

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2" NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI L.P. SAHU, ACCOUNTANT MEMBER**

I.T.A. No.5759 & 5760/DEL/2018
Assessment Year: 2013-14 & 2015-16

Samsung Electronics Co. Ltd., C/o Samsung India Electronics Pvt. Ltd., 20 th to 24 th Floor, Two Horizon Center, Sec-43, Golf Course Road, Gurgaon, Haryana.	v.	Asst. Commissioner of Income Tax, Circle-3(1)(2), International Taxation, 4 th Floor, E-2 Block, Pratyakshakar Bhawan, Civic Centre, New Delhi.
TAN/PAN: AACCS 8960N		
(Appellant)		(Respondent)

Appellant by:	Shri Sachit Jolly, Adv.		
Respondent by:	Shri H.K. Choudhary, CIT-DR		
Date of hearing:	19	09	2018
Date of pronouncement:	14	12	2018

ORDER

PER AMIT SHUKLA, J.M.:

The aforesaid appeals have been filed by the assessee against separate final assessment order of even date, dated 03.08.2018 passed u/s.143(3) r.w.s. 144C(13) in pursuance of directions given by the DRP vide order dated 20.07.2018 for the Assessment Years 2013-14 and 2015-16.

2. Since common issues are involved in both the appeals, therefore, same were heard together and are being disposed off by way of this consolidated order. For the sake of ready

reference, the grounds of appeal raised in the Assessment Year 2013-14, which is *pari materia* with grounds of appeal is to the appeal for the Assessment Year 2013-14, therefore, our finding given here will apply *mutatis mutandis* for both the years:-

1. *That on the facts and circumstances of the case and in law, the Assessing Officer (Assessing Officer) erred in making an addition of Rs.12,60,31,555/- to the income of the Appellant by holding that expatriate employees seconded by the Appellant to its subsidiary, viz., Samsung India Electronics Private Limited ("SIEL") constituted fixed place permanent establishment ("PE") of the Appellant in India under Article 5(1) of the DTAA.*
2. *That on the facts and circumstances of the case and in law, the AO and the Dispute Resolution Panel ("DRP") erred in holding that the presence of expatriate employees of SIEL constituted fixed place PE of the Appellant in India.*
3. *That the AO and DRP erred in not appreciating that the decision of the Hon'ble Delhi High Court in Centrica India Offshore (P) Ltd. v. CIT [2014] 364 ITR 336 (Del) had no application in the facts of the present case.*
4. *That on the facts and circumstances of the case and in law, the DRP, having noticed the decision of the Hon'ble Tribunal in the Appellant's own case for A.Ys 2004-05 to 2009-10, 2011-12, 2012-13 and 2014-15, wherein it has been held that the Appellant has no PE in India, in any form, erred in still holding that the Appellant had a fixed place PE in India solely on the ground that the Revenue was in the process of filing an Appeal to the High Court.*
5. *That the AO and DRP erred in not appreciating that since the Transfer Pricing Officer ("TPO") had held the transactions between the Appellant and its subsidiary (SIEL) to be at arm's length, no further attribution of profit could have been made to the alleged PE of the Appellant in India.*
6. *That the AO and DRP erred in attributing 10% of the remuneration*

cost to the alleged PE in India.

7. *That the AO erred in levying a uniform rate of 15% on all income in the nature of royalty and fees for technical services, without appreciating that majority of such income was in respect of agreements made on or after 01.06.2005 and, therefore, the applicable rate was 10% under Section 115A(1)(b) of the Act and not 15%.*

8. *That the AO erred in levying interest under Section 234A and 234B of the Act and in incorrectly computing the interest under Section 234B of the Act.*

9. *That the AO erred in incorrectly computing surcharge and cess levied/leviable.*

10. *That the AO erred in initiating penalty proceedings under Section 271(1)(c) of the Act.”*

3. At the outset, ld. counsel for the assessee, Mr. Sachit Jolly, submitted that both the Assessing Officer and DRP have followed the assessment orders for the Assessment Years 2004-05 to 2009-10, Assessment Years 2011-12 and 2014-15. Now these appeals stands decided by the Tribunal vide consolidated order dated 22.03.2018, wherein the matter has been resolved in favour of the assessee.

4. On the other hand, learned Department Representative has strongly relied upon the order of the Assessing Officer.

5. After considering the relevant findings given in the impugned orders as well as the order of the Tribunal for the earlier years, we find that the main issue involved is, whether the expatriate employees seconded by the assessee to its subsidiary, viz., Samsung India Electronics Pvt. Ltd. (SIEL) constituted fixed place Permanent Establishment (PE) under Article 5(1) of India Korea DTAA or not. The assessee, i.e.,

Samsung Electronics Co. Ltd. is a company established in South Korea and is tax resident of South Korea. It has two wholly owned subsidiaries in India, i.e., SIEL and Samsung India Software Operations Pvt. Ltd. The assessee company had established a project office in India on 14th March, 2013 for which necessary permission from the RBI was taken. The PE was set up and carried out the activities required in pursuance of the contract entered with SIEL for providing technical support assistance in relation to system/equipment used in the operation of LTE networks. However, the operations could not be started till 31st March, 2013. A survey was conducted in the month of June/July, 2010 at the premises of SIEL and in wake of such proceedings, the notices u/s.131 were issued to the assessee for the Assessment Year 2004-05 to 2009-10. The assessee's case before the Assessing Officer had been that the seconded employees transferred from SEC worked under the supervision and control of SIEL who was the real economic employer and hence it cannot be held that assessee has PE in India in the form of the expatriate employees. The main contention of the assessee as incorporated in the impugned assessment order in this regard reads as under:

“it is submitted that all the tests enumerated above do not get satisfied on account of our prime contention that the employees work under the control and supervision of the Indian Company i.e. SIEL and could not be held to be carrying out business activities of SEC in India or on its behalf. The seconded/transferred employees being employees of SIEL perform business activities of SIEL from its

premises. Such activities performed by seconded employees constitute business activities of SIEL and not of SEC.

That SIEL has entered into an arrangement for transfer of employees from SEC for the purpose of carrying out day to day business operations of SIEL, the Indian Company. Such expatriate employees worked in the capacity of SIEL's employees. SIEL has entered into a local employment contract with the individual expatriate employees for taking them on employment, wherein key employment terms have been provided such as roles and responsibility, remuneration entitlement, reporting relationship and other legal terms, etc. Sample copy of employment contracts / letter of appointments issued to expatriates by SIEL are enclosed as Annexure 1.

It is most respectfully submitted before your goodself that the assessee has seconded certain skilled and talented personnel to SIEL under employment of SIEL in order to enable the latter to carry out the business operations effectively and efficiently in India. The expatriates worked inclusively under the control and supervision of SIEL without any relation or connection with SEC. The concerned expats do not enjoy any privilege or authority to enter into any contract or negotiations or offerings on behalf of SEC or carry out any other activities on behalf of SEC. Post transfer, SEC does not bear any liability or responsibility towards acts or actions of the expat since he/she is now employed with SIEL and performing his/her official duties under the guidance and instructions of SIEL's management. Further, SIEL being the employer appropriately withhold taxes against salary payments made to expatriate employees under section 192 of the Act.

To sum up the following is evident from above:-

That the expatriates work under the employment with SIEL

That SIEL's management has effective control and supervision of these expatriates.

That expatriates work under the direction and guidance of SIEL's management and SIEL is responsible for work performed by them That SIEL bears/ pays salary expense of these expatriates and is responsible for tax withholding required under the Act. Accordingly, it is evident that SIEL has been the real and economic employer of the transferred employees. In this respect, it would be relevant to discuss the concept of real and economic employment.”

6. However, the learned Assessing Officer rejected the assessee's contention on the ground that the facts and issues have been decided in the case of the assessee in the earlier years wherein it has been held that assessee has a fixed place PE in the form of expatriates and he also referred to the judgment of Hon'ble Delhi High Court in the case of Centrica India Off shores Pvt. Ltd., reported in (2014) 44 Taxmann.com 300 (364 ITR 336).

7. We find that this issue has been discussed threadbare by the Tribunal right from the Assessment Years 2004-05 to 2014-15 (except for Assessment Year 2013-14) which is impugned before us on exactly similar points. The relevant observation and the discussion of the Tribunal including the statement of expatriates employees are as under:-

“20. It is the argument on behalf of the assessee that the assessee is the holding company of the Indian subsidiary, (SIEL) in a highly globalised and competitive business environment, it is essential for group companies spread across the globe to communicate with each other to sustain its supply chain management, without which exchange of information on the aspects as to what sort of models/designs are preferred by the customers in the market on

mid-term to long-term basis, relevant forecast, plan strategy to sell the products, detailed stock/Logistics status etc it would not be possible for any company to place optimized purchase orders at a right timing nor to acquire most promising manufacturing technologies. In this case also, as is evident from the statements recorded by the assessing officer, there is a constant exchange of information between the subsidiary and the Global Business Management ("GBM") to perform the product/strategy functions from a global market perspective.

21. Learned AR submitted that it is to be noted that none of the statements of the employees reveal that the key decisions with regard to the products, pricing, launching etc are taken by the assessee but they are well within the realm of the Indian subsidiary. He submits that none of the statements recorded by the assessing officer would show that any activity of the GBM is done in India. He further submitted that the assessee does not carry out any market survey in India, but whatever the market survey that was spoken by the employees was in relation to the business of the subsidiary to understand the business of the Indian customers and provide India specific information to GBM's which in turn then carry out research and development to develop India specific products.

22. It is further submitted on behalf of the assessee that is not the case of even the assessing officer that any core management decision relating to the assessee business was taken in India and the involvement of the seconded expatriate employees working under the control of the Indian subsidiary in the decision-making process with regard to product and pricing, marketing, strategizing etc one taken in respect of the business of the Indian subsidiary and not for the business of the assessee. According to the ld. counsel for the assessee, all the communication between the employees of the assessee in Korea and the seconded employees in

India relate only to the business of the Indian subsidiary and the seconded employees were discharging the duties of the subsidiary towards the holding company. He submits that no business of assessee is carried out by the seconded employees according to the statements recorded by the Ld. assessing officer. He, therefore, submitted that there is no basis for the authorities below to conclude that the seconded employees were acting in furtherance of the business of the assessee by sitting in the premises of the Indian subsidiary, thereby they constitute a fix replace permanent Establishment.

23. *Per contra, it is argument of the Ld. DR that it is evident from the statements of the expatriate employees well corroborated by the material that the amount was paid to the foreign parent but not to the account of the employees and if it all shouldn't be any convenience as pleaded by the assessee, the part of the salary should've been limited to a foreign account of the expatriate employee but not to the account of the foreign parent. Further, as could be seen even from the mode of payment the salaries are not paid to the expatriate employees after it is received from the SIL. As a matter of fact it was confronted to one of the employees with reference to the bank accounts that SEC paid the amount to personal bank account of the employees when such amount is limited to SEC, however the remittance of salaries are made to SEC on quarterly basis, which means that a person would get his salary in the his South Korean bank after 3 months of the receipt of salary in India and certainly it's not the to the convenience of such person.*

24. *Ld. DR further argued that the details are available show that the debit note has been raised by SEC, Korea and then after payment is made from SIL India, which implies the salaries are not paid to the employees of SIL after the payment has been received from India but the salaries are paid as if such expats were their*

own employees and then a debit note in respect of such salaries is raised by SIL India. Basing on this he argues that the expatriate employees are in fact the employees of the Korean entity and the beneficiary of the payments from SIL is the Korean entity.

25. *Ld. DR further drew our attention to Point No. 9 of the letter of appointment of Mr K W Cho, wherein it is stated that, -*

“your services may be utilized in any of the offices of the branches of the company or in any department of the company or in any of the associated companies as may be required from time to time. Your services can be transferred to any of the branches of the company located in India, whether in existence at the time of your appointment are set at a later date at the sole discretion of the management without detriment to your status and emoluments.”

and to point No 12 where it is stated that,-

during your appointment with a company, since you are on deputation, you will be governed by service as rules as applicable to Samsung India Electronics Co Ltd Korea employees.

26. *He lastly submitted that the expatriate employees, as revealed by their statements, are working in furtherance of the business interests of the Korean entity and their work description does not fit in the description of preparatory or auxiliary in nature as such there is no employer to employer relationship between the Korean parent and Indian subsidiary.*

27. *It is pertinent to note that having gone through the statements and also some other material relating to the aspects as to who pays the salary, whom the senior employees reported to, frequency of communication with headquarters in Korea etc, ld. DRP dealt with almost all the aspects argued by the ld. DR before us. They found that the assessee is not exercising that kind of absolute control over posting of employees to the Indian subsidiary, but the assessee has been posting the employees only pursuant to the Triparte agreements between the assessee, Indian subsidiary and the concerned employee. Ld. DRP further held that the Indian subsidiary is a company*

incorporated under the laws governing the companies in India and is confirming to all the rules and regulations that govern the operations of a corporate body in the country, by filing its returns and paying the taxes under the income tax at and other statutes. It was further observed by the library DRP that the international transactions have been reported under the transfer pricing regulations and examined by the TPO.

28. Ld. DRP vide paragraph No. 5.4.4.2 recorded that the observations of the Ld. AO in respect of the assertion as to the subsidiary as PE, the conclusions made by the AO are based on the statement of the various employees of SIEL during the survey conducted at its premises. Since SIEL is a company incorporated under the laws governing the companies in India and is confirming to all the rules and regulations that govern the operations of a cooperate body, filing its returns of income and paying taxes by reporting the international transactions under Transfer Pricing Regulations, it cannot be said that the SIEL which is subsidiary company is a PE and rejected the findings of the AO on that aspect.

29. So also the Ld. DRP by paragraph no. 5.4.4.4 rejected the contention of the AO that SIEL may be treated as a dependent agent for the purpose of Article 5. Ld. DRP also rejected the view of the AO that SIEL is a place of management for south east operations and held that no PE of the assessee exists under Article 5(2)(a) of the treaty with regard to south east operations.

30. Vide paragraph no. 5.4.4.6, Ld. DRP rejected the suggestion of the Ld. AO that SIEL can be considered as a service PE of the assessee. Lastly Ld. DRP held that the SIEL had nothing to do with the provision for royalty and fee for technical services.

31. Having rejected all the grounds pleaded by the AO, Ld. DRP reached a conclusion that SIEL be treated as a deemed fixed place

PE of the assessee, and the relevant observation is to the effect that,-

“Although they derive their remuneration from SIEL, their formal contract of employment is with the Parent company. The statements of some of these employees report frequently to SEC. Sh. B. D Park, Director (Mobile and I.T business), who is at number two position in SIEL has acknowledged that he communicates with SEC almost daily. Sh. J. H Kyung, Chief Financial Officer has stated that he is in touch with SEC two to three times a week. Sh. H. K Seo, President Marketing and Sales also stated that he communicates with SEC once a week in general. Sh. Yong Hee Cho, who is in charge of sales has stated that he communicates with SEC once a week. Statements of some of these officers who are of the rank of Division Heads, also show that they continue to be under some control of the SEC for certain activities like research and development of products for the Indian market, development of marketing strategy, decisions relating to pricing of product, exploration and development of new markets in the neighboring countries. These are the functions that would normally have been performed by SEC through its own employees, or such functions would have been outsourced by it to some third party, in which case the third party would be entitled to some remuneration for these services. However in the present case it is the seconded employees of SEC are performing these functions in addition to their own duties performed by them for SIEL. For performing the above functions of SEC these employees have a 'fixed place of business' i.e the premises of SIEL available to them. Moreover, it is an admitted fact that apart from these 'seconded employees' who are in the payroll of SIEL, other employees of SEC also come from time to time to India and use the premises of SIEL for the functions performed by them for SEC. This is quite evident from the statement of Sh. Mahesh Sutagatti and Sh. Anshuman Sah, VP (Sales & Marketing). Sh. Suttagati is himself an employee of SEC who was in India for the development of assessee's Wi-max business in India. Sh. Sah has admitted that the employees of SEC come from time to time and work with the local personnel.”

32. We have considered the observations of Id. DRP in the light of the above statements. There is no doubt that there is seamless information exchange between the employees of the assessee and the expat employees. However, on a careful consideration of the entire matter including the statements of the expatriate employees, extracted supra, we are of the considered opinion that the statements show that such information exchange relates to the

models/designs to the liking of the Indian consumers, plans and strategies relating to the sale of the products, detailed stock/logistical status, the market strategies both the mid and long terms etc.

33. *As rightly argued by the Ld. AR that none of the statement would go to show that the any activity of the global business management (GBM) has ever been conducted in India or that the market survey that is conducted in India, as spoken by the expatriate employees has nothing to do with the business of the Indian subsidiary and it is solely for the benefit of the assessee. All the activities that are spoken by the expatriate employees related to the specificity of the products, stock verification, they designs according to the preferences of the Indian consumers, the market strategies to be adopted etc are clearly within the ambit of the business of the Indian subsidiary. Such a communication would primarily benefit the Indian subsidiary, and would help the assessee in its GBM to sustain its supply chain management and to place optimized purchase orders at a right timing or to acquire the most promising manufacturing technologies, as is submitted on behalf of the assessee.*

34. *At the best, the statements and other material relied upon by the revenue show that by way of the seamless communication between the Indian subsidiary and the assessee, the expatriate employees were only discharging the duties of the subsidiary company towards the holding company. Whatever the benefits that are derived by the Indian subsidiary by such communication are offer to tax in India. We therefore find that the activities spoken by the expatriate employees in their statements are in the nature of reporting required in the course of discharge of the functions of the subsidiary company towards the holding company, and such*

activities do not constitute a PE under Article 5(4)(d), (e) and (f) of the DTAA.

35. *As rightly pointed out by the Ld. AR, even if the impugned activities of seconded employees amount to rendering of services to subsidiary by the assessee, in view of the fact that there is no provision for a service PE in India-South Korea DTAA, no question of Service PE arises in this matter. As a matter of fact, Ld. DRP vide paragraph No 5.4.4.6 of their Order observed the same.*

36. *From a reading of Art.5 of the DTAA, we understand that in order to constitute a PE, there must be a fixed place of business available to the assessee, through which the business of assessee is wholly or partly carried on. In the preceding paragraphs we held that what the expat employees are doing is only the discharge of the functions of subsidiary towards the holding company, which is for the benefit of the business of the subsidiary to make the GBM understand the priorities and preferences of the Indian customers by providing India specific information to GBM's which in turn then carry out research and development to develop India specific products. By no stretch of imagination could it be said that it is in furtherance of the business of the assessee de hors the business of the subsidiary.*

37. *In the absence of proof as to any management activity of the assessee being conducted in India or that it is established that the decisions relating to the products to be manufactured, pricing in the domestic markets, or the decisions relating to the launch of such products in India is taken by the assessee, we find it difficult to agree with the authorities below that through the expatriate employees the assessee has been conducting the business of assessee in India. Further, except stating that 10% of the remuneration of these employees has to be assumed as the income*

of the assessee, absolutely there is no evidence that is placed on record by the assessing officer to show that by way of business through these expatriate and seconded employees, the assessee derived any business income in India.

38. *For these reasons, we are of the considered opinion that there is neither any business conducted by the assessee in India through the expatriated employees nor any income is derived by them through the activities of the employees. Consequently we hold that there is no fixed place PE of the assessee constituted through the expatriated employees. Issue is, therefore, answered in favour of the assessee.*

ADDITION OF 10% ESTIMATED INCOME ON THE TOTAL REMUNERATION COST OF EXPATRIATE EMPLOYEES SECONDED TO SIEL IN INDIA,

40. *Ld. AO, in the assessment order, proceeded to attribute income in respect of such permanent establishment as per Article 7 of the Indo South Korean treaty. While making recourse to clause (iii) of Rule 10 of the Income Tax Rules, 1962, he took the remuneration cost of the expatriate employees seconded to SIEL as the basis for attributing income and added an estimated income of 10% on the understanding that had such services been rendered by an unrelated entity to SIEL, 10% would be a reasonable markup that would have been earned by it. Ld. DRP confirmed this finding of the Ld. AO. However, in view of our finding that there is no business activity that is conducted by the assessee through the expatriate employees, the question of estimated income does not arise.”*

8. Thus, in view of the aforesaid observation and the findings of the Tribunal, this is squarely applicable in the present case. Admittedly, there is no material change in the facts and circumstances of the case as both DRP and

Assessing Officer had followed the earlier year orders. Accordingly, we also hold that there is no fixed place PE through the expatriate employees nor any income is derived by the assessee to the expatriate employees. Further, it has been observed by the Tribunal that, since there is no service PE clause in India South Korea DTAA, therefore, no question of service PE arises. Accordingly, the judgment of Hon'ble Delhi High Court relied upon by the Assessing Officer in the case of Centrica (supra) would not be applicable because in that case seconded employees were held to constitute Service PE. In the result, the grounds raised by the assessee are allowed and even the attribution part would be allowed in favour of the assessee because once there is no business activity conducted by the assessee through expatriate employees, then there could not be question of any kind of attribution of estimate.

9. In so far as levy of interest u/s.234A and 234B is concern, admittedly it would be consequential.

10. The other issue raised in the grounds of the appeal by the assessee is regarding applicability of rate of 15% on all income by the Assessing Officer held to be in the nature of 'royalty' and 'fee for technical services'.

11. Before us, the learned counsel has pointed out that Assessing Officer has neither discussed this issue in the assessment order before applying the rate of 15% nor the ld. DRP has given any finding. Despite the fact that in the earlier

years the rate of tax paid by the assessee was @10%. Accordingly, we remit this issue to the file of the Assessing Officer to examine the assessee's claim that the rate of tax u/s.115A would be 10% and not 15%. The Assessing Officer will give adequate/proper opportunity to the assessee to substantiate its case.

12. The next issue is with regard to the computing of surcharge and cess. In this regard, it has been pointed out by the learned counsel that no surcharge and cess can be levied because the same is not provided in the DTAA. We are in tandem with such a contention raised by the learned counsel, because the DTAA provides the overall rate which is all inclusive, and therefore, no surcharge or cess has been levied. Accordingly, this issue is allowed in favour of the assessee.

13. In the result, the appeal of the assessee is partly allowed.

14. Since same issue has been raised in the Assessment Year 2015-16, therefore, our finding given in the Assessment Year 2014-15 will apply here mutatis mutandis.

15. In the result, the both appeal of the assessee are partly allowed.

Order pronounced in the open Court on 14th December, 2018.

Sd/-
[L.P. SAHU]
ACCOUNTANT MEMBER

Sd/-
[AMIT SHUKLA]
JUDICIAL MEMBER

DATED: 14th December, 2018