IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'B' BENCH, KOLKATA

[Coram : Pramod Kumar AM and Mahavir Singh JM]

I.T.A. No.: 833/Kol/2011
Assessment year: 2007-08

Dongfang Electric Corporation ***……Appellant***
71-73, First Section, West Yihyuan Avenue
Chengdu 610041, Sichuan Province, China
[PAN : AACCD0559L]

Vs.

Deputy Director of Income Tax-
International Taxation 1(1), Kolkata ***……Respondent***

Appearances by:

G C Srivastava,
alongwith **Ashish Agarwal, Arijit Chakraborty and Rohit Bothra**
for the appellant

Sanjay Kumar,
alongwith **L K S Dehiya and Shahi Sanjay Kumar**
for the respondent

Date of concluding the hearing : March 23, 2012
Date of pronouncing the order : June 22 , 2012

O R D E R

Per Pramod Kumar:

1. By way of this appeal, the assessee appellant has called into question correctness of the assessment order dated 29th April 2011, in the matter of assessment under section 143(3) r.w.s. 144 C of the Income

Tax Act, 1961 *(hereinafter referred to as 'the Act')* for the assessment year 2006-07.

2. Grounds of appeal, termed as 'concise grounds of appeal' filed vide letter dated 5th September 2011, are as set out below :

1. On the facts and in the circumstances of the case and in law, the AO has erred in law and on facts of the case in making a reference under section 92CA of the Act to the Transfer Pricing Officer (TPO) on the erroneous assumption that:

(i) the Project Office and Head Office in China are associated enterprises within the meanings of Section 92A of the Act read with Section 92 F(iii) and 92 F (iiia) of the Act.

(ii) domestic activities carried out by the Project Office are international transactions within the meaning of Section 92 B of the Act.

2. The learned AO/TPO/DRP have erred in law and on facts and circumstances of the case in making an adjustment of Rs 91,23,91,093 by applying the Transfer Pricing provisions and thereby rejecting the book results of the project office which are arrived at in consonance with Article 7(1) of the Double Taxation Avoidance Agreement between India and China, read with Article 5 thereof.

3. Without prejudice to the above grounds, the adjustment of Rs 92,23,91,013 made by the AO/TPO/DRP is bad in law on the facts of the case as the same has been made:

(i) by taking into consideration comparables having percentage of related party transactions;

(ii) without granting benefit of deduction under proviso to Section 92 C of the Act;

(iii) without making adjustments necessary to account for differences in comparables;

(iv) by failing to take the data on an average for three years which was necessary looking to the nature of the functions of the appellant;

(v) without appreciating that the total adjustment made is in excess of the revenue received by the appellant from third party contractees;

(vi) by applying cost plus method, and by rejecting profit split method, for determining the amount of profit; and

(vii) in separately adding 'other income' amounting to Rs 88,56,193 as appearing in the profit and loss account of the appellant, although the same had already been considered in applying cost plus method to data of comparable companies.

4. On the facts and circumstances of the case and in law, the AO, based on directions of the DRP, erred in making additions under section 40 A (3) of the Act and section 40(a)(ia) of the Act, while computing the total income for the assessment year under consideration.

5. On the facts and circumstances of the case and in law, the AO, based on directions of the DRP, erred in levying interest under section 234 B and 234 D of the Act.

3. The core issue in this appeal is against Assessing Officer's proceeding on the basis that the revenues of assessee's permanent establishment in India are understated by Rs 91,23,91,013 which, according to the Assessing Officer, should be treated as part of the onshore services rather than for offshore supplies as claimed by the assessee. Grounds of appeal numbers 1 to 3 deal with the same. We will take up these three grounds together.

4. The relevant material facts are like this. The assessee before us, Dongfang Electric Corporation (**DEC**, in short) is a non-resident company - incorporated under the laws of, and fiscally domiciled in, the People's Republic of China. The assessee had filed its return of income, on 31st July 2007, disclosing a loss of Rs 67,11,07,016. This income tax return was picked up for the scrutiny assessment proceedings, and, in the course of the assessment proceedings which followed, the Assessing Officer noticed that the assessee had entered into two separate contracts with Indian entities- (i) one with West Bengal Power Development Corporation Limited (**WBPDCL**, in short) for setting up of Units 1 and 2 (of 300 MW each) for Sagardighi Thermal Power Projects at Murshidabad, West Bengal; and (ii) the other with Durgapore Projects Limited (**DPL**, in short) for setting up Unit 7 (of 300 MW) for Durgapur Project Power Station at Durgapur, West Bengal. Each of these contracts was divided into two parts, details of which are as follows:

WBPDCL

(i) Contract No. SgTPP/1/(SgMP-1 Supply)/03/2004 dated 26th August 2004 for supply of equipment and materials of main plant turnkey package (SgMP-1) Units 1 and 2 (2 X 300 MW) alongwith some common facilities, read with letter of award dated 27th July 2004 issue dby WBPDCL for supply of materials of main plant turnkey package (SgMP-1) Units 1 and 2 (2 X 300 MW) alongwith some common facilities; and

(ii) Contract No. SgTPP/1/(SgMP-1 Erection)/04/2004 dated 26th August 2004 for erection and services of main plant turnkey package (SgMP-1) Units 1 and 2 (2 X 300 MW) alongwith some common facilities, read with letter of award dated 27th July 2004 issue dby WBPDCL for erection and services of main plant turnkey package (SgMP-1) Units 1 and 2 (2 X 300 MW) alongwith some common facilities; and

As per the terms of the said contracts, the consideration is to be received by the company from WBPDCL in respect of aforesaid activities as under:

(i) USD 22,20,56,503 on account of offshore supply of equipment (including spare parts, tools and tackles) outside India; and

(ii) Rs. 459,33,77,323 and USD 1,62, 75,326 for local supplies, design, engineering and construction, fabrication, erection, installation, testing and commissioning of thermal power unit in India.

DPL

(i) Contract No. DPL/Unit 7/(DMP-1 Supply)/2004-05/01 dated 26th August 2004 for supply of plant and equipment of thermal power plant, alongwith some common facilities; and

(ii) Contract No. DPL/Unit 7/(DMP-1 Services)/2004-05/02 for erection and services of thermal power plant, alongwith some common facilities; and

(i) LOA dated July 27,2004 issued by the DPL for supply of plant and equipment and erection and services of thermal power plant, alongwith some common facilities;

As per the terms of the said contracts, the consideration is to be received by the company from DPL in respect of aforesaid activities as under:

(i) USD 11,40,47,092 on account of offshore supply of equipment (including spare parts, tools and tackles) outside India; and

(ii) Rs. 240,91,28,459 and USD 1,06,82,305 for local supplies, design, engineering and construction, fabrication, erection, installation, testing and commissioning of thermal power unit in India.

5. The Assessing Officer further noticed that in both the above cases the original tenders were for setting up of turnkey thermal power

projects but entire scope of work was split up in two contracts each as per mutual agreement, even though there was 'cross-fall breach clause' which ensured that performance of entire contract was treated as 'single point responsibility of DEC, China and non-performance of any part of portion of contract was to be treated as a breach of the whole contract'. The assessee had moved applications under section 197 seeking declaration by the Assessing Officer to the effect that no taxes are required to be withheld from payments made to the assessee (i) in respect of offshore supplies of equipment as the same are not taxable in India under the domestic law and under the India China tax Double Taxation Avoidance Agreement; and (ii) in respect of local supplies and service portion as the assessee expected to 'incur substantial loss' in the same. The Assessing Officer rejected this claim of the assessee, and ruled that taxes are required to be deducted @ 1.045% from payments for offshore supplies (income tax plus surcharge @ 41.8% on estimated profits of 2.5% from offshore supplies) and @4.182% from payments for services and local supplies (income tax plus surcharge @ 41.8% on estimated profits of 10% from local supplies and services). However, when assessee carried its grievance against the aforesaid stand of the Assessing Officer, in a revision petition under section 264 of the Act, before the learned Director of Income Tax (International Taxation), his plea was upheld to the extent that offshore supplies were held to be non taxable in India as long as the offshore supplies are found to be unrelated to assessee's PE in India. Accordingly, no taxes were deducted from payments made to the assessee in respect of offshore supplies. The income from offshore supply of equipment by the assessee was also not taken into account, while computing taxable income of the assessee in India, and the reasons in support of this stand were stated to be as follows:

- **All operations in connection with the said supply were carried out outside India;**

- **The property in such goods also passed on to the buyer outside India;**
- **Invoices were also raised directly from China to the Indian buyer; and**
- **The consideration for such offshore supply was also received outside India.**

6. The assessee also contended that in view of Hon'ble Supreme Court's judgment in the case of **Ishikawjima Harima Heavy Industries Ltd Vs DIT (288 ITR 408)**, income from supply of offshore supplies is not taxable in India.

7. None of these submissions, however, impressed the Assessing Officer. He observed that "**the original contracts were for erection of power plants and those were divided into separate parts solely to suit the assessee's purpose**". He noted that the scope of contract was to "**design, manufacture, fabricate, conduct shop testing, supply, transport, storage, erection, testing and commissioning of steam generator and auxiliaries, turbine generator and auxiliaries, CW and ACW system, fuel oil pressuring system, compressed air system, transformers, control and instrumentation of the total plant and auxiliary packages, including all civil, structural and architectural work on turnkey basis" and the "tender was open to any single bidder**". He was thus of the view that entire bidding could have been done only by one person but "**the contract was….. split into two parts, at the convenience of the foreign contractor and manipulated in such a way that its activities in India will always result in losses**". The Assessing Officer further observed that normally attribution of profits of a permanent establishment, following the force of attraction rule spelt out in Article 7- by the virtue of which profit which may arise directly or

indirectly through the activities of the PE are taxable in the source state, and the determination of arm's length remuneration in the hands of the PE by adopting 'functionally separate entity approach' are not in conflict with each other and determination of profits either way could give more or less the same result, "**in a case like the assessee's case where the original contract- a simple one of erection of turnkey power plants- is cut into pieces and the price of its components might have been manipulated to show disproportionate result as narrated above, it is virtually impossible to determine the profits of the PE by any method other than transfer pricing**". The Assessing Officer further observed that the facts have been distorted from the beginning and the books of accounts have been prepared on the basis of distorted figures and are, therefore, "totally unreliable". He thus rejected the books of accounts of the assessee and held that **it could not be accepted that "any independent enterprise performing similar functions under uncontrolled circumstances would have incurred such huge losses as reflected by the assessee in its return of income**". The Assessing Officer took note of assessee's submission that the revenues receivable by the PE in respect of 'onshore supply and services' component of the contract with WBPDCL and DPL consist, inter alia, of the charges for transportation of overseas supply of equipment from Indian port of destination to the project site and inland insurance charges. In effect thus, according to the assessee, the end customers are being separately billed for inland transportation and insurance, which is shown as revenue generated by the PE, and the expenses incurred on the same are being claimed as deduction from income of the PE. However, when Assessing Officer probed the matter, he found that as against the expenses of Rs 54.56 crores incurred by the assessee upto 31.8.2008 on inland transportation and insurance, his corresponding revenue receivable on this account is only Rs 23.93 crores. The Assessing Officer, therefore, was of the view that "**the amount included in the on shore supply and services component for rendering services in the nature of transport**

and insurance coverage of the offshore equipment was grossly insufficient to cover the expenses". It was also noted that the scope of work in 'offshore supply' component of the contract included, *inter alia,* fabrication, inspection and testing etc, and not mere sale of equipment. The Assessing Officer was thus of the view that revenue in offshore supply was not only for price of equipment, but also for each and every function performed on the goods sold. The Assessing Officer then proceeded to give his categorical findings in this regard as follows:

> **"…….In the course of hearing, invoice for offshore supplies have been obtained from the assessee. It is seen that materials are brought into India in large number of packages. Separate invoices are raised for 'main plant components' and 'spare parts'. From the description of the items mentioned in the invoices, it appeared that several components of the power plant, together with the spares, are brought into India, which are to be inspected, fabricated and tested within the scope of 'supply contract' before their utilization, particularly when items are sent by ship from a distant place. The PE is definitely having a role to play in such activities and should be adequately remunerated for the same. Considering the huge risk involved, prominent presence of the 'cross-fall breach' clause in the contract and with a battery of trained persons at their disposal, it is impossible to perceive that the PE did not play any role at all in the process of arrival of machinery from China within the scope of the 'supply contract'. The presence of the project office itself presupposes that it has to play some role in overall execution of the contract. Therefore, the contention that its (PE's) role was restricted solely towards the performance of the services part of the contract cannot be accepted……."**

8. It was in this light, and to determine the arm's length price of the services rendered by the Indian permanent establishment of its general enterprises (i.e. DEC, China), that a reference was made by the Assessing Officer to the Transfer Pricing Officer. The Transfer Pricing Officer determined the arm's length price, on the basis of Cost Plus Method (CPM) of onshore services at Rs 91,23,91,013, and computed the profit at Rs 24,12,83,996 as against loss declared by the assessee to the tune of Rs 67,11,07,016. As regards offshore supplies, the Transfer Pricing Officer distinguished assessee's reliance on Hon'ble Supreme Court's judgment in the case of Ishikawajima Harima Heavy Industries Co Ltd *(supra)*, by referring to Hon'ble Madras High Court's observations in Ansaldo Energia SPA Vs ITAT (310 ITR 237) to the effect that, **"in *Ishikawajima-Harima Heavy Industries Ltd.'s* case (*supra*), "the permanent establishment's non-involvement in this transaction excludes it from being a part of the cause of the income itself, and thus there is no business connection." This is the reason why the profits of offshore supply was not taxed. This is also clear from what the Supreme Court held in *Hyundai Heavy Industries Co. Ltd.'s* case (*supra*) that, "therefore, unless the PE is set up, the question of taxability does not arise - whether the transactions are direct or they are through the PE. In the case of a Turnkey Project, the PE is set up at the installation stage while the entire Turnkey Project, including the sale of equipment, is finalized before the installation stage. The setting up of PE, in such a case, is a stage subsequent to the conclusion of the contract. It is as a result of the sale of equipment that the installation PE comes into existence. However, this is not an absolute rule".** The Assessing Officer noted that **"in the present case also , the offshore supply of equipments is an ongoing process"** and **"thus, the involvement of the PE in coordinating the supply and also providing information on actual site based requirements cannot be denied".** As PE was not compensated for its services, and in the absence of difficulties in quantifying the reward attributable to PE for such services, the TPO

estimated Rs 30,00,000 as arm's length remuneration for services rendered by the PE in connection with offshore supplies. We need not deal with this adjustment of Rs 30,00,000 in greater detail, as the Dispute Resolution Panel (DRP) has deleted the same on the ground that this adjustment is not based on any recognized method of determining the arm's length price, and thus not in accordance with the provisions of the transfer pricing legislation. As regards the main adjustment of Rs 91,23,91,013, assessee's grievance before the DRP was rejected and the action of the Assessing Officer was confirmed in entirety. The Assessing Officer thus proceeded to make the impugned adjustment of Rs 91,23,91,013 towards arm's length price of onshore services, aggrieved by which the assessee is in appeal before us.

9. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

10. While the impugned addition is made by the Assessing Officer by resorting to computation on the basis transfer pricing provision, it will be too naïve and simplistic to treat the impugned addition as of transfer pricing *simplictor*. In substance, it is a case in which, according to the Assessing Officer, the contract for onshore services and supplies was shown at a lesser amount, by correspondingly inflating the value of offshore supplies contract, so as to avoid tax liability in India. As a plain reading of the material on record clearly shows, the basic case of the Assessing Officer is that both the contracts with the WBPDCL and DPL , i.e. 'contract for offshore supplies' as also 'contract for onshore supplies and services', constitute one integrated contract and this splitting of contract is done, as per convenience of the assessee, so as to avoid taxability of assessee's income in India. The Assessing Officer has

discussed at length as to how "**the contract was….. split into two parts, at the convenience of the foreign contractor and manipulated in such a way that its activities in India will always result in losses**". As regards assessee's reliance on Commissioner's revision order holding that no taxes are required to be deducted with respect to the payments for offshore supplies, it is only elementary that the directions issued regarding non deduction of tax at source donot bind the Assessing Officer while completing the assessment of the recipient. Whatever the Commissioner has held applies only with respect to the tax deduction at source requirements and it does not extend to the assessment proceedings. The assessee's basic defence of the assessee then consists of its reliance on ***Ishikawajima-Harima Heavy Industries Ltd.'s*** **case (*supra*)** decision, which has been rejected on the Assessing Officer on the ground that whereas sale of equipment was finalized before the stage at which PE came into existence, the offshore supplies are a continuous process in the present case and the PE is fully involved in this process. but then there is a school of thought that the said decision does not hold good in law as evident from the observations made by the Authority for Advance Ruling, in the case of Alstom Transport SA, as follows (2012-TII-28-ARA-INTL):

> ***6. The tender floated by BMRC was a composite tender. …… The object of the contract and the purpose of the contract were the installation and commissioning of a signaling and communication system. The contract provided for the payment for the work in lump and it cast a joint and several liability on the consortium for carrying out the work. A contract has to be read as a whole in the context of the purpose for which it is entered into. A contract for the installation and commissioning of a project like the present one, cannot be split up into separate parts as consisting of independent supply or sale of goods and***

for installation at the work site, leading to the commissioning and so on. In the case on hand, on a true construction of the contract between the parties, I am clearly of the view that this is a contract, the main purpose, if not the sole purpose of which is installation and commissioning of a signaling and communication system and its delivery to BMRC. In recent rulings in AAR/962/2010 and in AAR/979/2010, this Authority has discussed this aspect and has taken the view that such contracts should be read as a whole in the context of the object sought to be achieved and they cannot be split up into different parts for the purpose of taxation.

7. In this context, great reliance was placed by learned Senior counsel for the applicant on the decisions of the Supreme Court in Ishikawajima – Harima Heavy Industries Limited vs. DIT 288 ITR 408 (2007-TII-01-SC-INTL); CIT vs. Hyundai Heavy Industries Co. Limited 291 ITR 482 = (2007-TII-02-SC-INTL) and on a Ruling of this Authority in Hyosung Corporation v. DIT [AAR/773/2008] = (2009-TII-14-ARA-INTL). I must take note of the fact that the two decisions and the Ruling relied on were rendered prior to the pronouncement of Supreme Court decision in Vodafone International Holdings BV v. UOI & another 341 ITR 1 = (2012-TII-01-SC-INTL). In Ishikawajima – Harima Heavy Industries Limited vs. DIT, a two Judge Bench of the Supreme Court held that a contract of this nature was capable of being dissected and it was open to the assessee to raise the contention that parts of the contract should be treated separately for the purpose of deciding whether income from the performance of that part of the contract arose onshore or offshore and that part of the income attributable to offshore transaction cannot be taxed in India. In the Vodefone judgement rendered by three-Judge bench of the Supreme Court it is clearly laid down that "it

is the task of the Revenue/Court to ascertain the legal nature of the transaction and while doing so it has to look at the transaction as a whole and not to adopt a dissecting approach." Thus, the approach adopted in Ishikawajima – Harima Heavy Industries Limited vs. DIT now stands disapproved or overruled, if not expressly, definitely by clear implication. In fact, with great respect, the basic principle in interpretation of a contract is to read it as a whole and to construe all its terms in the context of the object sought to be achieved and the purpose sought to be attained by the implementation of the contract. Reading parts of the contract as imposing distinct obligations may not be the proper way to understand a composite contract especially for installation and commissioning and delivery of a project or a system.

8. What was the purpose for which the tender was invited by BMRC cannot be in doubt in this case. It was for installing the signaling and communication system for the metro rail. It was not for supply of offshore equipments independently of the installation and commissioning. Nor was it for independent installation and commissioning, divorced from the design and supply of the equipments necessary. Such a contract has necessarily to be read as a whole and is not capable of being split up. On reading the contract in the context of the tender floated and the purpose sought to be achieved, in the light of the arguments raised by learned Senior counsel for the applicant, I am satisfied that the contract involved herein is a composite contract and it cannot be dissected into parts even if a dissecting approach is permissible after the Vodefone decision. Thus, looking at and reading the contract as a whole, I overrule the claim of the applicant that a part of the transaction sould be

treated as a contract for offshore supply not liable to be taxed in India. I find that for the purpose of taxation, the contract must be taken as one, for installation and commissioning of a project in India.

11. While one may have legitimate issues as to whether these observations regarding "looking at the transactions as a whole and not adopting dissecting approach" can indeed be applied in all cases in which separate contracts are entered into for offshore supplies and onshore services, in our considered view, these observations are certainly applicable in the cases in which the values assigned to the onshore services are *prima facie* unreasonable vis-à-vis values assigned to the offshore supplies, which make no economic sense when viewed in isolation with offshore supplies contract. To that limited extent, our views are the same as of the learned Authority for Advance Ruling. In other words, the transactions are to be essentially looked at as a whole, and not on standalone basis, when the overall transaction is split in an unfair and unreasonable manner with a view to evade taxes. In order that such a situation can arise, it is *sine qua non* that while the assessee submits the bids for different segments (e.g. offshore and onshore in the present case) separately, these bids are considered together, as a single cohesive unit, by the other party, and this fact must be apparent from material on record. On the facts of this particular case, we have also noted that each set of contracts, i.e. offshore supply contract and onshore services and supply contract, has a cross fall breach clause which provides that a breach in one contract will automatically be classified as breach of the other contract. We may, in this regard, refer to the following extracts from letter dated 27th July 2004 written by Durgapore Projects Limited to the assessee company (copy placed at pages 66 to 90 of the compilation of papers filed by the assessee; @ page 73, "**The**

contract for supply of plant equipment and materials and the contract for erection and services have a cross fall breach clause and breach in one contract will automatically be classified as breach of other contract. Any breach or occurrence shall give DPL a right to terminate any or both of the contracts in the manner of relevant clause of GCC *(i.e. General Conditions of Contract)*" A materially identical clause also appears in letter dated 27th July 2004 issued by the West Bengal Power Corporation Limited, a copy of which is placed at pages 99 to 110 of the paper book (relevant portion at page 102). While these clauses undoubtedly give an indication that 'the offshore supplies contract' and 'onshore services and supplies contract' are required to be viewed as an integrated contract, this fact by itself does not indicate that the onshore services and supplies contract is understated so as to avoid tax in the source country. That would be the situation in which while offshore supplies show unreasonable profits while onshore supplies and services result in unreasonable losses.

12. We have noted that in the present case, however, the assessee has stated that all the activities of the assessee company, i.e. onshore as also offshore, resulted in huge losses due to inordinate delays in the project. The assessee has also filed audited accounts of its Indian projects, including in respect of offshore supplies, which show losses in both segments – onshore as also offshore. The Dispute Resolution Panel has taken note of this submission, by observing, at page 8 of the order, that "**it has been further contended that consolidated financial statements duly certified by the auditors in respect of two power projects undertaken by DEC, China in India for financial year 2006-07 were submitted and it was stated that losses were incurred not only on onshore supplies undertaken in India but also on offshore supplies executed from China**", but has not dealt with the same at all. In our considered view, this is a very important aspect of the matter inasmuch

as if the assessee has incurred a loss on its entire project, whether onshore or offshore, the mere fact that the assessee has incurred a loss on onshore activities cannot be reason enough to show, or even indicate, that the value of the onshore activities was deliberately kept at a lower amount to avoid taxability in India. Of course, it could still make commercial sense that the offshore supplies are made at loss, as long as these supplies are at less than incremental costs i.e. marginal costs of offshore supplies, and thus overall losses of the assessee are minimized. However, what was clearly necessary that the Assessing Officer examines all these aspects of the matter and then come to appropriate conclusions, but then this exercise has not been carried out at all by the Assessing Officer or the Dispute Resolution Panel. The Assessing Officer was thus clearly in error in coming to the conclusion that one integrated contract for offshore supplies and onshore activities and supplies was artificially split to avoid taxability of income in India. Even if we take both these contracts together, as the Assessing Officer has canvassed, and if there is no profits earned by the assessee from both the contracts taken together, there cannot be an occasion to tax income from these contracts in India.

13. During the course of hearing before us, extensive arguments were advanced for and against the applicability of transfer pricing provisions on GE- PE transactions and the methodology employed in determination of arm's length provisions in respect of GE- PE transactions. These arguments, however, proceeded on the assumption that we have to adjudicate on the correctness of the arm's length price adjustment made to the value of GE-PE transaction, i.e. onshore activities carried out by the PE on behalf of the GE, on the facts of this case.

14. We are, however, of the considered view that the core dispute before us is not of the arm's length price adjustment but of an adjustment

to the value assigned to the contract for 'onshore supplies and services', which is alleged to have been kept for a lower amount with a view to avoid taxes in the India. No doubt, this adjustment in the value of the contract has been done on the basis of the working of transfer pricing provisions, but essentially the real issue is as to at what value the revenues for onshore supplies and services should be adopted so as to bring out the correct onshore profits. As we have noted earlier in our order, this action, in turn, proceeds on the assumption that there were profits on offshore supplies which have been outside the ambit of taxation in India. However, in view of the assessee's claim that there are losses on overall project and that there cannot thus be any advantage by assigning lower value to onshore activities, what really needs to be examined in the first place is the working of overall losses given by the assessee. In case the Assessing Officer has no issues with this computation of overall losses, the very foundation of his action ceases to hold good in law. It is, therefore, necessary that the Assessing Officer deals with this aspect of the matter before proceeding further.

15. The issues regarding applicability and working of transfer pricing mechanism in reallocating the values to onshore and offshore activities are, therefore, academic at this stage. These things will call for adjudication only if the assessee's basic plea regarding overall losses fails the Assessing Officer's examination.

16. In view of the above discussions, and bearing in mind entirety of the case, we remit the issue, regarding adjustment of Rs 92,23,91,013 to the value of the offshore supplies and services contract, to the file of the Assessing Officer for fresh adjudication in accordance with the law, by way of a speaking order and after giving yet another opportunity of hearing to the assessee. As the matter is being remitted back to the file of

the Assessing Officer for fresh adjudication, we make it clear that the matter is to be examined de novo in the right perspective, in the light of our observations above and in accordance with the correct legal position, but nothing contained hereinabove should be construed as our observations on the merits of the case.

17. Ground Nos 1, 2 and 3 are thus allowed for statistical purposes in the terms indicated above.

18. In ground no. 4, the assessee has raised a grievance against disallowances under section 40A(3) and 40 (a)(ia) and the only grievance of the assessee is that when income is being assessed on the estimate basis, there cannot be any occasion for such disallowances. However, in view of the fact that the quantum addition has been restored to the file of the Assessing Officer, this aspect of the matter has become infructuous and academic for the time being. We need not adjudicate on the same.

19. In ground no. 5, the assessee has raised grievance against levy of interest under section 234 B and 234 D but given the fact that the quantum addition itself has been restored to the file of the Assessing Officer for fresh adjudication, this aspect of the matter is academic and infructuous at this stage, and we need not adjudicate on this grievance also.

20. Ground No. 4 and 5 are thus dismissed as infructuous.

21. In the result, the appeal is partly allowed for statistical purposes in the terms indicated above. Pronounced in the open court today on 22nd day of June, 2012.

Sd/xx ***Sd/xx***
Mahavir Singh **Pramod Kumar**
(Judicial Member) (Accountant Member)
Kolkata, the 22nd day of June, 2012

Copies to : *(1)* *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *The Departmental Representative*
(6) *Guard File*

By order etc

Assistant Registrar
Income Tax Appellate Tribunal
Kolkata benches, Kolkata

Laha Sr PS