

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'C', NEW DELHI.**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER  
and  
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

**ITA No.6403/Del./2018  
(ASSESSMENT YEAR : 2001-02)**

M/s. GE Energy Parts Inc., vs. DCIT (International Taxation),  
6<sup>th</sup> Floor, Building No.7A, Circle 1(3)(1),  
Standard Chartered Building, New Delhi.  
DLF Cyber City,  
Phase – III,  
Gurugram – 122 002.

**(PAN : AACCG2798N)**

**Stay No.82/Del/2019  
(in ITA No.695/Del./2019)  
(ASSESSMENT YEAR : 2006-07)**

**AND**

**ITA No.695/Del./2019  
(ASSESSMENT YEAR : 2006-07)**

M/s. GE Wind Energy Gmbh, vs. DCIT (International Taxation),  
6<sup>th</sup> Floor, Building No.7A, Circle 1(3)(1),  
Standard Chartered Building, New Delhi.  
DLF Cyber City,  
Phase – III,  
Gurugram – 122 002.

**(PAN : AACCG2798N)**

**Stay No.83/Del/2019**  
**(in ITA No.697/Del./2019)**  
**(ASSESSMENT YEAR : 2008-09)**

**AND**

**ITA No.697/Del./2019**  
**(ASSESSMENT YEAR : 2008-09)**

**Stay No.84/Del/2019**  
**(in ITA No.696/Del./2019)**  
**(ASSESSMENT YEAR : 2007-08)**

**AND**

**ITA No.696/Del./2019**  
**(ASSESSMENT YEAR : 2007-08)**

M/s. GE Transportation Parts LLC,  
6<sup>th</sup> Floor, Building No.7A,  
Standard Chartered Building,  
DLF Cyber City, Phase – III,  
Gurugram – 122 002.

vs. DCIT (International Taxation),  
Circle 1(3)(1),  
New Delhi.

**(PAN : AADCG1587G)**

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Sachit Jolly, Advocate  
Shri Aarush Bhatia, Advocate  
REVENUE BY : Shri G.K. Dhall, CIT DR

Date of Hearing : 19.02.2019

Date of Order : 25.02.2019

## **ORDER**

### **PER BENCH :**

Since common questions of facts and law have been raised in the aforesaid appeals, the same are being disposed of by way of composite order to avoid repetition of discussion.

2. The appellant, M/s. GE Energy Parts Inc. (hereinafter referred to as 'the assessee') by filing the present appeal, sought to set aside the impugned order dated 31.07.2018 passed by Ld. CIT (Appeals)-42, New Delhi qua the Assessment Year 2001-02 on the grounds inter alia that :-

*"1. That on the facts and in circumstances of the case and in law, the Commissioner of Income-tax (Appeals) ["CIT(A)"] erred in confirming the action of the Assessing Officer ("AO") in levying penalty of Rs.24,93,590/- under Section 271(1)(c) of the Income tax Act, 1961 (the "Act").*

*2. That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the initiation penalty by way of issue of penalty notice under Section 274 of the Act without specifying whether the penalty is initiated for concealment of income or for furnishing of inaccurate particulars of income.*

*3. That on the facts and circumstances of the case and in law, the CIT(A) erred in alleging that the Appellant had concealed particulars of income, without appreciating that the Appellant made complete disclosure in the notes accompanying the return of income.*

*4. That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the levy of penalty, without appreciating that on identical facts, penalty had been deleted by the predecessor of the CIT(A) in the case of GE Caledonian Ltd. and GE Aviation Service Operation LLP for the A Y 2011-12.*

*5. That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the levy of penalty, without appreciating that the Hon'ble High Court having admitted the appeal of the Appellant for the same A Y on a substantial question of law qua existence of a permanent establishment, the issue was prima facie debatable, on which no penalty could have been levied.*

*6. That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the levy of penalty, without appreciating that penalty under Section 271 (1)(c) of the Act had been deleted in the case of Rolls Royce, which formed the bedrock and sole basis of the addition made by the AO, on which penalty has now been levied.*

*7. That on the facts and circumstances of the case and in law, the CIT(A) erred in confirming the levy of penalty under section 271(1)(c) of the Act on the basis of profits attributed to the alleged PE of the Appellant, which was based on estimation, and, therefore, do not tantamount to concealment of income or furnishing of inaccurate particulars of income.”*

3. The appellant, M/s. GE Wind Energy Gmbh (hereinafter referred to as ‘the assessee’) by filing the present appeal, sought to set aside the impugned order dated 22.11.2018 passed by Ld. CIT (Appeals)-42, New Delhi qua the Assessment Year 2006-07 on the grounds inter alia that :-

*“1. That on the facts and circumstances of the case and in law, the Commissioner of Income-tax (Appeals) [“CIT(A)”] erred in confirming the action of the Assessing Officer (“AO”) in levying penalty of Rs.20,85,540/- under Section 271(1)(c) of the Income Tax Act, 1961 (“the Act”)*

*2. That on the facts and circumstances of the case and in law, the Ld. AO erred in passing the penalty order under Section 271(1)(c) of the Act which are wholly without jurisdiction and clearly barred by limitation inasmuch as the same have been passed beyond the period of limitation prescribed under Section 275(1)(a) of the Act.*

*3. That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the initiation of penalty by way of issue of penalty notice under Section 274 of the Act without specifying whether the penalty is initiated for concealment of income or for furnishing of inaccurate particulars of income.*

*4. That on the facts and circumstances of the case and In law, the CIT(A) erred In alleging that the Appellant had concealed particulars of income, without appreciating that the Appellant made complete disclosure in the notes accompanying the return of income.*

5. *That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the levy of penalty, without appreciating that on identical facts, penalty had been deleted by the predecessor of the CIT(A) in the case of GE Caledonian Ltd. and GE Aviation Service Operation LLP for the A Y 2011-12.*

6. *That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the levy of penalty, without appreciating that the Hon'ble High Court having admitted the appeal of the Appellant for the same AY on a substantial question of law qua existence of a permanent establishment, the issue was prima facie debatable, on which no penalty could have been levied.*

7. *That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the levy of penalty, without appreciating that penalty under Section 271 (1)( c) of the Act had been deleted in the case of Rolls Royce, which formed the bedrock and sole basis of the addition made by the AO, on which penalty has now been levied.*

8. *That on the facts and circumstances of the case and in law, the CIT(A) erred in confirming the levy of penalty under Section 271 (1)( c) of the Act on the basis of profits attributed to the alleged PE of the Appellant, which was based on estimation, and, therefore, do not tantamount to concealment of income or furnishing of inaccurate particulars of income.”*

4. The appellant, M/s. GE Transportation Parts LLC (hereinafter referred to as ‘the assessee’) by filing the present appeals, sought to set aside the impugned orders dated 22.11.2018 passed by Ld. CIT (Appeals)-42, New Delhi qua the Assessment Years 2007-08 & 2008-09 on the identical grounds, except the difference in penalty amount, inter alia that :-

*“1. That on the facts and circumstances of the case and in law, the Commissioner of Income-tax (Appeals) [‘CIT(A)’] erred in confirming the action of the Assessing*

*Officer ("AO") in levying penalty (Rs.20,20,281/- & Rs.59,52,684/- in AYs 2007-08 & 2008-09) under Section 271(1)(c) of the Income Tax Act, 1961 ("the Act")*

2. *That on the facts and circumstances of the case and in law, the Ld. AO erred in passing the penalty order under Section 271(1)(c) of the Act which are wholly without jurisdiction and clearly barred by limitation inasmuch as the same have been passed beyond the period of limitation prescribed under Section 275(1)(a) of the Act.*

3. *That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the initiation of penalty by way of issue of penalty notice under Section 274 of the Act without specifying whether the penalty is initiated for concealment of income or for furnishing of inaccurate particulars of income.*

4. *That on the facts and circumstances of the case and In law, the CIT(A) erred In alleging that the Appellant had concealed particulars of income, without appreciating that the Appellant made complete disclosure in the notes accompanying the return of income.*

5. *That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the levy of penalty, without appreciating that on identical facts, penalty had been deleted by the predecessor of the CIT(A) in the case of GE Caledonian Ltd. and GE Aviation Service Operation LLP for the A Y 2011-12.*

6. *That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the levy of penalty, without appreciating that the Hon'ble High Court having admitted the appeal of the Appellant for the same AY on a substantial question of law qua existence of a permanent establishment, the issue was prima facie debatable, on which no penalty could have been levied.*

**7. That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the levy of penalty, without appreciating that penalty under Section 271 (1)( c) of the Act had been deleted in the case of Rolls Royce, which formed the bedrock and sole basis of the addition made by the AO, on which penalty has now been levied.**

**8. That on the facts and circumstances of the case and in law, the CIT(A) erred in confirming the levy of penalty under Section 271 (1)( c) of the Act on the basis of profits attributed to the alleged PE of the Appellant, which was based on estimation, and, therefore, do not tantamount to concealment of income or furnishing of inaccurate particulars of income.”**

5. Briefly stated the facts necessary for adjudication of the controversy at hand are : On the basis of completed assessment under section 143 (3) read with section 144C (5) of the Income-tax Act, 1961 (for short ‘the Act’) at an income of Rs.69,93,234/-, Rs.67,13,210/-, Rs.65,03,129/- & Rs.1,89,75,205/- for AYs 2001-02, 2006-07, 2007-08 & 2008-09 respectively, penalty proceedings were initiated by the AO u/s 271(1)(c) of the Act, by way of issuance of notice u/s 274 read with section 271(1)(c) of the Act. Declining the contentions raised by the assessee, AO proceeded to conclude that the assessee has not disclosed full material facts regarding the issue of Permanent Establishment (PE) in India attributable to the activities carried out from this PE and has thereby concealed the particulars of its income. Consequently, AO levied the penalty of Rs.24,93,590/-, Rs.20,85,545/-,

Rs.20,20,281/- & Rs.59,52,684/- in AYs 2001-02, 2006-07, 2007-08 & 2008-09 respectively @ 100%.

6. Assessee carried the matter before the Id. CIT (A) by way of appeals who has confirmed the penalty levied by AO by dismissing the appeals. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeals.

7. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

8. Undisputedly, assessment orders framed by the AO have been upheld by the Id. CIT (A) as well as by the Tribunal, who have held that GE Overseas entities have PEs in various forms and these are fixed place PE, Office PE, construction PE and agency PE and in case of oil and gas business, involves in installation and commissioning would also constitute construction PE and since the assessee has earned global profit of 10% on the sales made to the customer in India, the income chargeable to tax as attributable to the PE was computed at 3.5% of the sales made. It is also not in dispute that the findings returned by the Tribunal have been challenged before the Hon'ble Delhi High Court in a batch of

petitions bearing No.*ITA 660/2017 & Ors. and vide order dated 15.01.2018*, questions of law have been framed which are extracted for ready perusal as under :-

***“(1) Did ITAT fell into error in its findings with respect to existence of a fixed place Permanent Establishment (PE) of the assessee in India;***

***(2) Did ITAT fell into error in concluding that assessee/appellant's separately independent agent PE, was located in India; and,***

***(3) Whether on the facts and the circumstances of the case and the law, the ITAT was justified in attributing as high as 35% of the profits to the alleged marketing activities and thereafter, attributing 75% of such 35% profits to the alleged PE of the Appellant in India?”***

9. From the order passed by Hon’ble High Court (supra), it has become clear that the question as to whether the assessee is having fixed place PE in India is “debatable one” and in these circumstances, penalty levied by the AO is not sustainable in the eyes of law.

10. In view of what has been discussed above, since substantial question of law has been framed by Hon’ble High Court on the issue if the assessee is having fixed place PE in India, which is the basis of levying/confirming the penalty u/s 271(1)(c) of the Act, the issue becomes debatable, hence penalty u/s 271(1)(c) is not leviable. Reliance in this regard is placed on the decision rendered

by *Hon'ble Delhi High Court in ITA 240/2009 in CIT-II vs. Liquid Investment and Trading Co. order dated 05.10.2010*

whereby identical issue is decided as under :-

*“Both the CIT(A) as well as the ITAT have set aside the penalty imposed by the Assessing Officer under Section 271(1)(c) of the Income Tax Act, 1961 on the ground that the issue of deduction under Section 14A of the Act was a debatable issue. We may also note that against the quantum assessment hereunder deduction under Section 14A of the Act was prescribed to the assessee, the assessee has preferred an appeal in this Court under Section 260A of the Act which has also been admitted and substantial question of law framed. This itself shows that the issue is debatable. For these reasons, we are of the opinion that no question of law arises in the present case. This appeal is accordingly dismissed.”*

11. Consequently, penalty levied by the AO and confirmed by ld. CIT (A) of Rs.24,93,590/-, Rs.20,85,545/-, Rs.20,20,281/- & Rs.59,52,684/- in AYs 2001-02, 2006-07, 2007-08 & 2008-09 respectively is ordered to be deleted and all the appeals filed by the assessee are allowed.

12. Keeping in view the fact that since appeals bearing ITA Nos. 695/Del/2019, 696/Del/2019 & 697/Del/2019 have been decided, aforesaid stay petitions filed therein stand dismissed having been become infructuous.

**Order pronounced in open court on this 25<sup>th</sup> day of February, 2019.**

**Sd/-**

**(ANADEE NATH MISSHRA)  
ACCOUNTANT MEMBER**

**sd/-**

**(KULDIP SINGH)  
JUDICIAL MEMBER**

**Dated the 25<sup>th</sup> day of February, 2019/TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-42, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT  
NEW DELHI.