**THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 23.04.2014

**+ W.P. (C) NO. 3914/2012 & CM No.8187/2012**

**LINDE AG, LINDE ENGINEERING DIVISION AND ANR.** .....Petitioners

versus

**DEPUTY DIRECTOR OF INCOME TAX** .....Respondent

**Advocates who appeared in this case:**

For the Petitioners : Mr S. Ganesh, Sr. Adv. with Mr R.P. Garg, Mr V.S. Wahi, Mr Rupesh Jain & Mr Vaibhav Kulkarni.

For the Respondent : Mr Sanjeev Sabharwal.

**CORAM:-**
**HON'BLE MR JUSTICE BADAR DURREZ AHMED**
**HON'BLE MR JUSTICE VIBHU BAKHRU**

**JUDGMENT**

**VIBHU BAKHRU, J**

1. The petitioners have filed the present petition under Articles 226/227 of the Constitution seeking quashing of the ruling dated 20.03.2012 passed by the Authority for Advance Rulings (hereinafter referred to as the 'Authority'). By the said ruling dated 20.03.2012, the Authority has disposed of the application (AAR No.962 of 2010) filed by the petitioner under section 245Q of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') and held that the Consortium of the petitioner no.1 and Samsung Engineering Company Ltd. constitutes an Association of Persons and the income or profits received/ receivable by petitioner no.1 for the offshore

supply of goods and for rendering of offshore services were taxable in India. The said ruling is hereinafter referred to as the 'impugned ruling'.

2. The petitioner no. 1, Linde AG, Linde Engineering Division, Pullach, Germany is hereinafter referred to as 'Linde'. Samsung Engineering Company Ltd., Seoul, Korea is hereinafter referred to as 'Samsung'. Linde and Samsung are hereinafter also referred to as members and collectively referred to as 'Consortium'. ONGC Petro Additions Limited is hereinafter referred to as 'OPAL'. Memorandum of Understanding dated 03.03.2008 is hereinafter referred to as 'MOU'.

3. The principal controversy which is required to be considered in the present petition is: whether in the given facts, Linde and Samsung constitute an Association of Persons within the meaning of 'person' as defined under section 2(31) of the Act? And, whether the income received/receivable by Linde for the supply of equipment, material and spares outside India and for rendering services outside India is taxable in India?

4. The relevant facts in brief are as follows:-

4.1. On 19.4.2007, OPAL floated a Tender Notice inviting bids executing the work (including undertaking all activities and rendering all services) for the design, engineering, procurement, construction, installation, commissioning and handing over of the plant for the Dual Feed Cracker and Associated Units of Dahej Petrochemical Complex in accordance with the Bid Documents. The project was to be executed on turnkey basis.

4.2. On 03.03.2008, Linde and Samsung entered into a Memorandum of Understanding (hereinafter referred to as the 'MOU') whereby both the parties agreed to form a Consortium, for jointly submitting a bid to secure the contract for execution of the aforesaid project. The MOU was followed by an 'Internal Consortium Agreement' dated 14.03.2008 executed between Linde and Samsung. Thereafter, on 20.03.2008, the Consortium submitted its proposal pursuant to the aforementioned tender notice publicised by OPAL. The price bid was submitted by the Consortium on 28.07.2008.

4.3. The said proposal submitted by Linde and Samsung was accepted and OPAL issued a Notification of Award on 23.12.2008 awarding the work of executing the project on a turnkey basis to the Consortium. 23.12.2008 was also fixed as the effective date.

4.4 Thereafter, OPAL (referred in the Contract as the 'Company') and the Consortium (referred in the Contract as the 'Contractor') entered into a definitive agreement on 10.02.2009. As per the said agreement, OPAL awarded the contract for carrying on work of all activities and services required for the design, engineering, procurement, construction, installation, commissioning and handing over of the plant on a lump sum turnkey basis in accordance with the Bidding Documents, to the Consortium. The Consortium agreed to perform the work in conformity with the terms of the agreement and OPAL agreed to pay the consideration in the manner as specified in the contract. The agreement included various annexures, *viz.*: the General conditions of contract as amended, Technical documents, Agreed clarifications, contract price schedule, construction schedule, Project instructions, Milestone payment formula, Notification of

award, Letter of acknowledgement of notification of award from the Consortium, Integrity pact and the MOU executed between the Consortium members. The said agreement being Contract No. MR/OW/MM/DFC/02/2007 dated 10.02.2009 for dual feed cracker and associated units of Dahej Petro Chemical Complex is hereinafter referred to as the 'Contract'.

5. Linde filed an application before the Assessing Officer under section 197 of the Act claiming that no portion of the amount payable to Linde for supply of equipment, material and spares and for providing basic and detailed engineering services was liable to be subjected to withholding of tax under section 195 of the Act as it was contended that the said transactions were performed and completed outside India and payments for the said transaction were also received outside India. It was, thus, contended that the amounts received/receivable by Linde for the said supplies and services were not chargeable to tax in India. The Assessing Officer did not accept the plea of Linde and directed OPAL to withhold tax on amounts paid to Linde in terms of the Contract. Thereafter, Linde filed an application before the Authority under section 245Q of the Act seeking advance ruling with regard to the status of Linde and Samsung as an Association of Persons and also as to the tax liability of Linde in India in respect of income received/receivables under Contract dated 10.02.2009. The Authority admitted the application for consideration of the following questions:-

> "(i) Whether in terms of the Contract dated 10.02.2009 (hereinafter referred to as the contract) between ONGC Petro

Additions Limited (hereinafter referred to as "OPAL") and Consortium of Linde AG, Germany, and Samsung Engineering Company Ltd., Korea (hereinafter referred to as "SEC") the applicant and SEC are taxable in the status of AOP?

(ii) Whether in terms of the Contract, the amount receivable/received in respect of design and engineering, prepared solely for manufacture, procurement of equipment outside India and being inextricably linked to such equipment to be supplied, liable to tax in India, under the provisions of the Income-tax Act, 1961 ("the Act") or under the Double Taxation Avoidance Agreement read with Protocol between India and Germany ("DTAA").

(iii) If the answer to question no. 2 is in the affirmative, to what extent and at what rate of tax, are the amounts received/receivable for design and engineering liable to tax in India?

(iv) Whether in terms of the Contract, the amount receivable by the applicant for supply of equipment, material and spares, outside India are liable to tax in India, under the provisions of the Income-tax Act, 1961 or under the DTAA read with Protocol?

(v) If the answer to (iv) is in the affirmative, to what extent are the profits from supply of plant and equipment taxable in India?

(vi) Whether in terms of the Contract, consideration for onshore services comprising supervision of installation, testing, commissioning and construction, management/ supervision is liable to tax on the profits of the PE, as may be deemed to exist in India, in terms of Section 44DA of the Act read with the provision of the DTAA?

(vii) If the answer to question No. (vi) is in the affirmative, whether for the purpose of determining the profits of the PE in India, the actual expenditure incurred by head office exclusively and specifically in relation to onshore activities of

the PE (not being general administrative/executive expenses) and reimbursed to it, are allowable in full and not subject to limits in Section 44C of the Income-tax Act, 1961?"

6. The said application (AAR No.962 of 2010) was disposed of by the impugned ruling whereby the Authority held that the Consortium of the Linde and Samsung constitutes an Association of Persons. The Authority noted that the Notification of Award was in the name of the Consortium and not in the name of Linde and Samsung individually. The liability of Linde and Samsung towards OPAL, for due performance of the Contract, was joint and several. The Authority further held that the Contract was an indivisible contract and was incapable of being split up into different components/parts. And, on this basis the Authority concluded that income received/ receivable by the petitioner for offshore supply of equipment, materials and spares and for offshore supply of drawings and designs relating thereto was taxable in India. The Authority also held that since Linde/Samsung continued to be responsible for the supplies up to the stage of acceptance of the work in relation to the erection, procurement and commissioning project, the title of the equipment/material supplied could not be accepted to have transferred to OPAL overseas.

7. Aggrieved by the impugned ruling passed by the Authority, the petitioners have filed the present writ petition.

***SUBMISSIONS***

***Submissions of Petitioners/Linde***

8. It is contended by the learned senior counsel for the petitioner that the status of the Consortium formed by Linde and Samsung was not that of

an Association of Persons and as such the Consortium was not liable to be assessed under the Act as an Association of Persons. It was submitted on behalf of Linde that an Association of Persons is one in which two or more persons join in a common purpose or common action whether or not the same is formed with the object to produce income, profits or gains. It is contended that in the present case, there is no element of the common action or common purpose and, therefore, the status of the Consortium was not that of an Association of Persons.

9. It was submitted on behalf of petitioners that Linde and Samsung were having the requisite technical experience in their respective fields and, therefore, had jointly submitted the bid in order to fulfil the criteria/conditions specified under the bid documents. It was submitted that the common object of Linde and the Samsung was to secure the contract and the Consortium was formed only for this limited purpose and each party was required to perform its specified portion of the Contract separately. The learned counsel for Linde referred to various clauses of the MOU, the Internal Consortium Agreement as well as the Contract and submitted that Linde and Samsung were responsible for performing separate items of work. Both Linde and Samsung were responsible for their respective profits and liabilities and there was no sharing of risks, expenses or profits. The expenses or the costs incurred by each member, for the part of the work performed by it, was also borne exclusively by that member. There was also no sharing of assets or resources employed by each of them. The scope of the work to be performed under the Contract by both the parties was clearly demarcated and separately identified. The

considerations payable to Linde and Samsung for the respective items of work to be performed by them were separately specified and the amounts payable by OPAL under the Contract were also paid directly to each member of the Consortium. It was also pointed out that the Performance Bank Guarantee was also required to be submitted by the members of the Consortium separately. It was submitted that in these facts, no joint management or joint action or common purpose in the performance of the Contract could be inferred and hence, the Consortium could not be assessed as an Association of Persons.

10. In support of these contentions, the learned counsel placed reliance on the judgment of the Supreme Court in the case of ***CIT v. Indira Balkrishna*: (1960) 39 ITR 546 (SC)** and also referred to the decisions passed by the Authority in the case of ***Hyundai Rotem Co. and Mitsubishi Co. v. DIT (International Taxation)*: [2010] 323 ITR 277 (AAR), *Hyosung Corporation v. Director of Income-tax (International Taxation) New Delhi*: [2009] 314 ITR 343 (AAR)** and ***In Re: Van Oord Acz. Bv*: [2001] 248 ITR 399 (AAR).**

11. It is also contended that the Authority was obliged to follow its earlier rulings passed in the cases of ***Hyundai Rotem Co. and Mitsubishi Co.*** (supra), ***Hyosung Corporation*** (supra) and ***In Re: Van Oord Acz. Bv*** (supra) as it is settled law that a principle of law laid down by any Judicial Authority, unless upset in appeal or rendered inapplicable by subsequent change in law would be binding on the said Judicial Authority. In support of this contention, reliance has been placed on the judgment of the Supreme Court in the case of ***Columbia Sportswear Co. v. DIT*: (2012) 11 SCC 224.**

12. It was next contended on behalf of Linde that the consideration received/receivable by Linde for supplying equipment, material and spares was not taxable in India as the income arising and accruing from the transaction could not be deemed to accrue or arise in India. It was submitted that certain offshore services provided by Linde were inextricably linked with the offshore supplies and income arising therefrom would also not accrue or arise in India. It is contended that the petitioner being a non-resident would be chargeable to tax in India only in the event income accrues or arises in India or is deemed to accrue or arise in India. Therefore, the amount received/receivable by the petitioners for the offshore supplies or offshore services were not liable to tax under the provisions of the Act or under the Double Taxation Avoidance Agreement read with Protocol between India and Germany.

13. It is contended that although the liability of Linde and Samsung for due performance of the Contract was joint and several, the respective items of work to be executed by them were separately identified along with the consideration payable for the same. It was submitted that as per the Contract, the petitioner was obliged to perform, broadly, the following activities, viz.: (i) basic and detailed engineering and drawings; (ii) procurement and offshore supply of equipment and material; and, (iii) onshore services such as supervision during pre-commissioning, construction, post-commissioning, training of personnel, etc. While activity (iii) had to be performed in India, activities (i) and (ii) were required to be performed entirely outside India. As per the Contract, the consideration/price for the offshore and onshore transactions was also

separately provided. Whilst, the considerations for the offshore transactions were also to be paid in foreign currency (i.e. Euros), the considerations for the onshore transactions were to be paid in Indian currency. It was pointed out that in terms of Clause 7 of the Contract, the equipments, materials and spares were to be supplied on FOB basis. It was submitted that this meant that the title to the said equipment, materials and spares was transferred to OPAL outside the territory of India. The offshore services were stated to be inextricably linked to the supply of equipment and had also been rendered outside India. It was submitted that as no part of the income for the offshore supply or offshore services was received or accrued in India, the same was not taxable in India and the Authority misdirected itself in passing the impugned ruling.

14. It was also contended that in terms of the Double Taxation Avoidance Agreement (DTAA) between India and Germany, income of Linde was taxable exclusively in Germany with respect to its global business income, except in cases where the petitioner carried on business through a permanent establishment in India, in which case the profits attributable to the permanent establishment would be taxable in India. The counsel has relied upon Articles 5 and 7 of the said DTAA. It was also submitted that the permanent establishment of Linde did not come into existence till the commencement of the installation stage which was subsequent to Linde providing the basic and detailed engineering and drawings and offshore supply of equipment and material. Thus, the income from provision of offshore supplies and services had already accrued and arisen, prior to Linde's permanent establishment coming into existence.

Thus, it was contended that the income from supply of equipments, materials and spares supplied from overseas and offshore services were not taxable under the Act.

15. It was further submitted that treating Linde's enterprise as an Association of Persons would deprive the petitioners of the treaty benefits and the same would amount to "treaty override" which is illegal and impermissible. It was contended that, as per section 90A of the Act and as per the judgment delivered by the Supreme Court in the case of ***Azadi Bachao Andolan v. Union of India*****: 263 ITR 706 (SC)**, it was settled that in case of conflict between the provisions of the Act and the provisions of DTAA, the provisions of DTAA would prevail to the extent that the treaty provisions are more beneficial to the tax payer.

16. It was submitted that the case of the petitioner was covered by the judgment of the Supreme Court in the case of ***Ishikawajima-Harima Heavy Industries v. Dir. Of Income Tax*****: (2007) 288 ITR 408 (SC)** and also in the case of ***CIT v. Hyundai Heavy Industries Co. Ltd.*****: (2007) 291 ITR 482 (SC).** The counsel has also placed reliance on the judgment of this Court in the case of ***DIT v. LG Cable Ltd.*****: 197 Taxmann 100 (Del.).** It is contended that the impugned ruling was liable to be set aside as the Authority had not considered the judgments in ***Ishikawajima-Harima Heavy Industries*** (supra) and ***Hyundai Heavy Industries Co. Ltd.*** (supra). It is contended that the Authority had erred in referring to the judgment of the Supreme Court in the case of ***Vodafone International Holdings B.V. v. Union of India (UOI) and Anr.*****: (2012) 6 SCC 613** as the same was not applicable to the facts of the present case.

17. The learned counsel for the petitioner also referred to Instruction No.1829 dated 21.09.1989 issued by the Central Board of Direct Taxes in respect of taxability of income of non-residents arising from the execution of power projects on turnkey basis involving activities to be carried out in India as well as outside India. It was submitted by the petitioner that the said instruction indicated a correct understanding of law. The said Instruction has been withdrawn subsequently by the Board by an Instruction No.5/2009 dated 20.07.2009. However, it was submitted by the petitioner that the withdrawal of the Instruction was prospective in nature as held by this Court in the case of ***DIT v. Ericsson AB*****: 343 ITR 470** and the since the Contract was entered into by Linde prior to 20.07.2009, the said instruction would still be applicable in respect of income arising from the Contract.

18. It was lastly, contended that in terms of Section 86 of the Act, the income of an Association of Persons was to be taxed in the hands of the association and the distribution of income to the members of an Association of Persons was not liable to tax. In the present case, the entire consideration under the Contract was paid/payable by OPAL to the members separately and not to the Consortium. Thus, the notional inflow of funds in the hands of the Consortium was also equal to the outflow in favour of the members. And in such case, no income would arise in the hands of the Consortium. It is pertinent to mention that this contention was neither raised by the petitioner before the Authority nor was considered by the Authority.

***Submissions of Respondent/Revenue***

19. The learned counsel for the respondent has supported the impugned ruling passed by the Authority. It was contended by the respondent that the Consortium formed by petitioner and Samsung constituted an Association of Persons and income or profits received/receivable under the Contract were liable to be assessed in the hands of the Consortium as a separate person. It was submitted that the Contract was entered by OPAL with the Consortium as one entity, which was described as the "contractor" under the contract. It is submitted that the common purpose was to bid as a single entity and the common action was to execute the contract as a single entity. The subsequent division of the work between the members of the consortium was not relevant. It is submitted that Linde and Samsung agreed to jointly cooperate as a Consortium in the submission of the proposal and for jointly executing the same. The learned counsel for the respondent drew the attention of this court to various clauses of the Contract to indicate that insofar as OPAL was concerned, it regarded the Consortium as a single entity for due performance of the Contract. It was further submitted that the Contract was awarded to the Consortium for the entire work with the parties agreeing to be jointly and severally liable to OPAL for due performance of the Contract. It is further submitted that the Contract provided for a lump sum consideration payable for execution of the entire Contract and as such the same was not divisible. The certificate of completion and acceptance of work was to be given to the Consortium and not to individual members. The Consortium was liable to OPAL for consequential and liquidated damages and Linde and Samsung being members of the Consortium were both jointly and severally liable for the same. It is submitted that Linde and Samsung submitted their bid as one

and the Contract is indivisible. It was further submitted that the object and purpose of the Contract was to set up the Dual Feed Cracker and Associated Units of the Petrochemical Complex. The activities required for the execution of the Contract could not be considered as independent transactions. Linde and Samsung had joined for the said common purpose of bidding and execution of the contract and thus any income arising therefrom was assessable in their hands as an unregistered association i.e. an Association of Persons. The counsel for the respondent relied upon the ruling passed by the Authority in the case of ***Geoconsult ZT GmbH v. Director of Income Tax (International Taxation)*****: [2008] 304 ITR 283 (AAR)** in support of his contentions. The counsel for the respondent has also submitted that the facts in the case of ***Hyundai Rotem Co.*** (supra) were not similar to the facts in the present case and, therefore, the said decision was not applicable to the present case.

20. The counsel for the respondent disputed the contention of the petitioner that income/profits received outside India for the offshore transaction were not taxable in India. It was contended by the respondent that the project in the present case is a turnkey project and the contract is an integrated and indivisible contract. Any splitting up of the contract would be artificial and could not be resorted to. It was submitted that the offshore and the onshore transactions could be segregated for the purposes of taxation and the contract had to be read as a whole as an indivisible contract. The dominant object of the contract is the execution of a turnkey project and the question whether the title to the goods supplied passes offshore or within India is secondary to the execution of the contract. The

offshore and the onshore transactions are interlinked and the non-execution of one transaction/part would result in the breach or failure of the whole contract. The contract itself provides for milestone dates and the breach of any of the terms thereof would result in the breach of the entire contract and not just a particular obligation. The consideration received for the offshore transaction formed part of the consideration for the entire contract and could not be segregated for the purposes of taxation. Therefore, the consideration for the whole work was receivable by the Consortium and could not be segregated on the basis of the transactions/activities involved in execution of the Contract. As such, the whole income or profit received/receivable under the contract was taxable in India.

21. It is submitted that the judgments in the case of ***Ishikawajima-Harima Heavy Industries*** (supra) and ***Hyundai Heavy Industries Co. Ltd.*** (supra) relied upon by the petitioner in support of its contention were not applicable in the present case. It is submitted by the respondent that the facts in each case were dissimilar. It was submitted that in the present case, the role and responsibilities were not specified and the different milestones specified for the execution of the contract made no difference in so far as the taxability of the income arising from the Contract was concerned. The Contract specified that the contract price/consideration was payable by OPAL to the Consortium for the whole of the Contract and the entire work was to be executed by the Consortium.

22. In response to the submission made on behalf of the petitioner that the petitioner did not have any permanent establishment in India at the material time when the offshore transactions were performed, it was

contended that Linde had a direct subsidiary in India and the same was involved in pre-bidding negotiations. Thus, Linde had a permanent establishment in India even prior to the Contract being signed. It was further submitted that the Contract entailed execution of the project on a turnkey basis and the ground work for the same commenced shortly after execution of the Contract. The same also implied that Linde had its permanent establishment in India. It was contended that the Consortium was liable to be taxed as a tax resident entity in India and to that extent the DTAA between India and Federal Republic of Germany did not apply.

23. With regard to the contention of the petitioner on the application of Instruction No.1829 dated 21.09.1989 in the present case, it is submitted by the respondent that the said Instruction is not applicable in the facts of the present case as the same was limited to power projects and in any event the same was withdrawn on 21.07.2009.

24. It is submitted that the Sections 86 and 67A of the Act relied upon by the petitioners only dealt with the method of computation of the income of partnership/Association of Persons and not whether the association was to be taxed as a separate entity.

***DISCUSSION AND CONCLUSION***

25. We have heard the counsel for the parties. The principal questions that are required to be considered are:-

(i) Whether the consortium formed by Linde and Samsung constitutes an Association of Persons under section 2(31) of the Act and are they

liable to be taxed under the provisions of the Act as an Association of Persons; and

(ii) Whether the income/profit received/receivable by the Linde towards the offshore supply of equipment, materials and spares and for drawings and designs in relation thereto, is taxable in India under the provisions of the Act or under the Double Taxation Avoidance Agreement read with the Protocol between India and Germany?

***Whether the Consortium constitutes an AOP***

26. Section 4 of the Act is the charging section. Section 4(1) provides that income tax shall be charged in respect of the total income of a person in the previous year. A person is defined under Section 2(31) of the Act as under:-

> "(31) 'person' includes—
>
> (i) an individual,
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> (ii) a Hindu undivided family,
>
> (iii) a company,
>
> (iv) a firm,
>
> (v) an association of persons or a body of individuals, whether incorporated or not,
>
> (vi) a local authority, and
>
> (vii) every artificial juridical person, not falling within any of the preceding sub-clauses;
>
> *Explanation*.— For the purposes of this clause, an association of persons or a body of individuals or a local authority or an artificial juridical person shall be deemed to be a person, whether or not such person or body or authority or juridical

person was formed or established or incorporated with the object of deriving income, profits or gains;"

27. Section 3(42) of the General Clauses Act, 1897 defines a 'person' to include *"any company or association or body of individuals, whether incorporated or not".*

28. The expression 'Association of Persons' has not been defined in the Act. However, it is apparent that the expression has not been used in any technical sense and the expression has to be construed as per the plain ordinary meaning of the words used. Given the wide definition of the word 'person', the meaning of the expression 'Association of Persons' would also be of wide import. The Supreme Court in the case of ***Indira Balkrishna*** (supra), taking cue from the dictionary meaning of the word 'associate', interpreted the said expression and held as under:-

> "9. In B.N. Elias [(1935) 3 ITR 408] Derbyshire, C.J., rightly pointed out that the word "associate" means, according to the Oxford dictionary, "to join in common purpose, or to join in an action". Therefore, an association of persons must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains. This was the view expressed by Beaumont, C.J. in CIT v. Laxmidas Devidas [(1937) 5 ITR 548] at page 589 and also in Re. Dwaraknath Harishchandra Pitale [(1937) 5 ITR 716] …."
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> (emphasis supplied)

29. The Supreme Court in the case of ***G. Murugesan and Brothers v. Commissioner of Income Tax, Madras*****: (1973) 4 SCC 211** made the following observations:-

> For forming an 'Association of Persons', the members of the association must join together for the purpose of producing an income. An 'Association of Persons' can be formed only when two or more individuals voluntarily combine together for a certain purpose. Hence volition on the part of the member of the association is an essential ingredient. It is true that even a minor can join an 'Association of Persons' if his lawful guardian gives his consent. In the case of receiving dividends from shares, where there is no question of any management, it is difficult to draw an inference that two more shareholders functioned as an 'Association of Persons' from the mere fact that they jointly own one or more shares, and jointly receive the dividends declared. Those circumstances do not by themselves go to show that they acted as an 'Association of Persons'.
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> (emphasis supplied)

30. It is also relevant to refer to a judgment of the Supreme Court in the case ***N.V. Shanmugham and Co. v. CIT*: (1970) 2 SCC 139** for understanding the meaning of the term Association of Persons. In that case, the Court appointed three receivers in a suit for dissolution of a partnership firm. The receivers were directed to conduct the business of the firm and the profits earned from the business, being treated as an assets of the firm, were directed to be distributed among the partners as per their shares and in accordance with the deed. The issue before the Supreme Court was whether the profits earned in the business should be considered as profits earned by an 'Association of Persons' or whether it should be considered as having been earned by individuals (individual partners as beneficiaries). The Supreme Court held that the receivers constituted an Association of Persons on the ground that the business was carried on by the receivers jointly and the control and the management of the business was a unified one in the hands of the receivers. The relevant portion of the judgment is as under:-

"7. We are unable to accede to the contentions of the learned counsel for the assessee. It is not denied that the business was carried on by the receivers on behalf of erstwhile partners of the firm and that considerable profits were earned from the business. The control and the management of the business was in the hands of the receivers. That control and management was a unified one. The receivers had joined in a common purpose and they acted jointly. When they did so they acted on behalf of the persons who were the owners of the business. The receivers did not and could not have represented the individual interest of the various owners of the business. If they had done so there would have been chaos in the business. The profits to which those owners lay claim and which they were not averse to pocket, were earned on behalf of an "association of persons". The profits were earned on behalf of the persons who had a common interest created by the order of the Court and were on that account of an "association of persons". The existence of specific or defined interest in the profits did not make the earning any the less by an "association of persons". Liability to tax depends upon the earning of profits by a unit and not upon the ultimate division of the profits....."

(emphasis supplied)

31. It is also relevant to refer to the decision of the Calcutta High Court in the case of ***B. N. Elias and others, In Re.*****: (1935) 3 ITR 408 (Cal)**. The Supreme Court in the case of ***Indira Balkrishna*** (supra) cited the following passages from the concurring opinion of Costello J, with approval:-

"...although these four persons did not constitute a body which was the same as partnership, it was in many respects similar to a partnership and was approximate to a partnership and it may well be that the intention of the Legislature was to hit combinations of individuals who were engaged together in some joint enterprise but did not in law constitute partnership....

xxxx xxxx xxxx xxxx xxxx

> when we find, as we do find in this case, that there is a combination of persons formed for the promotion of a joint enterprise banded together if I may so put it, co-adventurers to use an expression, then I think no difficulty whatever arises in the way saying that in this particular case these four persons did constitute an "association of individuals" within the meaning of both section 3 and section 55 of the Indian Income Tax Act, 1922."

32. The condition that the association must be formed for the object of producing income, profits or gains is no longer applicable in view of the Explanation inserted in Section 2(31) of the Act, with effect from 01.04.2002. However, the essential condition that an association of persons must be one where two or more persons join in common action for a common purpose continues to be applicable and is not diluted in any manner.

33. Therefore, it emerges from the above discussion that the Association of Persons is one in which two or more persons join together for a common purpose or common action and there is a joint management or joint action by the said two or more persons. In order to treat persons as an association, it is necessary that the members must have a common intention and must act jointly for fulfilling the object of their joint enterprise.

34. However, it is also necessary to bear in mind that the purpose of treating two or more persons as an association of persons is to impose tax on the income that may be attributed to their joint enterprise. It is, thus, obvious that it would be necessary to consider the extent and the nature of the common purpose and the common action, in order to determine whether the said persons form an association for the purposes of imposing tax or

not. As explained by the Calcutta High Court in ***B. N. Elias*** (supra), the intention of the Legislature was to treat combinations of persons, who were engaged together in some joint enterprise but did not in law constitute partnerships, as a separate taxable entity. It is, thus, essential that an Association of Persons has the trappings of a partnership for conducting the joint enterprise which makes it amenable to be treated as a separate taxable entity. A person carrying on business may in the usual course cooperate with others for a common purpose. In many instances, the test of common purpose and common action, if literally applied, may also hold true. However, treating every instance of such cooperation between two or more persons as resulting in an Association of Persons would militate against the purpose of considering an association as a separate tax entity. Whether an arrangement or collaborative exercise between two or more persons results in constituting an Association of Persons as a separate taxable entity would depend on the facts of each case including the nature and the extent of collaboration between them. The Supreme Court in ***Indira Balkrishna*** (supra) had also clarified that:-

> "there is no formula of universal application as to what facts, how many of them and of what nature are necessary to come to a conclusion that there is an association of persons within the meaning of Section 3".

35. It is obvious that unless the facts lead to a conclusion that there is sufficient joint participation for a common enterprise, it would not be appropriate to treat two or more persons as an Association of Persons for the purposes of assessing them as a separate taxable entity. A mere cooperation of one person with another in serving one's business objective

would not be sufficient to constitute an Association of Persons merely because the business interests are common. A common enterprise, which is managed through some degree of joint participation, is an essential condition for constituting an Association of Persons.

36. It follows from the above discussions that before an association can be considered as a separate taxable entity (i.e an Association of Persons), the same must exhibit the following essential features:

(i) must be constituted by two or more persons.

(ii) the constituent members must have come together for a common purpose.

(iii) the association must move by common action and there must be some scheme of common management.

(iv) the cooperation and association amongst the constituent members must not be perfunctory and/or merely in form. The association amongst members must be real and substantial which is sufficient to treat the association as a separate homogenous taxable entity.

37. The facts in the present case need to be considered in view of the above discussion and in the light of the judgments of the Supreme Court referred above. In the present case, the MOU dated 03.03.2008 and the Internal Consortium Agreement dated 14.03.2008 entered into by Linde and Samsung record their agreement, on the basis of which they had agreed to bid and execute the project. The intention of the parties has to be ascertained from the terms of the said MOU and the Internal Consortium Agreement. The relevant extracts of the said MOU are quoted below:-

"WHEREAS LE ("LEADER OF CONSORTIUM") will perform Basic Engineering, supply of Selected Key Equipment and the Related Detail Engineering, Detail Engineering and Procurement of Cracking Furnaces, parts of Technical Supervision Services, Commissioning, Testing, Conducting Performance Tests and Post-Commissioning Services of the PROJECT.

WHEREAS, SECL will perform Detailed Engineering of DFCU Recovery Section and AU, Supply of Equipment, Construction, Erection and Pre-Commissioning of DFCU and AU and Parts of Technical Supervision Services of the PROJECT.

WHEREAS, PARTIES intend to jointly cooperate as consortium (hereinafter referred to as "CONSORTIUM") in order to prepare and submit a joint proposal as a consortium for the PROJECT, (hereinafter referred to as "BID") and if the BID is accepted by ONGC/OPaL to perform the contract (hereinafter referred to as "CONTRACT") for the execution of the PROJECT.

NOW THEREFORE the PARTIES agree as follows:

1. AGREEMENT TO COOPERATE

xxxx xxxx xxxx xxxx xxxx

As far as the CONSORTIUM MEMBERS are concerned, this AGREEMENT is signed only for the purpose of bidding and, if awarded, as a basis for a consortium agreement ("CONSORTIUM AGREEMENT") in order to execute the CONTRACT.

2. CONSORTIUM

2.1 The PARTIES agree to cooperate on the basis of the CONSORTIUM AGREEMENT with joint and several responsibility/liability towards ONGC/OPaL for

execution of the entire works and discharging all obligations under the CONTRACT.

xxxx xxxx xxxx xxxx xxxx

The overall responsibility of the project management of the entire project shall be that of the leader of the consortium and shall also perform by himself and not through sub-contract, Project Management + FEED Engineering for the DFCU.

xxxx xxxx xxxx xxxx xxxx

2.4 The PARTIES confirm herewith that direct payments to each PARTY shall be made by ONGC/OPaL according to the details of the price break-up and payment schedule as laid down in the BID.

xxxx xxxx xxxx xxxx xxxx

3.1 Each PARTY, in the event that the CONSORTIUM is awarded the CONTRACT, shall be responsible for performance of its responsibilities and services as stipulated in this AGREEMENT and to be stipulated in the CONSORTIUM AGREEMENT in detail.

xxxx xxxx xxxx xxxx xxxx

3.4 Each PARTY shall be responsible for timely performance of its share of work under CONTRACT including timely supply of required information, data, and material required for the performance of the scope of the work of other PARTIES. Each PARTY is also responsible for quality of its scope of work.

xxxx xxxx xxxx xxxx xxxx

4.4 Notwithstanding any other provisions of the AGREEMENT, in no event shall either PARTY be liable to the other PARTIES, whether arising under contract, tort (including negligence), strict liability or otherwise,

for loss of revenue, profit or use of capital, downtime of facilities, damage for failure to meet other contractual commitments or deadlines, loss of business reputation or opportunities, loss of production, loss of product, or for any special, incidental or consequential loss or damage of any nature arising at any time or from any causes whatsoever.

xxxx xxxx xxxx xxxx xxxx

4.8 The PARTIES mutually agree and confirm that the CONSORTIUM shall constitute an unincorporated arrangement established for the limited purpose of representations and dealing with ONGC/OPaL with independent and separate scope of work as set forth herein. The PARTIES shall be liable jointly & severally vis-a-vis ONGC/OPaL for the obligations of the PROJECT in accordance with the terms & conditions of the Tender document. Such Joint and Several Liability shall not extend to any third party other than ONGC/OPaL nor for any purpose other than the Project and each one will be liable in respect of its separate and independent scope of work set forth herein.

Nothing in the AGREEMENT shall be deemed to constitute, create, give effect to, or otherwise recognize a corporation, association, partnership joint venture or formal or informal business entity of any kind (incorporated or not incorporated). Nothing shall be construed as providing for common management and the sharing of profits or losses arising out of the Project. Both parties shall file their respective tax returns and be assessed separately.

Each of the Parties expressly agrees that it is not their intention through the joint venture to carry on business in common with the other PARTIES with a view to profit. Each party shall bear its own losses and retain all profits

arising from the performance of its respective scope of work.

The CONSORTIUM Linde – Samsung is a non-incorporated one-time co-operation of two individual, independent and separate legal entities with a defined split of scope of work under this CONTRACT. Individual payments will be released by ONGC/OPaL to the members of the CONSORTIUM as per their separate invoices."

38. The intention of the members of the Consortium is discernable from the various clauses of the MOU which are quoted above. Clause 4.8 of the MOU expressly provided that "*the CONSORTIUM shall constitute an unincorporated arrangement established for the limited purpose of representations and dealing with ONGC/OPaL with independent and separate scope of work as set forth"* in the MOU. Clause 3.1 of the MOU clearly specifies that each consortium member would be responsible for performance of its responsibilities and services as stipulated in the MOU. Clause 3.4 of the MOU further specified that each consortium member would be responsible for its share of work and would also provide the information, data and material required for performance of work by the other member.

39. Insofar as the execution of the contract is concerned, the responsibilities of each member were separate and independent. Neither of the members had any role to play with respect to the scope of work which was allocated to the other member. The equipment/material to be supplied and the works to be executed by each member under the MOU as well as under the Contract entered into with OPAL was well defined and the

members were to act separately and in accordance with the respective work allocated to them. The opening recitals as recorded in the MOU indicate that the Linde was required to perform Basic Engineering, supply Selected Key Equipment and the related Detail Engineering, Detail Engineering and Procurement of Cracking Furnaces, parts of Technical Supervision Services, Commissioning, Testing, Conducting Performance Tests and Post-Commissioning Services of the Project. Samsung was required to perform Detailed Engineering of DFCU Recovery Section and AU, supply of Equipment, Construction, Erection and Pre-Commissioning of DFCU and AU and parts of Technical Supervision Services of the Project.

40. The allocation of the work was done in such a manner that each member was required to perform work which was within its field of expertise and could not be performed by the other party. The work to be performed by both the members was separate, definite and divisible. Therefore, as far as execution of the project was concerned, each party had to work independent of the other. The only area of cooperation and management envisaged under the MOU was in respect of sharing of information and material, to enable the other member to perform its work. In terms of the MOU, each member was obliged to provide the necessary information to the other which was necessary for the other member to perform its work. This level of cooperation is necessary for execution of any project where multiple agencies are involved. Even in cases where the agencies involved in execution of a project are not related, it would be necessary that they cooperate with each other in providing information so that each agency can work in a coordinated manner. The said MOU formed

an integral part of the Contract entered into between Linde, Samsung and OPAL and was appended as Annexure J to the said Contract. And, to that extent OPAL also recognized the relationship between Linde and Samsung.

41. Subsequent to the MOU, Linde and Samsung entered into an Internal Consortium Agreement. This agreement also clearly specified that the scope of works of Linde and Samsung were separate and independent. Each of the members was responsible for its own scope of work. The annexures to this agreement included a Gantt Chart which indicated the schedule for execution of the project. This schedule clearly specified the separate tasks/work to be executed by the Linde and Samsung. The agreement also made a specific provision in case the scope of work of the respective members was altered and either of the members was required to execute additional work. It was agreed that in such case, the price for additional work would have to be paid to the party executing additional work in addition to the consideration as agreed under the contract. Clause 6.1 of the said agreement expressly provided that prices and payment for the respective works to be performed by the members would be stipulated separately in the bid and the Contract to be entered into with OPAL. Clause 6.3 contemplated that separate invoices would be issued by Linde and Samsung to OPAL (described as the 'company' under the Contract). Clauses 6.1 and 6.3 of the said agreement are relevant and are quoted below:-

> "6.1 The prices and payment conditions for Linde's and SECL's respective Scope of Work as per Articles 4.1 and 4.2 shall be as stipulated in the Bid and, finally, as stipulated in the Contract with the COMPANY.

xxxx xxxx xxxx xxxx xxxx

6.3 Detailed terms and conditions regarding payments to be effected by the COMPANY to the Parties under the Contract shall be as follows: Separate invoices will be issued by SECL and Linde to COMPANY for each milestone payment. The Parties agree and acknowledge that under the Contract there shall be direct payments by the COMPANY to each Party for its respective price portion and/or related progress in the total Contract price. The Contract shall include individual Contract prices and payment schedules for Linde and SECL for which each party shall be solely responsible. "

42. The Internal Consortium Agreement was also explicit with regard to risk to be borne by the members. Linde and Samsung agreed to bear the risk for the work falling within their scope of work including on account of non-payment or default by OPAL. Neither of the members would be liable to each other on account of any loss or damages incurred by the other member on account of non-payment by OPAL. This was expressly provided in Clause 6.4 of the said agreement which reads as under:-

"6.4 Each Party to this Agreement shall bear the risk of non-payment or payment default by the COMPANY WHETHER from equity or from loans or from other sources of the COMPANY'S funding for the Project regarding its respective price portion and related progress in the total Contract Prices under the Contract."

43. Each of the members was also responsible for any deficiency in performance of the work falling within their scope of works. Although, the parties had agreed to be joint and severally liable to OPAL, the members had internally agreed that each of them would be responsible and liable for

performance and completion of their scope of work. Clauses 9.1 and 9.2 of the said agreement are relevant and are quoted below:-

> "9.1 Notwithstanding Linde's and SECL's liability towards the COMPANY as per Contract, it is agreed that internally the Parties shall each be responsible and liable for the performance and completion of their Scope of Work for the Project according to the requirements and stipulations of the Contracts and this Agreement.
>
> 9.2 Linde's Liabilities
>
> 9.2.1 Licensing and Engineering
>
> (1) In case of deficiencies in Linde's engineering work defined in Article 4.1.1(1) and (2) above, Linde will perform the necessary corrective engineering work at its own expense.
>
> 9.2.2 Equipment
>
> If for reasons attributable to Linde the equipment supplied by Linde as per Article 4.1.1(10) above is found defective by COMPANY prior to the expiration of the warranty period as per Contract, Linde will, at its cost, repair or replace such defective equipment including related CIF transportation, as well as any import duties and any taxes or expenses according to the stipulations of the Contract, and will compensate the respective additional construction costs.
>
> 9.2.3 Liquidated Damages for Delay
>
> (1) In case deficiencies in Linde's execution of its Scope of Work as defined in Article 4.1.1 and in Annex 2 to this Agreement result in a delay in the penalized milestone(s) according to the Contract with COMPANY, Linde shall be responsible for the payment of the liquidated damages for the length of delay caused by Linde due to

COMPANY and claimed by COMPANY under the Contract.

(2) Linde's liability for liquidated damages under this Article 9.2.3 shall be limited to 5 percent (%) of Linde's price of its Scope of Work.

9.2.4 Liquidated Damages for Non-fulfilment of Performance Guarantees

In case of non-fulfillment of the process performance guarantees - as per the Contract-if claimed by the COMPANY, Linde will be responsible for payment of liquidated damages."

44. Insofar as cooperation between Linde and Samsung towards project management is concerned, it was expressly agreed between the said parties that each shall be responsible for the management and control of work falling within their own scope. However, for the purposes of representing the Consortium to OPAL, it was agreed that 'Project Directors' would be nominated by Linde and Samsung who would have the authority to direct the project execution in accordance with the provisions of the Contract entered into between the parties with OPAL and in conformity with their internal agreements. It was expressly agreed that the Project Directors would remain responsible to their respective sponsors. Clause 7 of the Internal Consortium Agreement is relevant and is quoted below:-

"7. Project Management

7.1 Each Party shall be responsible for the management and controlling of its Scope of Work.

Linde and SECL will nominate one responsible Project Manager each and will establish their Project teams.

The Project Directors are persons to be nominated by the Parties to whom the Project Managers report and are responsible and who are the official representatives of the Consortium towards COMPANY. The Project Directors shall be given full authority by Linde's and SECL's management to direct the Project execution in accordance with the provisions of the Contract and this Agreement and to act in the best interest of the Consortium. The Project Directors shall remain responsible to Linde and SECL respectively and shall regularly report to Linde and SECL with respect to any matters concerning the Consortium.

For the avoidance of doubt, Project Directors responsibility towards Linde and/or towards SECL shall not constitute a personal financial liability of the Project Directors.

The Project Managers shall discuss all important matters related to the Project and shall make best efforts to reach agreement on all issues. In order to achieve a successful implementation of the Project in accordance with the provisions of the Contract, un-resolvable disagreements between the Project Managers shall be referred to the Project Directors.

In addition to representing the Consortium towards COMPANY, the Project Directors shall receive un-resolvable disagreements between the Project Managers and make best efforts to facilitate a consensus with regard to such disagreements.

Should no consensus be reached, despite best efforts of the Project Directors and the Project Managers, the Project Directors shall refer such unresolved disagreements to the Steering Committee for further action."

45. Subsequent to executing the Internal Consortium Agreement, Linde and Samsung submitted a bid as a Consortium which was accepted and a Notice of Award dated 23.12.2008 was issued. Thereafter, a Contract dated 10.02.2009 was executed between the OPAL on one part and the Consortium on the other. It is necessary to refer to the relevant clauses of the said Contract and the same are reproduced hereunder:-

> "AND WHEREAS the Contractor represents that it has expertise and technical know-how in respect of the said Work and had submitted his offer as per Company's Bidding Documents in response to the above said Tender enquiry of the Company vide the Contractor's offer No. P310-7009 dated 20.03.2008 and 28.07.2008 for Adjustment Price Bid.
>
> AND WHEREAS pursuant to the above and the discussions conducted with the Contractor, the Company has awarded to the Contractor the Contract for the said Work by its NOA No. MR/OW/MM/DFC/02/2007 dated 23.12.2008 which is the effective date of commencement of this Contract and on the terms and conditions as agreed to by the two parties as of the said date of NOA and as outlined in this Agreement, (hereinafter also referred to as "the Contract").
>
> xxxx xxxx xxxx xxxx xxxx
>
> 1.1.3 (a) "**Company**" means ONGC Petro additions Limited ("COMPANY") incorporated under Companies Act, 1956 having its registered office at Jeevan Bharati, Tower-11, 124 Cannought Circus, New Delhi - 110 001, and one of its offices at 4th Floor, VCCI Commercial Complex, 73-GIDC Makarpura, Vadodara - 390010, India including its legal successors and permitted assignees.
>
> xxxx xxxx xxxx xxxx xxxx

1.1.10 **"Contractor"** means consortium of Linde Engineering and Samsung Engineering Co. Ltd. the successful party with whom contractual relations are subsequently formed for the Dual Feed Ethylene Cracker & Associated units for the Dahej Petrochemical Complex at Dahej.

The consortium is comprising of

LINDE AG, Linde Engineering Division, a company organized and existing under the laws of Germany, whose principal office is at Dr.-Carl-von-Linde-Strasse 6-14,82049 Pullach, Germany

and

SAMSUNG ENGINEERING CO. LTD., a company organized and existing under the laws of the Republic of Korea, whose principal office is at Samsung SEI Tower, 467-14 Dogok 2-Dong,Gangnam-Gu, Seoul, Korea, a Company established and registered under the laws of Korea, the party to this Contract so defined in the agreement including their legal successors or permitted assignees.

1.1.11 "**Contract Price**" means the total amount specified in the substantive article in the contract (i.e. Section 3.1) subject to any additions thereto, or deductions there from which may be made through applications of the relevant provisions of the Contract.

xxxx xxxx xxxx xxxx xxxx

1.2.5 **Entire Agreement**

The Contract constitutes the entire agreement between the Company and the Contractor with respect to the subject matter of the Contract and supersedes all communication, negotiations and agreement (whether written or oral) of the parties with respect thereto made prior to the date of this Agreement.

xxxx xxxx xxxx xxxx xxxx

2.4 **Scope of Works for each discipline**

The Scope of work for the tender shall include in general but not be limited to the following, as defined by Annexure - B and Annexure - E of the Contract. In case of any contradiction, scope of Work described in Annexure - B of the Contract shall prevail over the scope of Work outlined in the GCC (Annexure - A) of the bidding document.

xxxx xxxx xxxx xxxx xxxx

3.0 **PAYMENT**

3.1 **Contract Price**

The Company shall pay to the Contractor in consideration of satisfactory completion of all the works covered by the Scope of Work under the Contract the Contract Price of

**EURO 354,512,000** (in words: EURO Three Hundred Fifty Four Million and Five Hundred Twelve Thousand only)

plus

**USD 365,109,000** (in words: United States Dollars: Three Hundred Sixty Five Million and One Hundred Nine Thousand only)

plus

**INR 27,088,667,000** (in words: Indian Rupees: Twenty Seven Billion Eighty Eight Million and Six Hundred Sixty Seven Thousand only) as per the details and break-up of prices given in Schedule of prices.

xxxx xxxx xxxx xxxx xxxx

Payment shall be made in the currency or currencies given in the schedule of prices for the work executed as per the procedure set forth in Clause 3.2. Adjustment to Contract Price, if any, shall be made in accordance with provisions of Contract.

3.2 **Payment Procedure**

3.2.1 Pending completion of the whole Works, provisional progressive payments for the part of the Works executed by the Contractor shall be made by Company on the basis of said work completed and certified by the Company's Representative as per the milestone formula provided in the Contract at Annexure 'F'. Such certification of the Work completed shall be made by the Company's Representative within 15 days of receipt of Contractor's Application for Certification. No payments shall become due and payable (with the exception of the 10% down payment of the Contract Price which is due for payment within 30 days after signing of Contract) to the Contractor until Contract is signed by the two parties and Contractor furnishes to the Company Performance Bank Guarantee (as per Clause 3.3) and Insurance policy / Certificate of Insurance (as per requirement of Clause 7.3) for the policies specific for the Project and requirement of Reserve Bank of India, if any (for foreign Contractors).

3.2.2 The Contractor shall submit its invoice(s) once in each month along with four copies for the work completed and certified by Company's Representative as per agreed milestone formula, with all required supporting documents and details of the said work to the Company's Representative for certification of the said invoice, at Company's Office for approval of the amount payable and any payment thereafter. Contractor shall submit separately in accordance with the Clause 3.2.5 hereof a monthly invoice for Extra Work approved by the Company. Payment shall be done to each member of the

Consortium individually as per each member's detailed price break down as indicated under Annexure -C to the Agreement to be authorized by the leader of the Consortium.

3.2.3 The Company shall arrange approval of the invoice (undisputed amount) and payments within 15 (fifteen) working days of receipt thereof by the Company. In the event of the Company objecting to any portion of Work covered by the said invoice, such objection shall be communicated to the Contractor within 10 working days from the date of receipt of invoice by the Company at its office. The Contractor shall have the right to claim the payment of such amounts objected by the Company in subsequent invoice after removal of cause of such objection.

3.2.4 The payment against clear (undisputed) bills/invoices submitted by the Contractors will be made by Company within 15 (Fifteen) working days from the date of submission of bill/invoices complete in all respects. However, in case of payment to non-resident contractors, the time required for obtaining NOC and / or RBI permit for release of subject payment shall be in addition to 15 working days (normally applicable for first payment only). In case of delay in payment of undisputed portion of the invoices beyond 30 Working days, interest @ LIBOR plus 1% shall be applicable on the undisputed portion of the invoices for the period beyond 30 Working days.

Payment for amount objected to by Company as referred to in Clause 3.2.3 shall be made in accordance with provision under this Clause when the objection due to which the amount withheld by the Company has been removed/settled and the Contractor submits fresh invoice for the same.

xxxx xxxx xxxx xxxx xxxx

3.2.6 All the payments outside India by the Company shall be remitted through Electronic Fund transfer (EFT) / Telegraphic transfer (T/T) and credited to the Contractor's bank account to be specified by the Contractor in writing to the Company before submission of the first invoice. The payment shall be made in currencies stated in the Contract. The Company shall be deemed to have arranged payment to the Contractor on the date of transmission of instruction by the Company's bankers to the Contractor's Bank in the country where the money is required to be paid to the Contractor.

xxxx xxxx xxxx xxxx xxxx

3.2.6.1 The Contractor agrees to receive all payments inside India under this contract through Electronic Clearing system (ECS) to their Bank account. The details of Bank Account along with MICR No. of the Bank and Branch shall be provided by the Contractor at the time of submission of the first invoice.

The Company shall be deemed to have arranged payment to the Contractor on the date of Company's instructions to Company's bankers to effect payment under ECS to the Contractor's account.

Payment shall be made by account payee cheque wherever such facility is not available.

Upon Company's instruction to Company's bankers, the Company shall also inform in writing to the Contractor the details of remittance i.e amount and date of payment.

xxxx xxxx xxxx xxxx xxxx

3.3 **Performance Guarantee**

3.3.1 The Contractor shall furnish to the Company within 2 weeks from the date of signing of this Contract two separate unconditional and irrevocable letters of

guarantee ("Performance Bank Guarantee(s)") for due performance of the Contract, each of which shall be as per proforma given at Appendix - I of the Contract, for an aggregate sum equivalent to 10% (ten percent) of the Contract price. The Performance Bank Guarantees shall be drawn in favour of the Company and shall be valid upto a period of Scheduled Completion Date for the Works of the Contract and warranty period plus sixty (60) days. The aggregated value of Performance Bank Guarantees for warranty period shall be reduced from 10% to 5% of Contract value.

xxxx xxxx xxxx xxxx xxxx

3.3.4 The Contractors will submit individually irrevocable and unqualified bank guarantees issued by Hypovereinsbank / Germany and K-EXIM Bank (Korean Export and Import Bank) / Korea (or any other bank as listed in the ITB) in the aggregate sum equivalent to 10% (ten percent) of the Contract Price.

5.2.1 **Assignment**

The Contractor shall not, except with the explicit prior approval in writing of the Company, transfer, sub-contract or assign his obligations or any benefit or interests in the Contract or any part thereof in any manner whatsoever. Any such assignment shall not absolve the Contractor from his obligations and responsibilities under this Contract.

5.10.2 If the Company is satisfied that the entire Works have been completed as specified in 5.10.1 above and have successfully passed all tests provided in the Contract then the Company shall issue within fourteen working days a Certificate of Completion and Acceptance which certificate shall be effective from the completion date which the Contractor had notified to the Company subject to the Company's Representative certifying that the entire Works were completed by the Contractor

without any defect on the said notified completion date except for the Punch List items.

5.14 Performance of Contract/Discharge Certificate

No certificate other than the Discharge Certificate referred to in Clause 5.14.1 shall be deemed to constitute approval of any Work or other matter in respect of which it is issued or shall be taken as an admission of the due performance of the Contract or any part of it or of the accuracy of any claim or demand made by the Contractor or of extra Work/Charge Order having been ordered by the Company nor shall any other certificate conclude or prejudice any of the rights of the Company under the contract.

5.14.1 The Contract shall not be considered as completed until a discharge certificate has been signed by the Company's Representative on behalf of the Company and delivered to the Contractor stating that the Works have been completed and made good to the satisfaction of the Company's Representative in accordance with the Contract.

5.14.2 The Discharge Certificate shall be issued by the Company's Representative within (28) twenty eight days after the expiration of Guarantee period (of if different guarantee periods become applicable to different parts of the Works then, without prejudice to the Company's Representatives' rights upon the expiration of the latest of those periods) or as soon thereafter as any Works ordered during that period have been completed to the satisfaction of the Company's Representation in accordance with the Contract. In case Company fails to issue such Discharge certificate within the period prescribed herein above without any reason having been notified to the Contractor in writing, the Discharge Certificate shall be deemed to have been issued on the expiry of the above said period.

6.1.1 The Contractor agrees to ensure that all materials and components used in execution of the works under this Contract, shall be new and unused (not reconditioned) and of recent manufacture which shall in no case be of a date of manufacture older than one year from the date of delivery.

6.2.2 The Company or its other contractors or their personnel shall in no event be responsible for or liable to the Contractor or his Sub-contractor for consequential damages suffered by the contractor or his sub-contractor including without limitation to business interruption or loss of profits etc.

6.3.2 **Liquidated Damages**

If the Contractor, due to reasons not solely attributable to Company, fails to achieve the date of Ready for Start-Up (RFSU) on or before 44 (Forty four) months from the date of issue of NOA or the extended date for Ready for Start- Up (RFSU) or if Contractor repudiates the Contract before completion of the Works related to Ready for Start Up (RFSU), the Company may without prejudice to any other right or remedy available to the Company as under the Contract.

i) recover from the Contractor as ascertained and agreed liquidated damages and not by way of penalty, sum equivalent to ½ % (Half percent) of the total Contract Price for each week of delay or part thereof beyond the date of Ready for Start-Up (RFSU) subject to a maximum of 5% (Five percent) of the total Contract Price even though the Company may accept delay for the date of Ready for Start-Up (RFSU) after the expiry of the Ready for Start-Up (RFSU) date

AND/OR

ii) terminate the Contract or a portion or part of the Work thereof after 90 days of delay (or longer if technically required) related to the date of Ready for Start-Up (RFSU) subject to provision of Clause 8.3. The Company shall give 14 working days notice to the Contractor of its intention to terminate the Contract and shall so terminate the Contract unless during the 14 days notice period, the Contractor initiates remedial action acceptable to the Company.

7.1.1 Ownership of materials shall be transferred to the Company upon FOB shipment for imported supply and FOT for local supply subject to Contractor takes full responsibility for any damage / loss during the course of transportation until acceptance of works.

7.1.2 Deleted

7.1.3 Ownership of the construction Equipment used by the Contractor and its subcontractors in connection with the Works shall remain with the Contractor and its sub-contractors."

46. The Contract also included various annexures forming an integral part of the contract and *inter alia* specifying certain details as agreed between the parties. Annexure C of the said Contract was a Contract Price Schedule which clearly indicated the overall split of prices for the work to be performed by Linde and Samsung respectively. The summary of payments agreed to be made to Linde and Samsung as tabulated from the details specified in Annexure C of the Contract, is as under:

Overall split of prices for the work to be performed by LINDE (excluding service tax)

| DESCRIPTION OF THE SCOPE OF WORK TO BE PERFORMED BY THE LINDE | Total Amount to be Paid |
|---|---|
| **I.** Design and Engineering rendered (outside India) in Germany (Process Design, Basic Engineering, Detailed Engineering) [EUR x 1000] | 40.071 |
| **II.** Supply (CIF Indian Port) – Mechanical, Electrical, Instrumentation) [EUR x 1000] | 275.944 |
| **III.** Services (EURO Portion) rendered by Linde (construction management and supervision/testing and commissioning) [EUR x 1000] | 18.540 |
| **TOTAL LINDE EURO PORTION I – III. (EUR x 1000)** | 334.555 |
| **IV.** Services rendered by Linde (construction management and supervision/testing and commissioning) [INR x 1000] | 621.209 |
| **TOTAL LINDE INR PORTION IV. (INR x 1000)** | 621.209 |

Overall split of prices for the work to be performed by SAMSUNG (excluding service tax)

| DESCRIPTION OF THE SCOPE OF WORK TO BE PERFORMED BY THE SAMSUNG | Total Amount to be Paid |
|---|---|
| **I.** Design and Engineering rendered by SAMSUNG (Detailed Engineering) [USD x 1000] | 53.800 |
| **II.** Design and Engineering rendered by SAMSUNG (Detailed Engineering) [EUR x 1000] | 4.500 |
| **III.** Supply - DDU (i.e FOT) Dahej site – rendered by SAMSUNG (Mechanical, Electrical, Instrumentation, Civil/Structural and Architectural) [USD x 1000] | 293.909 |
| **IV.** Supply - DDU Dahej - rendered by SAMSUNG (Mechanical, Electrical, Instrumentation, Civil/Structural and Architectural) [EUR x 1000] | 12.158 |
| **V.** Supply – DDU Dahej - rendered by SAMSUNG | 18.550.258 |

| | |
|---|---|
| (Mechanical, Electrical, Instrumentation, Civil/Structural and Architectural) [INR x 1000] | |
| **VI.** Services rendered by SAMSUNG (Construction Management and Supervision/Testing and Commissioning/Post Commissioning) [EUR x 1000] | 3.300 |
| **VII.** Services rendered by SAMSUNG (Construction Management and Supervision/Testing and Commissioning/Post Commissioning) [USD x 1000] | 17.400 |
| **VIII.** Services rendered by SAMSUNG (Construction/Fabrication/Erection on Site) [INR x 1000] | 6.969.000 |
| **Total (II. + IV. + VI.) EUR - Portion rendered by SAMSUNG [EUR x 1000]** | 19.958 |
| **Total (I. + III. + VII.) USD – Portion rendered by SAMSUNG [USD x 1000]** | 365.109 |
| **Total (V. + VIII.) INR – Portion rendered by SAMSUNG [INR x 1000]** | 25.519.258 |

47. It is material to note that even, as per the terms of the Contract, the scope of work to be executed by Linde and Samsung was separate and was accordingly specified in the annexures to the Contract. The payments to be made for separate items of work were also specified. The currency in which the payments were to be made was also separately indicated. Thus, insofar as execution of the work was concerned, even OPAL recognised that different items constituting the Contract would be performed independently by Linde and Samsung. The consideration for the work performed was to be made directly to the concerned member of the Consortium in accordance with the work performed by him. Annexure C of the Contract specified the payment schedule i.e. the amount to be paid for the supply of goods and

services rendered by both the members of consortium. Linde and Samsung were to be paid on the basis of the separate invoices raised by them respectively. There was no arrangement for sharing of profits and losses between Linde and Samsung. And, each of them would make profits or incur losses based on the price as agreed by them and the costs incurred by them for performance of the contract falling within their independent scope of work.

48. It follows from the above, that Linde and Samsung had joined together to (a) bid for the contract; (b) present a façade of a consortium to OPAL for execution of the contract and accept joint and several liability towards OPAL for due performance of the contract and completion of the project; and (c) put in place a management structure for *inter se* coordination and execution of the project. However, in all other respects, both Linde and Samsung were independent of each other and were responsible for their own deliverables under the Contract, without reference to each other.

49. In the aforesaid facts, the substratal controversy to be addressed is whether the following features of the agreement between Linde and Samsung and their contract with OPAL would lead to a conclusion that the consortium of Linde and Samsung constitutes an AOP :-

(a) That Linde and Samsung are jointly and severally liable to OPAL for due performance of the Contract dated 10.02.2009.

(b) That in terms of the Contract dated 10.02.2009, Linde and Samsung were described as a "contractor" and for the purpose of the obligations under the Contract were considered as a Consortium.

(c) That the agreement between the parties provided for certain level of cooperation by way of appointing Project Directors and Manager for execution of the project.

50. The Contract defines the "contractor" to mean the Consortium of Linde and Samsung. The learned counsel for the respondent has, thus, contended that insofar as OPAL was concerned, the consortium was treated as a single entity. This according to the respondent would indicate that the project being executed by the consortium is their joint enterprise. Clause 3.1 of the Contract specified that the consideration for execution of the works was payable to the "contractor". The payments as contemplated under clause 3.2 of the said Contract were to be made on achieving certain milestones. This according to the learned counsel for the respondent also indicated that as far as OPAL was concerned (which is referred to as "company" under the contract) both the consortium members were treated as one contracting party and not as independent parties. The learned counsel for the respondent had also referred to various other clauses of the contract in support of this contention.

51. A plain reading of the said Contract clearly indicates that insofar as OPAL is concerned, the consortium members were treated as a single party for due performance of the Contract. However, the annexures to the contract provided for the split of the Contract between the consortium

members and amounts payable to each of the consortium members is detailed separately. The scope of work of each of the members was also separately listed. The Contract specified that an organisation structure would be set up which would facilitate OPAL in dealing with the consortium members collectively and not separately. The only conclusion one can draw is that while OPAL treated the consortium members as a single entity for imposing liability for due performance of the Contract, OPAL also recognized that each consortium member would perform the items of work falling within their respective scope of work, independently.

52. While, it is relevant as to how a third party deals with the members of a consortium, the same would not be conclusive in determining whether the consortium members constitute an Association of Persons. It is indisputable that the purpose of Linde and Samsung in collaborating with each other was to procure the Contract and, to that end, both the said members had agreed to present themselves as a consortium. However, as stated earlier the question as to whether the said consortium members formed an Association of Persons would have to be determined by the level of association and the extent of collaboration as agreed between them. The fact that a third party is desirous to deal with the members as one consortium cannot be the determinative factor in considering whether the members constitute an Association of Persons for the purposes of being assessed for taxation. Both the consortium members had agreed to present a common face. However, the agreement *inter se* between the members clearly spelt out that except for presenting a common face and complying with the conditions as imposed by OPAL, the members would conduct their

business independently with no interference from the other. This, in our view, clearly indicates that Linde and Samsung had no intention to form an Association of Persons. Clause 4.8 of the MOU and 16 of the Internal Consortium Agreement expressly recorded that the members did not have any intention to form an association.

53. We are also unable to accept the contention that the fact that Samsung and Linde had agreed to be jointly and severally liable for performance of the contract, would be sufficient to hold that they constituted an Association of Persons for the purposes of the Act. Linde and Samsung agreeing to be jointly and severally liable to OPAL for due performance of the Contract only indicates that Linde and Samsung had accepted a contractual obligation towards a third party, the same does not by itself lead to a conclusion that the said members had formed an Association of Persons. Any entity/individual may agree, for its own business purposes, to accept a liability for due performance of an obligation of another. This by itself would not lead to a conclusion that the said persons had formed a common enterprise or an association which was moved by joint action for a common purpose. As a matter of illustration, let us take a case where a director of a company provides a personal guarantee for a loan taken by the company. Having stood as a surety for the company, the director and the company would be jointly and severally liable to the lender. However, they continue to be independent of each other and the fact that are jointly and severally liable cannot possibly lead to the conclusion that the company and its director constitute an Association of Persons for the purposes of the Act. In order for independent entities/individuals to be

considered as an Association of Persons, they must exhibit some trappings of a partnership in relation to their common enterprise.

54. Lastly, it is necessary to consider whether the joint management structure of the project as agreed to be constituted by Linde and Samsung is sufficient to conclude that they had constituted an Association of Persons. Clause 7 of the Internal Consortium Agreement between Linde and Samsung specifically records that *"each Party shall be responsible for the management and controlling of its Scope of Work"*. It was further agreed that Linde and Samsung would establish their own project teams and also nominate one responsible "Project Manager" each who would report to the respective "Project Directors" nominated by Linde and Samsung. The Project Directors would represent the consortium in interaction with OPAL. It is, thus, apparent that both Linde and Samsung were managing the execution of their part of the contract separately without interference by the other member. Neither Samsung nor Linde could carry out the work agreed to be performed by the other. Neither of the parties exercised any control over the quality of the equipment/plant supplied by the other or exercised any control with respect to the quality of the works executed. Each of the parties, thus, were responsible for executing the project through their own personnel and through their independent resources. There was no pooling of resources to form a common management. Each of the parties conducted its business independently. However, in terms of the MOU, Linde and Samsung had agreed to share information and material to enable the other member to perform its work. The Gantt chart annexed to the Contract indicated the schedule in accordance with which each member

was expected to complete the various tasks and works within their respective scope of works. This would undoubtedly, require co-ordination between Linde and Samsung.

55. In every project which is executed by multiple independent agencies, a certain level of cooperation and coordination is required to ensure that the agency involved performs its work in a timely manner as per a predetermined schedule in order to enable the other agency to commence and complete its portion of work. The level of cooperation as agreed between Linde and Samsung was also akin to the level of cooperation as expected from independent agencies executing a project. This can be understood by taking an illustration of a simple project for construction of a building. It is only after an Architect or a Designer provides the detailed drawings that a civil contractor can commence construction. Similarly, it is only after the civil construction is commenced and progressed to a certain level that space for electrical contractors is available for them to perform their work. The work of Interior finishing can take place only after the civil works are complete. The fact that each of the aforesaid agencies, namely, the architect, the civil and electrical contractors are required to complete their work in a pre-determined sequence and are required to cooperate with each other in providing the necessary information and adhering to a specified schedule would not necessarily imply that the architect, civil contractors and electrical contractors had formed an Association of Persons. In this illustration each one of the participants works towards a common project with a certain level of cooperation. However, since the said participants do not act as a single cohesive entity, but perform their

independent allocated works, they cannot be considered as an Association of Persons. In order to consider independent agencies as an Association of Persons, it is necessary that they form a joint enterprise with a greater level of common management. An element of mutual agency and joint action for mutual purpose is also necessary. Mere obligation to exchange information, between independent agencies, for co-ordinating their independent tasks would not result in an inference that the agencies had constituted an Association of Persons.

56. It is relevant to keep in mind that Linde and Samsung shared neither the costs nor risks. Both Linde and Samsung managed their own deliverables. As discussed above, in our view, the facts of this case do not indicate a sufficient degree of joint action between Linde and Samsung either in execution or management of the project to justify a conclusion that they had formed an Association of Persons and in our view, the Authority erred in concluding so.

57. The learned counsel for the petitioner had also referred to the Instruction No.1829 dated 21.09.1989 issued by the Central Board of Direct Taxes (CBDT). The said Instruction had been issued in respect of power projects being executed by a Consortium of companies on turnkey basis. The said Instruction explains that the concept of turnkey execution of a project would involve the persons undertaking the project to take complete responsibility of the entire project. It is noted in the circular that the projects may involve a Consortium of companies where one company may be designated as a leader for the purposes of ensuring coordination of the inter-related tasks. The said Instruction explains that in such cases, the

foreign companies forming a Consortium would not constitute an Association of Persons under the Act and each foreign company would be individually liable for taxation as a separate entity. The learned counsel for the petitioners had relied upon the said Instruction in support of its contention that foreign companies forming a Consortium to execute large projects on turnkey basis would not constitute an Association of Persons. Admittedly, the said Instruction had been withdrawn by Instruction No. 5 dated 20.07.2009. However, it is contended that the said instruction would be applicable as the Contract had been entered into prior to the withdrawal on 20.07.2009. This contention cannot be accepted as the applicability of the Instruction/Circular would have to be viewed in relation to the relevant assessment years during which the same was in force. Merely because the Contract had been entered into before 20.07.2009 would not imply that the instructions would continue to be applicable on the income arising therefrom which may be spread over several years. The decision of this Court in case of ***Ericsson A.B.*** (supra) also clearly indicates the same. The relevant passage from the said judgment is quoted below:-

> "43. Thus, Overall Agreement does not result the income accruing in India. The execution of an overall agreement is prompted by purely commercial considerations as the India Cellular Operator would be desirous of having a single entity that he could liaise with, a fact which even the Board has noted in its Instruction No. 1829 dated 21st September, 1989. Although Instruction number 1829 stands withdrawn by virtue of Circular No.7/2008 dated 22nd October, 2009, such withdrawal can have no retrospective effect and the principle laid down in Instruction No. 1829 must continue to govern the assessment for the relevant year."

58. Having stated the above, we must add that although, the said instruction does not strictly apply to the facts of the present case, however, the said instruction does indicate the correct understanding in law. That is, in projects where various foreign companies form a consortium for a coordinated execution of the project on turnkey basis, their limited collaboration for coordination of their inter-related tasks would not be sufficient to constitute an Association of Persons under the Act.

59. Although, the said Instruction had been, subsequently, withdrawn on 20.07.2009, the reasons for the withdrawal are principally: that the earlier instruction had been misused by certain assessees who were deliberately splitting up the contract and creating consortia where non-residents took take advantage of the said instruction to avoid exigibility to tax. Therefore, it is apparent that the instructions had not been withdrawn on account of any change in understanding of law and to that extent reference to the Instruction No. 1829 may be relevant.

60. The learned counsel for the petitioner had contended that the Authority has erred in not following its earlier decisions in ***Hyundai Rotem Co. and Mitsubishi Co.*** (supra), ***Hyosung Corporation*** (supra) and ***Re: Van Oord Acz BV*** (supra). He submitted that the facts in the said cases were similar to the facts of the present case and a view in variance with the earlier decision, was not warranted.

61. In the case of ***Hyosung Corporation*** (supra), the applicant therein - Hyosung Corporation (Hyosung) submitted a bid for execution of the works relating to 800 KV/400KV Tehri Pooling Station which was floated by

Powergrid Corporation of India Limited (Powergrid). The applicant was successful and its bid was accepted. As per the terms and conditions of the bid, the applicant could assign the whole or part of the work to an independent contractor subject to the approval of Powergrid. In terms of this provision, the applicant requested that part of the contract relating to onshore supply and services be assigned to M/s L & T. Accordingly, Powergrid entered into a separate contract for onshore supplies and services with M/s L & T. Although, Hyosung continued to be responsible for the overall execution of the project, the scope of work of Hyosung was limited to the offshore portion of the contract. It is apparent from the above that the facts of the present case are not entirely similar with the facts of the ***Hyosung Corporation*** (supra). First of all, there is no separate contract entered into between OPAL and each of the consortium members and a single contract had been entered into by OPAL with the Consortium consisting of Linde and Samsung. Secondly, Linde and Samsung were jointly and severally liable for execution of the entire Contract.

62. However, the material facts in the present case and in the case of ***Hyundai Rotem*** (supra) are, indisputably, similar. In that case, Hyundai had entered into a MRMB Consortium Agreement with Mitsubishi Corporation, Mitsubishi Electric Corporation and BEML Ltd. (hereinafter collectively referred to as the 'MRMB Consortium'). As per the terms of the MRMB Consortium Agreement, Mitsubishi Corporation was appointed as a consortium leader. The MRMB Consortium submitted a bid to Delhi Metro Rail Corporation (DMRC) for mass rapid transport system, phase-II. The MRMB Consortium Agreement provided for constitution of a "project

board" which included project directors nominated by each consortium member. The function of the project board included overall planning, organizing and directing the complete execution of the project in an efficient manner. After the bid of the MRMB Consortium was accepted, the consortium members entered into a Supplementary Consortium Agreement which specified the role of each consortium member. The percentage of each participating member in the contract was specifically agreed for the purposes of sharing the amount receivable for execution of the Contract. DMRC insisted on a separate guarantee from the parent company of each consortium member and the same was provided. The liability of each consortium member towards DMRC was also joint and several. The Authority considered the facts of that case and came to the conclusion that the Consortium could not be treated as an Association of Persons. The factors which weighed with the Authority to conclude that MRMB Consortium did not constitute an Association of Persons were as under:-

(a) The nature of work undertaken and capable or being executed by each consortium member was different and the scope of work of one member could not be undertaken by the other.

(b) Each consortium member had a different skill set.

(c) Overseeing of each others work, by the consortium members was not possible.

(d) Each consortium member had independently determined the prices (by way of agreeing to separate discounts).

(e) The consortium agreements specifically recorded that nothing in the agreement would be construed as creating a partnership, joint venture or any other legal entity with the other parties to the said agreements.

(f) The profit and losses were borne by individual members and there was no common expenditure to be incurred by the members jointly.

63. The facts in case of ***Hyundai Rotem*** (supra) are similar in all material aspects with the facts of the present case. In absence of any material change in law, the Authority was bound to follow the principle of law as applied in the earlier ruling. The Supreme Court in the case of ***Columbia Sportswear*** (supra) had after examining the powers exercised by the Authority held as under:-

> "10. .....We have, therefore, no doubt in our mind that the Authority is a body exercising judicial power conferred on it by Chapter XIX-B of the Act and is a Tribunal within the meaning of the expression in Arts. 136 and 227 of the Constitution."

64. The Supreme Court had noted that, although, a ruling would be binding only on the applicant and the Income-tax Authorities in respect of a transaction in relation to which the ruling had been sought. However, the Supreme Court also explained that the same did not mean that the principles of law which were settled in a case, would not be followed in future. The relevant observation of the Supreme Court is quoted below:-

> "9. ....However, it has also been rightly held by the Authority itself that this does not mean that a principle of law laid down in a case will not be followed in future."

65. We also find merit in the submission made by the learned counsel for the petitioner that the Authority exercising judicial power would necessarily have to follow the principle of law already accepted by it. This is also a necessary facet of Article 14 of the Constitution of India. The equal protection clause in the Constitution would necessarily imply that the judicial authorities interpreting the law must also follow a consistent view. Thus, in the event the Authority was of the opinion that the earlier view was erroneous, it was incumbent upon the Authority to refer the matter to a larger bench. In the present case, the Authority has sought to distinguish its earlier decision in the case of ***Hyundai Rotem*** (supra) without pointing out any material dissimilarity in facts which would render the earlier decision inapplicable. We are also unable to find any material dissimilarity in facts that would warrant such a conclusion.

66. The next contention to be considered is whether the Income Tax Authorities can assess Linde and Samsung as an Association of Persons in view of the provisions of the "Agreement between Republic of India and Federal Republic of Germany for avoidance of double taxation with respect to taxes on income and capital" (referred to as DTAA herein). It is contended that in the event of a conflict between the provisions of the DTAA and the provisions of the Act, the provisions of the Act would prevail to the extent the same are more beneficial to the tax payer. It is contended that treating Linde and Samsung as an Association of Persons would amount to depriving Linde of the benefits under the DTAA and as such constitutes a "Treaty override". We are unable to accept this contention as it based on an erroneous assumption that there would be a

conflict between the provisions of the DTAA and the Act in the event an Association of Persons, which has a resident of Federal Republic of Germany as one of its constituent members, is assessed to tax in India. If in given facts, it is found that a non-resident has formed an association with another entity for conduct of a business venture in India, there is no doubt that the said association would be assessed to tax in India and the same is not proscribed by the provisions of the DTAA. In this regard, it is also apposite to refer to certain provisions of the DTAA.

67. The expression "enterprise of a contracting state" is used at several places in the DTAA including in Article 7 of the DTAA (which deals with Business profits). The said expression is defined by Clause (g) of Article 3 as under:-

> "(g) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State."

The expression "resident of a Contracting state" is defined under paragraph 1 of Article 4 as under:-

> "For the purposes of this Agreement, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any criterion of a similar nature. But this term does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein."

Clause (d) of Article 3 of the DTAA defines a "person" as under:-

> "(d) the term "person" includes an individual, a company and any other entity which is treated as a taxable unit under the taxation laws in force in the respective Contracting States."

68. It is apparent from the above that the DTAA recognises that the laws of each of the Contracting State may define a tax entity. Section 2(31) of the Act defines a 'person' to include an 'Association of Persons'. It is obvious that a venture undertaken by an Association of Persons formed by a resident of Germany in India would not be considered as an enterprise of Germany. The reliance placed by the petitioner on paragraph 6 of Article 5 of the DTAA is misplaced. The said paragraph of DTAA reads as under:-

> "6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business and in their commercial and financial relations to the enterprise no conditions are agreed or imposed which differ from those usually agreed between independent persons."

69. Article 5 of the DTAA defines the expression "permanent establishment". It is clear from a plain reading of paragraph 6 of the said Article that the same only clarifies that an enterprise conducting business through a broker, commission agent or an agent of independent status would not be deemed to have a permanent establishment only for the reason of conducting business through the said specified agents. Undisputedly, a non-resident carrying business through brokers and agents of independent status acting in normal course of business on usual terms would not be construed as forming an Association of Persons with them. It is, thus,

obvious that the said paragraph has no application to an Association of Persons.

70. It was submitted on behalf of the petitioners that even if Linde and Samsung were considered as an Association of Persons, no income could be assessed in the hands of the said Association as all the fund were received directly by Linde and Samsung separately. And, any notional inflow of funds would be matched by the outflow of funds. We do not propose to consider this submission for the following reasons: First of all, this contention was not canvassed by the petitioner before the Authority and Secondly, that the quantum of income that may be assessed in the hands of an Association of Persons is not relevant for the purpose of determining whether in given facts an Association of Persons had been formed.

***Whether Linde's income is taxable under the Act and DTAA***

71. The next question to be considered pertains to the taxability of income received and/or receivable by Linde for:

(a) design and engineering, prepared solely for manufacture and/or procurement of equipment outside India;

(b) supply of equipment, material and spares, outside India.

72. The relevant questions i.e. question (ii) and (iv) framed for consideration of the Authority are quoted below:-

> "(ii) Whether in terms of the Contract, the amount receivable/received in respect of design and engineering,

prepared solely for manufacture, procurement of equipment outside India and being inextricably linked to such equipment to be supplied, liable to tax in India, under the provisions of the Income-tax Act, 1961 ("the Act") or under the Double Taxation Avoidance Agreement read with Protocol between India and Germany ("DTAA").

xxxx xxxx xxxx xxxx xxxx

(iv) Whether in terms of the Contract, the amount receivable by the applicant for supply of equipment, material and spares, outside India are liable to tax in India, under the provisions of the Income-tax Act, 1961 or under the DTAA read with Protocol?"

73. It is apparent that the above questions are in two parts. The first being whether the income received/receivable in respect of the specified items of work is liable to tax in India under the provisions of the Act. The second part is whether the income received in respect of the specified items of work is taxable under the DTAA. Double Taxation Avoidance Agreements do not contain any charging provisions by virtue of which income tax is levied. Income tax is charged by virtue of Section 4 read with Section 5 of the Act. It is only in the event that an assessee is liable to pay tax under the Income Tax Act (*dehors* any Double Taxation Avoidance Agreements) that the question of examining whether the assessee is entitled to any benefit under the relevant Double Taxation Avoidance Agreement would arise. Any income which is not liable to tax under the normal provisions of the Act would not be bought to tax only by virtue of a Double Taxation Avoidance Agreement. It would thus, be essential to first examine whether any amount receivable/received by Linde in respect of design and engineering or for supply of equipment is liable to tax under the Act. In the

event, a portion of income is not exigible to tax under the Act, it would not be necessary to consider whether the DTAA is applicable.

74. The scope of work under the Contract has been broadly described in clause 2.1.1 of the Contract and the same is quoted below:-

> "2.1.1 **Scope of Work**
>
> The scope of work for the tender shall include in general but not be limited to the following, as defined by Annexure - B and Annexure - E in the bidding document. In case of any contradictions, scope of Work described in Annexure - B of the Contract shall prevail over the scope of Work outlined in the GCC of the contract document.
>
> Scope of EPC (LSTK) within RFSU
>
> - Preparation of the Process Design Package
> - Residual Basic Engineering
> - Detailed Engineering
> - Management Control of all procurement activities of all materials
> - Fabrication, construction, installation, testing etc.
> - Trial run and Pre-commissioning
> - Obtaining statutory approvals as far as in Contractor's scope and required prior to Commissioning
> - Project Management and Support services
> - Carrying out of function tests of individual equipment
> - Preparation of start up and operating manuals
> - Management of HSE including Hazop, DMP etc.
>
> Scope of EPC (LSTK) Contractors after RFSU
>
> - Commissioning of the Plant
> - Performance Test Runs for the Plants
> - Remaining training activities

- Providing as built drawings
- Supply of all test report,
- Post commissioning services for six months as per Clause 2.4.11
- Working for punch list item,
- Working for any warranty obligations
- Training of operators within Post Commissioning Services"

75. It was submitted by Linde that the Contract entailed certain activities which were to be performed in India and certain activities which were required to be performed entirely outside India. It is stated that the procurement of equipment as well as providing basic engineering and detailed engineering and drawings were to be performed entirely overseas. As discussed hereinbefore, even though the Contract provided a lump sum consideration, Annexure C to the Contract separately indicates the detailed break up of the amounts payable for various activities. A perusal of the said schedule indicates a split of prices for the work which were to be performed by Linde and Samsung. The schedule also expressly indicates that certain work was to be performed outside India. The consideration payable for the performance of the Contract was also split in three components. While one component was payable in INR, the other two components were payable in Euros and US Dollars respectively.

76. There can be no dispute that Linde would be liable to pay tax on the component of income included in the amounts received by Linde on account of onshore supply and services, *viz*,: supervision during the pre commissioning construction, post commissioning services and supplies, training and other items of work/activities to be performed in India.

However, the liability in respect of income arising in respect of offshore services and supplies is disputed. And, it would be necessary to first consider whether any income can be deemed to accrue or arise in India in respect of the income which is received / receivable for offshore supply of equipment, material, spares and provision of services outside India.

77. Section 5(2) of the Act provides that the total income of a person who is a non-resident in any previous year includes income that is received or is deemed to be received in India or which accrues or arises or is deemed to accrue or arise in India. Section 9 of the Act indicates the income that shall be deemed to accrue or arise in India. Sections 5(2), 9(1)(i) and 9(1)(vii) of the Act are relevant and are quoted below:-

> "**5. Scope of total income –**
>
> (1) xxxx xxxx xxxx xxxx xxxx
>
> (2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which —
>
> a) is received or is deemed to be received in India in such year by or on behalf of such person; or
>
> b) accrues or arises or is deemed to accrue or arise to him in India during such year."
>
> xxxx xxxx xxxx xxxx xxxx
>
> "**9. Income deemed to accrue or arise in India**. — (1) The following incomes shall be deemed to accrue or arise in India—
>
> (i) all income accruing or arising, whether directly or indirectly, through or from any business connection in

India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India:

Explanation 1.— For the purposes of this clause—

(a) in the case of a business of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;

xxxx xxxx xxxx xxxx xxxx

(vii) income by way of fees for technical services payable by—

a) the Government; or

b) a person who is a resident, except where the fees are payable in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

c) a person who is a non-resident, where the fees are payable in respect of services utilised in a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India."

78. Explanation to Section 9(2) of the Act, as amended by Finance Act 2010 with retrospective effect from 01.06.1976 is quoted below:

"Explanation.— For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and

shall be included in the total income of the non-resident, whether or not,—

(i) the non-resident has a residence or place of business or business connection in India; or

(ii) the non-resident has rendered services in India."

79. In terms of Section 9(1)(i) of the Act, all income which accrues or arises directly or indirectly from any business connection in India would be deemed to accrue or arise in India. The expression "Business Connection" has been explained in a catena of decisions. The Supreme Court in the case of ***CIT v. R.D. Aggarwal & Co.***: **(1965) 56 ITR 20** explained that the expression "Business Connection" as contemplated under Section 42 of the Indian Income-tax Act, 1922 (corresponding to Section 9 of the Act) envisaged "a relation between a business carried on by a non-resident and some activity in the taxable territories which are attributable directly or indirectly to the earnings, profits or gains of such business". The core issue to be addressed is whether the amount receivable by Linde for supply of goods outside India and for providing services outside India bears a nexus with any activity in India which can be ascribed to result in any income to Linde in India. The business connection as contemplated under Section 9 of the Act has to be direct and real. A sale of goods simplicitor outside India would not give rise to any taxable income in India even though the said goods are to be utilized within India. Similarly, income from providing offshore services (other than Fees for Technical Services) would also not be taxable under the Act unless the same can be said to arise through or from any "business connection" in India. Thus, in order to determine whether any income accrues or arises from provision of services by Linde, it would

be necessary to consider whether the consideration for such services can be considered as "Fees for Technical Services" or whether the income subsumed in the consideration for the services accrues or arises through or from any business connection in India. Similarly, it would also be necessary to consider whether income from supply of equipment, materials and spares outside India can be stated to arise from any business connection in India.

80. The Authority has held, by the impugned ruling, that the Contract entered into by the Consortium with OPAL is a composite contract and cannot be split for the purposes of tax. It is contended that this view is erroneous as Annexure C to the Contract provides for the break-up of the lump sum consideration as agreed under the Contract and separate value is allocated to various items of work. It is further contended that the title to the equipment and material supplied offshore was also transferred to OPAL outside India and the basic and detailed engineering is inextricably linked with the equipment supplied overseas.

81. At this stage, it is apposite to refer to the judgment of the Supreme Court in the case of ***Ishikawajima-Harima Heavy Industries*** (supra) as the issues raised and considered in that case are similar to the issues in the present case. In that case, Petronet LNG Limited, on the one hand, and five members of the consortium, on the other hand, entered into an agreement for setting up a Liquefied Natural Gas (LNG) receiving storage and degasification facility at Dahej in the State of Gujarat. The contract envisaged a turnkey project. The scope of work and the role and responsibility of each member of the consortium was specified separately.

The contract price was payable for offshore supply and offshore services in US dollars and each member of the consortium was to receive separate payments for the work executed by them. The contract indisputably involved: (i) offshore supply, (ii) offshore services, (iii) onshore supply, (iv) onshore services and (v) construction and erection. The disputes related to the liability to pay tax, under the provisions of the Act and the India-Japan tax treaty, in respect of the amounts received/receivable by the appellant (therein) from Petronet LNG for offshore supply and offshore services. The contention of the appellant (therein) was that the contract being a divisible one, it did not have any liability to pay any tax with regard to offshore services and offshore supplies. The Revenue, on the other hand, contended that the contract was a composite and integrated one, and thus could not be split for the purposes of considering whether the income arising therefrom was taxable under the Act. The Supreme Court considered the question whether the income in respect of 'offshore supply' and 'offshore services' was taxable under the Act and/or the DTAA between India and Japan and held as under:-

> "**30.** The contract is a complex arrangement. Petronet and the appellant are not the only parties thereto, there are other members of the consortium who are required to carry out different parts of the contract. The consortium included an Indian company. The fact that it has been fashioned as a turnkey contract by itself may not be of much significance. The project is a turnkey project. 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 appellant 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.

**31.** 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 appellant thereunder would also be different.

**32.** The contract indisputably was executed in India. By entering into a contract in India, although parts thereof will have to be carried out outside India would not make the entire income derived by the contractor to be taxable in India. We would, however, deal with this aspect of the matter a little later.

xxxx xxxx xxxx xxxx xxxx

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

**40.** Income arising out of operations in more than one jurisdiction would have territorial nexus with each of the jurisdictions on actual basis. If that be so, it may not be correct to contend that the entire income "accrues or arises" in each of the jurisdictions. ……

xxxx xxxx xxxx xxxx xxxx

**76.** In construing a contract, the terms and conditions thereof are to be read as a whole. A contract must be construed

keeping in view the intention of the parties. No doubt, the applicability of the tax laws would depend upon the nature of the contract, but the same should not be construed keeping in view the taxing provisions.

xxxx xxxx xxxx xxxx xxxx

**98.** We, therefore, hold as under:

**(A) Re: Offshore supply**

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

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

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

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

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

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

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

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

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

**(B) Re: Offshore services**

(1) Sufficient territorial nexus between the rendition of services and territorial limits of India is necessary to make the income taxable.

(2) The entire contract would not be attributable to the operations in India viz. the place of execution of the contract, assuming the offshore elements form an integral part of the contract.

(3) Section 9(1)(vii) of the Act read with memo cannot be given a wide meaning so as to hold that the amendment was only to include the income of non-resident taxpayers received by them outside India from Indian concerns for services rendered outside India.

(4) The test of residence, as applied in international law also, is that of the taxpayer and not that of the recipient of such services.

(5) For Section 9(1)(vii) to be applicable, it is necessary that the services not only be utilised within India, but also be rendered in India or have such a "live link" with India that the

entire income from fees as envisaged in Article 12 of DTAA becomes taxable in India.

(6) The terms "effectively connected" and "attributable to" are to be construed differently even if the offshore services and the permanent establishment were connected.

(7) Section 9(1)(vii)(c) of the Act in this case would have no application as there is nothing to show that the income derived by a non-resident company irrespective of where rendered, was utilised in India.

(8) Article 7 of DTAA is applicable in this case, and it limits the tax on business profits to that arising from the operations of the permanent establishment. In this case, the entire services have been rendered outside India, and have nothing to do with the permanent establishment, and can thus not be attributable to the permanent establishment and therefore not taxable in India.

(9) Applying the principle of apportionment to composite transactions which have some operations in one territory and some in others, is essential to determine the taxability of various operations.

(10) The location of the source of income within India would not render sufficient nexus to tax the income from that source.

(11) If the test applied by the Authority for advanced rulings is to be adopted here too, then it would eliminate the difference between the connection between Indian and foreign operations, and the apportionment of income accordingly.

(12) The services are inextricably linked to the supply of goods, and it must be considered in the same manner."

82. The facts obtaining in the present case are quite similar to the facts as in the case of ***Ishikawajima-Harima Heavy Industries*** (supra). It is indisputable that as far as obligations of Linde and Samsung are

concerned, the Contract is an indivisible one. However, for the purposes of tax, the Contract does specify the amounts that are payable with respect to the various activities carried on by Linde/Samsung. Income may accrue or arise at various stages and on account of varied activities. In case of a non-resident tax entity any income which accrues or arises from an activity outside India, would not be taxable unless the same falls within the deeming provision contained in Section 9(1) of the Act. In these circumstances, following the decision of the Supreme Court in ***Ishikawajima-Harima Heavy Industries*** (supra), it would not be apposite to consider the contract as a composite one for the purposes of imposition of tax under the Act.

83. The Authority concluded that although, payments for each item or work were specified or that the amounts payable for the work to be performed by individual members of the Consortium was recognized under the Contract, the same would not alter the nature of the Contract in any manner. The Authority concluded that the Contract would have to be considered as one indivisible contract and the income from the same would be taxable in India as the object of Contract was to set up a facility in India. The Authority further held that the MOU entered into between Linde and Samsung could not be understood to be overwriting the Contract or the object of the Contract. With respect to the Internal Consortium Agreement, the Authority held that the same was at best only an internal arrangement between Linde and Samsung and could not be referred to for determining the nature of the Contract. The Authority was of the view that the Contract being a composite contract, a 'dissecting approach' was not permissible.

Having found that the contract was an indivisible one, the Authority concluded that it was not open for Linde to plead that the sale of equipment and machinery and designing of the project and equipment should be treated as an offshore transaction. The Authority referred to the decision of the Supreme Court in the case of ***Vodafone International Holdings B.V. v. Union of India*****: (2012) 6 SCC 613** in support of its view that since in law the liability for performance of the Contract by Linde and Samsung was joint and severable, the Contract must be read as an indivisible one for the purposes of tax.

84. In our view, the approach as well as the conclusion of the Authority is flawed. First of all, the Authority erred in proceeding on the basis that the contract as a whole was the subject of taxation. The subject matter of taxation was not the Contract between the parties but the income that the petitioner derived from the Contract. Thus, the situs of the object of the Contract would not be as relevant as determining the situs where the income of Linde had accrued or arisen. By virtue of Section 4 of the Act, income tax is charged in respect of the total income of a person. By virtue of Section 5 of the Act, the scope of total income of a non-resident is limited to income which is received or deemed to be received in India and income which accrues or is deemed to accrue or arise in India. It, therefore, follows that the object of inquiry would have to be to determine whether any income of Linde accrued or arose in India or whether any income could be deemed to accrue or arise in India. The fact that the contractual obligations of Linde were not limited to merely supplying equipment, but were for due performance of the entire Contract, would not necessarily

imply that the entire income which was relatable to the Contract could be deemed to accrue or arise in India.

85. The principle of apportionment of income on the basis of territorial nexus is now well accepted. Explanation 1(a) to section 9(1)(i) of the Act also specifies that only that part of income which is attributable to operations in India would be deemed to accrue or arise in India. It necessarily follows that in cases where a contract entails only a part of the operations to be carried on in India, the assessee would not be liable for the part of income that arises from operations conducted outside India. In such a case, the income from the venture would have to be appropriately apportioned. The Supreme Court in the case of ***Ishikawajima-Harima Heavy Industries*** (supra) had considered this aspect and held that merely because a project is a turnkey project would not necessarily imply that for the purposes of taxability, the entire contract be considered as an integrated one. The taxable income in execution of a contract may arise at several stages and the same would have to be considered on the anvil of territorial nexus. The decision in the case of ***Ishikawajima-Harima Heavy Industries*** (supra) is clearly applicable to the facts of the present case as in that case also the contract in question was for a turnkey project where the object was to setup a Liquefied Natural Gas (LNG) receiving, storage and degasification facility. Indisputably, insofar as obligations of parties are concerned, this contract was also an indivisible contract. The Supreme Court held that for the purposes of determining the taxability, it was necessary to enquire as to where the income sought to be taxed had accrued

or arisen. The impugned ruling is thus clearly contrary to the decision of the Supreme Court in ***Ishikawajima-Harima Heavy Industries*** (supra).

86. The reference of the Authority to the decision of the Supreme Court in the case of ***Vodafone International Holdings B.V.*** (supra) is also not apposite. In that case, the Supreme Court was considering a matter which, *inter alia*, involved a transfer of a capital asset outside India which was sought to be taxed by the Income Tax Authorities under Section 9(1)(i) of the Act. The subject matter of controversy was a transaction of sale and purchase of a share of an overseas company (capital asset). This capital asset was sold by a non-resident company to another non-resident company. The Revenue contended that the capital gains arising from this transaction was exigible to tax under the Act by virtue of Section 9(1)(i) of the Act as the transaction also implied transfer of control and assets of the Indian subsidiary of the overseas company, whose share had been sold and purchased. The Supreme Court observed that the last sub-clause of Section 9(1)(i) of the Act referred to income arising from "transfer of capital asset in India". The Court further explained that Section 9(1) of the Act created a legal fiction which had a limited scope and could not be expanded. Accordingly, transfer of capital asset situated outside India could not be taxed by virtue of Section 9(1)(i) of the Act. The expression "look through" had been used by the Supreme Court in this context. The relevant extract of the judgment is as under:-

> "90. We have to give effect to the language of the section when it is unambiguous and admits of no doubt regarding its interpretation, particularly when a legal fiction is embedded in that section. A legal fiction has a limited scope. A legal fiction

> cannot be expanded by giving purposive interpretation particularly if the result of such interpretation is to transform the concept of chargeability which is also there in Section 9(1)(i), particularly when one reads Section 9(1)(i) with Section 5(2)(b) of the Act. What is contended on behalf of the Revenue is that under Section 9(1)(i) it can "look through" the transfer of shares of a foreign company holding shares in an Indian company and treat the transfer of shares of the foreign company as equivalent to the transfer of the shares of the Indian company on the premise that Section 9(1)(i) covers direct and indirect transfers of capital assets.
>
> 91. For the above reason, Section 9(1)(i) cannot by a process of interpretation be extended to cover indirect transfers of capital assets/property situate in India. To do so, would amount to changing the content and ambit of Section 9(1)(i)."

87. In the present case also, Linde has contended that it being a non-resident is not liable to pay tax in India and the sweep of Section 9(1) of the Act cannot be extended to income which has not accrued or arisen in India.

88. The Supreme Court also reiterated the "look at" principle as was enunciated in ***W.T. Ramsay Ltd. v. IRC*: (1981) 1 All ER 865 (HL)**. That matter related to a combination of transactions where gains in one transaction were sought to be counteracted by another, so as to avoid tax. The set of transactions was designed to create an artificial loss in one transaction which was counteracted by a gain in another. The House of Lords' dismissed the appeal of the tax payer by holding that the Courts would "look at" the entire combination of transactions. It was held that the Revenue or the Courts were not limited to consider the genuineness or otherwise of each individual transaction in the scheme but could consider the scheme as a whole. The contentions being considered by the Supreme

Court in the ***Vodafone International Holdings B.V.*** (supra) as well as the House of Lords' in ***Ramsay Ltd.*** (supra) were in respect of schemes which were contended to be for the purposes avoiding tax. The Supreme Court held that the "look at" principle must be applied to see the transaction as it existed and piercing of the Corporate Veil was not necessary where the transactions were genuine and had commercial substance. In the present case, there is no controversy which involves lifting of the corporate veil or "looking at" any scheme to find whether a transaction is a sham or has any substance. Both the Revenue and Linde are accepting the Contract as it stands and the controversy only revolves around the situs of the income accruing or arising from the contract. To our minds, the Authority has read the principles applied by the Supreme Court in ***Vodafone International Holdings B.V.*** (supra) completely out of context.

***Income from Offshore Supplies***

89. In the present case, the Contract involves supply of equipment, materials and spares by Linde. The contract specifically provides that the ownership of the material to be supplied by Linde would be transferred to OPAL upon FOB shipment. Article 7 of the Contract is quoted below:-

> "7.1.1 Ownership of materials shall be transferred to the Company upon FOB shipment for imported supply and FOT for local supply subject to Contractor takes full responsibility for any damage / loss during the course of transportation until acceptance of works.
>
> 7.1.2 Deleted
>
> 7.1.3 Ownership of the construction Equipment used by the Contractor and its subcontractors in connection with the

> Works shall remain with the Contractor and its sub-contractors."

90. FOB is an abbreviation of "Free on Board" and clearly indicates that the ownership of the material to be supplied by Linde would transfer to OPAL, the moment, the materials were placed for shipment. The petitioner had pointed out that shipping Documents/Bill of Lading also recorded the name of Linde as a Consignor and OPAL as a Consignee. In terms of the Contract, Linde and Samsung were fully responsible for any damage/loss during the transportation of the equipment and material. However, the same would not in any manner contradict the position that the ownership of the material in question was transferred to OPAL overseas. The petitioner has also submitted that the payment for design and engineering, supply, insurance and spares and consumables was to be paid to Linde in Euros and for the balance onshore work the payments were to be made in INR. According to the petitioner, this also indicated the portion of work that was required to be done overseas.

91. In the case of ***Ishikawajima-Harima Heavy Industries*** (supra) also the applicant therein, continued to be responsible for the equipment and material till the acceptance of the project. The relevant Clause which was considered by the Supreme Court in that case is quoted below:-

> "*22.1 Title to equipment and materials and contractor's equipment*:
>
> Contractor agrees that title to all equipment and materials shall pass to the owner from the supplier or subcontractor pursuant to section E of exhibit H (General Project Requirements and Procedures). Contractor shall, however, retain care, custody,

and control of such equipment and materials and exercise due care thereof until (a) provisional acceptance of the work, or (b) termination of this contract, whichever shall first occur. Such transfer of title shall in no way affect the owner's rights under any other provision of this contract."

92. It is also relevant to refer Explanation 1(a) to Section 9(1)(i) of the Act which clearly embodies the principle of apportionment. In cases where all the operations of business are not carried out in India, the income arising therefrom is required to be apportioned and only that portion of income i.e. reasonably attributable to operations carried on in India would fall within the net of tax in India under Section 9(1)(i) of the Act. In the facts of the present case, where the equipment and material is manufactured and procured outside India, the income attributable to the supply thereof could only be brought to tax if it is found that the said income therefrom arises through or from a business connection in India. However, in view of the decision of the Supreme Court in ***Ishikawajima-Harima Heavy Industries*** (supra) it cannot be concluded that the Contract provides a "business connection" in India and accordingly, the Offshore Supplies cannot be brought to tax under the Act.

***Income from Offshore Services***

93. It is stated that Linde was responsible for preparing drawings and designs for manufacturing and fabricating equipment to be supplied to OPAL. It is submitted that the said work is a part of the Basic and Detailed Engineering that was to be performed by Linde outside India. The steps for process design and Basic Engineering have been described by Linde as under:-

"Block Diagram, Process Flow Diagram, Material and Heat Balance, Process Simulation, Process Data Sheets for Equipment, Instruments, Piping etc., Piping & Instrumentation Diagram, Operating Manual, Process Safety Design. All of the above is prepared by qualified engineers using in-house know-how and software applications, in Germany.

Detailed engineering, designing of each plant unit, equipments, components before it's manufacture. These are prepared in Germany and sent for approval of OPAL.

Only after receipt of approval, order for purchase/manufacture of equipment is placed.

Invoices for payments for engineering are raised based on each equipment, drawings, calculations.

At the end of engineering phase, all documents are compiled and issued as engineering package soft and hard copy.

Consignee for Dahej Project is always OPAL. Entire set of final drawings, documents, manuals, hard copies were cleared through the Indian Customs. No customs duty was payable being a SEZ, project."

94. It has been contended by Linde that the above steps are only for the purposes of manufacturing and fabricating the equipment that was to be supplied overseas. It is submitted that the work relating to design and engineering is inextricably linked with the manufacture and fabrication of the material and equipment to be supplied overseas and this work was also performed wholly outside India. These submissions have not been evaluated. Question no. (ii) framed for consideration of the Authority invites a ruling on the basis that the offshore services falling within the scope of services by Linde are inextricably linked with the Offshore supply of equipment and material and cannot be considered as technical services

on a standalone basis. This is a question of fact which would have to be considered at an appropriate stage. However, if it is accepted that the services provided by Linde relating to design and engineering are inextricably linked with the manufacture and fabrication of the material and equipment to be supplied overseas and form an integral part of the said supplies, then the services rendered by Linde would not be amenable to tax under Section 9(1)(vii) of the Act. Consideration for such services would not be considered as "Fees for Technical Services" for the purposes of Section 9(1)(vii) of the Act. This view has also been expressed by the Authority ***In Re, Rotem Company***: **(2005) 279 ITR 165 (AAR)**. The relevant extract of the said decision reads as under:-

> "16. The principle which emerges from the decisions in the aforementioned cases is that in a contract for manufacture, installation, sale or supply of goods the element of services will always be present. Where services are inextricably linked with manufacture, installation, sale or supply, they cannot be evaluated for the purpose of FTS; it is only where services are separable and independent that the FTS will be assessable."

95. It is clarified that in order to fall outside the scope of Section 9(1)(vii) of the Act, the link between the supply of equipment and services must be so strong and interlinked that the services in question are not capable of being considered as services on a standalone basis and are therefore subsumed as a part of the supplies. Given the fact that its Linde's case that the consideration for the supplies are separately specified, this aspect would require a closer scrutiny and determination of facts, which we do not propose to do in the present proceedings.

96. It is clarified that in the event, it is found that the offshore services rendered by Linde are not inextricably linked to the manufacture and fabrication of equipment overseas so as to form an integral part of the supply of the said equipment, the income arising from the said services would be taxable in India as fees for technical services. By virtue of Section 9(1)(vii) of the Act, fees for technical services paid by a resident are taxable in India (except where such fees are payable in respect of services utilised by such person in business and profession carried outside India). In view of the Explanation to Section 9(2) as substituted by Finance Act 2010 with retrospective effect from 01.06.1976, the decision of the Supreme Court in ***Ishikawajima-Harima Heavy Industries*** (supra), in so far as it holds that in order to tax fees for technical services under the Act the services must be rendered in India, is no longer applicable. Therefore, in the event the services in question are not considered as an integral and inextricable part of equipment and material supplied, it would be necessary to examine whether any relief in respect of such income would be available to Linde by virtue of the DTAA between Germany and India.

***Taxability under the DTAA***

97. The next question that requires to be considered is whether the amount receivable/received by Linde in respect of design and engineering and supply of equipment, material and spares outside India is liable to tax in India under the DTAA. Section 90(2) of the Act provides that where the Government has entered into an agreement with the Government of another country for granting Avoidance of Double Taxation then in relation to the assessee to whom such agreement applies, the Provisions of the Act would

apply only to the extent they are more beneficial to the assessee. Article 7 of the DTAA provides that 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. It is further specified that only the income that is attributable to the permanent establishment would be taxed in the other contracting state. Linde being a tax resident of Federal Republic of Germany would not be taxable in India in respect of its business profits unless such business profits are attributable to its "permanent establishment" in India. By virtue of Article 12 of DTAA, the income from fees for technical services would be amenable to tax in the contracting state in which they arise. Article 5 of the DTAA defines permanent establishment. The relevant extracts of Article 5, 7 and 12 of the DTAA are quoted below:-

> "ARTICLE 5 : *Permanent establishment - 1.* For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of an enterprise is wholly or partly carried on.
>
> 2. The term "permanent establishment" includes especially,—
>
> (a) a place of management;
>
> (b) a branch;
>
> (c) an office;
>
> (d) a factory;
>
> (e) a workshop;
>
> (f) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources, including an installation or structure used for the exploration or exploitation;
>
> (g) a warehouse or sales outlet;

(h) a farm, plantation or other place where agricultural, forestry, plantation or related activities are carried on; and

(i) a building site or construction, installation or assembly project or supervisory activities in connection therewith, where such site, project or activities continue for a period exceeding six months.

3. An enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if it provides services or facilities in connection with, or supplies plant and machinery on hire used for or to be used in the prospecting for or extraction or exploitation of mineral oils in that State.

4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include,—

(a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;

(b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

(c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;

(d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;

(e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;

(f) the maintenance of a fixed place of business solely for any combination of activities mentioned in sub-paragraphs (a) to (e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2, where a person - other than an agent of an independent status to whom paragraph 6 applies - is acting in a Contracting State on behalf of an enterprise of the other Contracting State that enterprise shall be deemed to have a permanent establishment in the first-mentioned State, if this person,—

(a) has and habitually exercises in that State an authority to conclude contracts on behalf of the enterprise, unless his activities are limited to the purchase of goods or merchandise for the enterprise;

(b) has no such authority, but habitually maintains in the first-mentioned State a stock of goods or merchandise from which he regularly delivers goods or merchandise on behalf of the enterprise; or

(c) habitually secures orders in the first-mentioned State, wholly or almost wholly for the enterprise itself or for the enterprise and other enterprises controlling, controlled by, or subject to the same common control, as that enterprise.

6. An enterprise shall not be deemed to have a permanent establishment in a Contracting State merely because it carries on business in that State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business and in their commercial and financial relations to the enterprise no conditions are agreed or imposed which differ from those usually agreed between independent persons.

7. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident

of the other Contracting State or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself constitute either company a permanent establishment of the other.

xxxx xxxx xxxx xxxx xxxx

ARTICLE 7 - *Business profits* - 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 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.

xxxx xxxx xxxx xxxx xxxx

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

xxxx xxxx xxxx xxxx xxxx

7. Where profits include items of income which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

xxxx xxxx xxxx xxxx xxxx

ARTICLE 12 - *Royalties and fees for technical services* - 1. Royalties and fees for technical services arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties and fees for technical services may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties, or fees for technical services, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties or the fees for technical services.

xxxx xxxx xxxx xxxx xxxx

4. The term "fees for technical services" as used in this Article means payments of any amount in consideration for the services of managerial, technical or consultancy nature, including the provision of services by technical or other personnel, but does not include payments for services mentioned in Article 15 of this Agreement.

5. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties or fees for technical services, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties or fees for technical services arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right, property or contract in respect of which the royalties or fees for technical services are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article 7 or Article 14, as the case may be, shall apply."

98. In terms of paragraphs 1 & 2 of Article 12 "fees for technical services" are liable to be taxed in the Contracting State in which they arise and according to the laws of that State. However, paragraph 5 of Article 12 provides that paragraphs 1 and 2 of the said Article would not apply, if the

beneficial owner of fees for technical services carries on business through a permanent establishment situated in the State. And, in that case Article 7 of the DTAA would apply. Thus, fees for technical services (which are not inextricably linked with offshore supplies and form integral part of those supplies) are liable to be taxed in the State in which they arise. In this case, the source of fees for technical services is in India and, therefore, by virtue of paragraph 1 and 2 of Article 12 of the DTAA read with Section 9(1)(vii) of the Act, the fees for technical services would be liable to be taxed in India provided the said fees is not attributable to Linde's Permanent Establishment in India. In the event such fees is attributable to Linde's PE in India, by virtue of paragraph 5 of Article 12 of DTAA, Article-7 of the DTAA would be applicable and the income arising from provision of services would be liable to tax in India as Business Profits.

99. At this stage, it is relevant to refer to the decision of the Supreme Court in ***Hyundai Heavy Industries Co. Ltd.*** (supra). In that case, the petitioner (therein) had entered into an agreement with ONGC for designing, fabrication, hook-up and commissioning of South Bassein Field Central Complex Facilities in Bombay High. The contract was divided into two parts i.e. the fabrication of the platform was to be performed in Korea and the installation and commissioning of the platform was to be done in India. The petitioner (therein) claimed that no tax is payable for the operations outside India as there is no permanent establishment of the petitioner (therein) in India and for Indian operations, the petitioner claimed exemption under Article 7 of the Convention for Avoidance of Double Taxation (between India and South Korea which is similar to the DTAA

between India and Germany). The Assessing Officer rejected the contention of the appellant and held that the income from designing, fabrication, procurement of material etc. was partly attributable to the permanent establishment of the assessee in India. The Assessing Officer arrived at this conclusion on the ground that the contract was not divisible and the designing, fabrication and procurement of material were activities having nexus/linkage to the ultimate activity of installation and commissioning of platform in Bombay High and, therefore, income from the Korean operations was taxable in India. The Commissioner of Income Tax (Appeals) upheld the view taken by the Assessing Officer. On Appeal, the Income Tax Appellate Tribunal set aside the decision of the Assessing Officer and CIT (A) and accepted the contention of the assessee that the income from work performed outside India was not taxable in India. The High Court also dismissed the appeal preferred by the Revenue. The Supreme Court also dismissed the appeal preferred by the Revenue and held as under:-

> "8. The Income Tax Act, 1961 is concerned only with the profits earned in India and, therefore, a method is to be found out to ascertain the profits arising in India and the only way to do so is by treating the Indian PE as a separate profit centre vis-à-vis the foreign enterprise (the Korean GE, in the present case). This demarcation is necessary in order to earmark the tax jurisdiction over the operations of a company. Unless the PE is treated as a separate profit centre, it is not possible to ascertain the profits of the PE which, in turn, constitutes profits arising to the foreign GE in India. The computation of profits in each PE (taxable jurisdiction) decides the quantum of income on which the source country can levy the tax. Therefore, it is necessary that the profits of the PE are computed as independent units. However, in a case where the

Government of India has entered into a tax treaty with a foreign country (Korea, in the present case) then in relation to an assessee on whom such tax treaty applies, the provisions of the Act shall apply only to the extent to which the provisions thereof are more beneficial to the assessee

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11. Applying the above test to the facts of the present case, we find that profits earned by the Korean GE on supplies of fabricated platforms cannot be made attributable to its Indian PE as the installation PE came into existence only after the transaction stood materialised. The installation PE came into existence only on conclusion of the transaction giving rise to the supplies of the fabricated platforms. The installation PE emerged only after the contract with ONGC stood concluded. It emerged only after the fabricated platform was delivered in Korea to the agents of ONGC. Therefore, the profits on such supplies of fabricated platforms cannot be said to be attributable to the PE. There is one more reason for coming to the aforestated conclusion. In terms of Para (1) of Article 7, the profits to be taxed in the source country were not the real profits but hypothetical profits which the PE would have earned if it was wholly independent of the GE. Therefore, even if we assume that the supplies were necessary for the purposes of installation (activity of the PE in India) and even if we assume that the supplies were an integral part, still no part of profits on such supplies can be attributed to the independent PE unless it is established by the Department that the supplies were not at arm's length price. No such taxability can arise in the present case as the sales were directly billed to the Indian customer (ONGC). No such taxability can also arise in the present case as there was no allegation made by the Department that the price at which billing was done for the supplies included any element for services rendered by the PE. In the light of our above discussion, we are of the view that the profits that accrued to the Korean GE for the Korean operations were not taxable in India.

> 12. …..It is the act of setting out a PE which triggers the taxability of transactions in the source State. Therefore, unless the PE is set up, the question of taxability does not arise—whether the transactions are direct or they are through the PE. In the case of a turnkey project, the PE is set up at the installation stage while the entire turnkey project, including the sale of equipment, is finalised before the installation stage. The setting up of PE, in such a case, is a stage subsequent to the conclusion of the contract. It is as a result of the sale of equipment that the installation PE comes into existence. However, this is not an absolute rule……..We reiterate, in the circumstances, not all the profits of the assessee Company from its business connection in India (PE) would be taxable in India, but only so much of profits having economic nexus with PE in India would be taxable in India. To this extent, we find no infirmity in the impugned judgment of the Tribunal. Accordingly, we are of the view that the Tribunal was right in holding that profits attributable to the Korean operations were not taxable in view of Article 7 of CADT."
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> (emphasis supplied)

100. Following the aforesaid decision, it would be necessary to determine the income attributable to Linde's permanent establishment in India. Admittedly, Linde has a permanent establishment in India, however, it is contended by Linde that its Permanent Establishment came into existence after Linde had completed the offshore supplies of equipment and duly provided the offshore services. This is disputed by the Revenue and it is contended that Linde had a pre-existing permanent establishment in India. The stage at which the permanent establishment came into existence is a mixed question of fact and law. The Authority has not considered this question in view of its conclusion that Linde and Samsung had constituted an Association of Persons which was a tax resident entity in India for the

purposes of the Act. The question at what stage Linde's permanent establishment came into existence would have to be examined by the Authority.

101. In the event, it is found that Linde had a permanent establishment in India at the material time when taxable services were being rendered by Linde which were attributable to the permanent establishment, the same would have to be considered as Business Profits and taxed accordingly.

102. We do not propose to examine these questions for the first time in these proceedings.

103. In view of the foregoing, the impugned ruling is set aside and we remand the matter to the Authority for deciding the same afresh and in accordance with the views expressed herein.

104. Accordingly, the petition and application stand disposed of.

**VIBHU BAKHRU, J**

**BADAR DURREZ AHMED, J**

**APRIL 23, 2014**
**RK/MK**