion, the ratio emanating from the above case laws is applicable on the facts of the present case. We hold that erection and fabrication cannot said to be attributable to PE in India. All the activities prior to installation and commissioning are carried out in UAE and thus having regard to Article 7 of the DTAA, no

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income can be attributed to the PE in India. Thus, in the background of the aforesaid discussions, we hold that the profits can be attributed to the PE in India only in respect of installation and commissioning activities. The profits attributable to the supplies i.e. erection and fabrication of the platforms cannot be brought to tax in India.

17.6 We find that assessee has contended that taxability of the assessee should be the same as in preceding years. Earlier assessee has declared income @1% of outside India revenue & 10% of inside India revenue after claiming expenses on which TDS has been made. Assessee has claimed that this formula of declaring income was adopted by the Assessing Officer in A.Y. 1997-98. Subsequent to A.Y. 1999-2000, the assessee did not file audited accounts but simply declared the taxable income on the basis of above referred formula.

17.7 It has been submitted that the facts and circumstances, as prevalent in the preceding years, have remained unchanged and therefore, applying the rule of consistency, the income declared may be assessed and no more. In this regard, assessee has placed reliance upon catena of case laws. We find that the above said contention is not sustainable.

17.8 We agree with the contention of the Ld. Departmental Representative that any formula or any agreement whatsoever arrived at between the assessee and department which is against the provision of law is not enforceable under the law. The Revenue is not bound to follow and perpetuate the mistake which has been committed in the past. In this regard, the case of Distributor (Baroda)

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Pvt. Ltd., 155 ITR 120 (SC) may be referred where Hon'ble Apex Court has held that there is no heroism in perpetuating a mistake

18. Applicability of provision of Section 44BB

19 We find that assessee has argued that provisions of section 44BB are applicable to the inside India activity of the contract. The relevant provision is as under:-

> "(1) Notwithstanding anything to the contrary contained in sections 28 to 41 and sections 43 and 43A, in the case of an assessee, being a non-resident, engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, of extraction or production of, mineral oils, a sum equal to ten per cent. of the aggregate of the amounts specified in sub-section (2) shall be deemed to be the profits and gains of such business chargeable to tax under the head "Profits and gains of business or profession":
>
> Provided that this sub-section shall not apply in a case where the provisions of section 42 or section 44D or section 115A or section 293A apply for the purposes of computing profits or gains or any other income referred to in those sections."

19.1 From the above, it is evident that section 44BB applies in two situations,

(i) when non-resident is engaged in the business of providing services or facilities in connection with, OR

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(ii) supplying plant and machinery on hire used or to be used, in the prospecting for, of extraction or production of, mineral oils.

In our opinion, the assessee is not in the business of providing services, neither any plant or machinery has been supplied on hire basis. The assessee is under the contract engaged in successful installation of off-shore platform. This activity cannot be characterized as facility provided by the assessee. Thus, we hold that business activity of the assessee does not fall within the meaning of section 44BB.

20. Interest u/s. 234B, 234C & 234D

21. Assessee has pleaded that no interest under the provision of section 234B of the Act is leviable. On this issue DRP has held the Hon'ble Apex Court has held that levy of interest u/s. 234B of the Act was mandatory in the case of C.I.T. vs. Anjuman G. Ghaswala 252 ITR 1. In this regard assessee has submitted that NPCC is a non-resident foreign company and accordingly, its entire income is liable for tax deduction under section 195 of the Act. Thus, ONGC, payer/deductor, had made payments to NPCC after deducting taxes in pursuyance of withholding tax certificate issued by the income tax authorities. In this background, it has been submitted that NPCC was not liable to pay advance tax and could not have committed any default in paying advance tax. Hence, it has been argued that NPCC cannot be made

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liable to pay tax u/s. 234B of the Act. In this regard, assessee has also placed reliance upon the several case laws:-

- D.I.T. vs. General Electric International Inc. 323 ITR st 46 (SC)
- National Petroleum Construction Company vs. JCIT, Spl. Range Dehradun in I.T.A. No. 1772/Del/2001
- C.I.T. vs. Sedco Forex International Drilling Co. Ltd. 264 ITR 320 (Uttaranchal)
- Judgement of Delhi High Court in the case of D.I.t. vs. Jacabs Civil Inc. in I.T.A. No. 491 of 2008.
- D.I.T. vs. NGC Network Asia LLC 313 ITR 187 (Bom).
- Motorola Inc. vs. DCIT 95 ITD 269 (Del.)
- D.I.T. vs. NGC Network Asia LLC 32 ITR 46.
- Xelo Pty Ltd. vs. DDIT 32 SOT 338 (Mum).

22. We have carefully considered the submissions and perused the records. We find that section 234B of the Act is attracted where in any financial year an assessee is liable to pay advance tax under sec. 208 and he has failed to pay such tax or where the advance tax paid by the assessee under sec. 210 is less than 90% of the assessed tax. Similarly, section 234C is attracted wherein in any financial year, an assessee is liable to pay advance tax under section 208 and he failed to pay such tax or the advance tax paid by the assessee and its current income on or before the specified dates is less than the specified percentage of the tax due on returned income. In this regard, assessee's contention is that its entire income is subject to tax at source under section 195 of the Act. The payer has also taken

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certificate from the Assessing Officer under section. 195(2) of the Act and thus, there was no liability to pay the advance tax under section 208 of the Act and in the absence of any liability, Sec. 234B and 234C could not be applied. The above is also supported by the case laws referred by the ld. Counsel of the assessee hereinabove. As regards interest under section 234D, no arguments were advanced, it will be consequential.

23. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 05/10/2012.

Sd/- Sd/-

[A.D. JAIN] [SHAMIM YAHYA]
JUDICIAL MEMBER ACCOUNTANT MEMBER

Date 05/10/2012

"SRBHATNAGAR"
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1. Appellant 2. Respondent 3. CIT 4. CIT (A)
5. DR, ITAT

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By Order,

Assistant Registrar,
ITAT, Delhi Benches

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