

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'D' BENCH,
NEW DELHI (THROUGH VIDEO CONFERENCING]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 646/DEL/2021 [A.Y 2004-05]
ITA No. 647/DEL/2021 [A.Y 2005-06]
ITA No. 648/DEL/2021 [A.Y 2006-07]
ITA No. 649/DEL/2021 [A.Y 2010-11]
ITA No. 650/DEL/2021 [A.Y 2008-09]
ITA No. 651/DEL/2021 [A.Y 2009-10]
ITA No. 652/DEL/2021 [A.Y 2013-14]
ITA No. 653/DEL/2021 [A.Y 2014-15]

&

SA Nos. 197 to 204/DEL/2021

L.G. Electronics Inc Ltd
C/o Pricewater House Cooper Pvt Ltd
18th Floor, Building No. 10,
Tower C, DLF Cyber City
Gurgaon

Vs.

The Addl. C.I.T
Special Range-9
New Delhi

PAN: AAACL 7929 E
(Applicant)

(Respondent)

Assessee By : Shri Deepak Chopra, Adv
Shri Ankul Goyal, Adv

Department By : Mrs. Anupama Anand, CIT-DR

Date of Hearing : 15.11.2021
Date of Pronouncement : 17.11.2021

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above captioned 8 appeals by the assessee are preferred against the order of the Commissioner of Income Tax, International Taxation - 2, New Delhi dated 30.03.2021 pertaining to assessment years 2004-05 to 2006-07, 2008-09 to 2010-11, 2013-14 and 2014-15 framed u/s 263 of the Income-tax Act, 1961 [hereinafter referred to as 'The Act' for short].

2. Since all these appeals pertain to same assessee and were heard together involving identical issue, these are being disposed of by this common order for the sake of convenience and brevity.

3. The sum and substance of the grievance of the assessee is that the ld. CIT erred in assuming jurisdiction u/s 263 of the Act since the assessment order framed u/s 147 r.w.s 143(3) r.w.s 144C(13) of the Act was neither erroneous nor prejudicial to the interest of the Revenue.

4. Briefly stated, the facts of the case are that the appellant company is a company incorporated under the laws of Korea and is engaged in the business of manufacture and sale of refrigerators, washing machines, air conditioners and other household electronic appliances. Assessment in the case of the appellant for the captioned Assessment Years so completed was on the basis of cost plus method on the salary of expat employees, wherein 25% of salary is attributable to operation in India and cost of 20% of salary was applied on the same to determine the profit taxable in India.

5. The ld. CIT observed that after completion of assessment proceedings, on perusal of the records, it was noticed that the Assessing Officer did not follow the correct directions of the DRP in so far as the attribution of PE is concerned and assessed the income of the captioned Assessment Years at a lesser rate thereby causing loss to the Revenue.

6. Referring to the appellate proceedings before the DRP for Assessment Year 2007-08, the ld. CIT observed that the assessee company had submitted without prejudice that PE could be inferred in India but the attribution of profit of PE may be based on cost plus method of salary

of expat employees. The ld. CIT further noted that the assessee company clearly mentioned that salary of 50% is attributable to operation in India and cost plus of 10% may be applied on the same to determine the profit taxable in India.

7. Thereafter, the ld. CIT referred to the following directions on this issue by the DRP:

"Thus, basis above the income of the PE can be reasonably ascertained by imputing the costs in terms of salary paid to the employees of the AE and applying a reasonable markup on such costs to determine the income of the PE in Indian jurisdiction. The factual history of the matter is in the assessment records with the AO. The panel accepts the same in view of the facts of the case. The action of the TPO/AO is upheld., subject to charge on the wages/remuneration paid to the seconded employees at the cost-plus margin of 20% on 'salary attributed to India operations' (being a reasonable attribution basis the work performed for the AE-though the assessee seeks only 10%) and existence of PE conceded by the assessee. The assessee has agreed to the issue of PE and the attribution because salary is charged to the PE. The rate offer is not reasonable as the extent of activities performed are substantially more than the quantum conceded by the assessee. As. it is clear that these employees

exercise significant influence on the business decisions benefitting the parent AE. The panel directs as above. The objections are disposed of as above."

8. After referring to the directions of the DRP for Assessment Year 2007-08, the ld. CIT observed that instead of cost plus 10% offered by the assessee, the Assessing Officer was directed to apply cost plus 20% on salary attributable to Indian operation. It was further observed that the assessee had already offered 50% of the salary attributable to Indian operation though the DRP did not reduce to 20%.

9. However, the Assessing Officer, while complying with the directions of the DRP, computed the cost plus 20% but reduced attribution of salary to 25%. The ld. CIT was of the firm belief that when the assessee itself had agreed for 50% salary attributable to Indian operation, then the Assessing Officer should have followed the directions of the DRP but instead reduced the attribution of salary to 25%.

10. In the captioned Assessment Years, the Assessing Officer completed assessment on the basis of attribution done in Assessment Year 2007-08. The ld. CIT was of the opinion that the Assessing Officer has wrongly

interpreted the directions of the DRP's order of Assessment Year 2007-08 to pass final order and accordingly, came to the conclusion that the assessment orders passed u/s 143(3) of the Act for Assessment Years 2004-05 to 2006-07, 2008-09 to 2010-11 and 2013-14 and 2014-15 are not only erroneous but also prejudicial to the interest of the Revenue and set aside all the assessment orders on the issue of attribution of income to Indian operation.

11. The representatives of both the sides were heard at length, the case records carefully perused. Judicial decisions relied upon were duly considered.

12. Before proceeding further, it would be necessary to understand the provisions of section 144C of the Act. Section 144C(1) read as under:

144C. (1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in

the income or loss returned which is prejudicial to the interest of such assessee.

13. Section 144C(13) read as under:

"144C(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in [section 153](#) ^{51a}[or [section 153B](#)], the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received."

14. A perusal of the above relevant provisions of Section 144C(13) show that there is a mandate given to the Assessing Officer that on receipt of the directions issued under sub-section (5) of the Act by the DRP, the Assessing Officer shall, in conformity with the directions, complete the assessment.

15. The Hon'ble High Court of Delhi in the case of PCIT Vs. Head Strong Services India Ltd 125 Taxmann.com 362 has explained the provisions of section 144C of the Act as under:

"17. In the opinion of this Court, Section 144C is a self contained provision which carves out a separate class of assesses *i.e.* 'eligible assessee' *i.e.* any person in whose case the variation arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of Section 92CA. For this class of assessees, it prescribes a collegium of three commissioners, once objections are preferred. Dispute Resolution Panel's powers are co-terminous with the CIT(A), including the power to confirm, reduce or enhance the variation proposed and to consider the issues not agitated by the Assessee in the objections. In fact, under section 144C, the Dispute Resolution Panel can issue directions as it thinks fit for the guidance of the Assessing Officer to enable him to complete the assessment and the Dispute Resolution Panel can confirm, reduce or enhance the variations proposed in the draft order. It is specifically stipulated in Section 144C that every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer. This is akin to the Assessing Officer giving effect to an order passed by the Appellate Authority or the Courts.

18. Consequently, Section 144C envisages a change of forum and it leads to complete cessation of the jurisdiction of the Assessing Officer on passing of the draft order. Thereafter the Assessing officer is to give effect to either the direction of the Dispute Resolution Panel or pass an order on acceptance by the Assessee."

the expression in the first instance' has been used in section 144c to signify the first step to be taken by the assessing officer in a series of acts contemplated by the said section to accept the appellant's argument would be to permit the assessing officer to decide the objections filed by the assessee which power has been specifically denied by the statute."

16. From the above observations of the Hon'ble High Court of Delhi, it is clear that it is mandatory to follow the directions of the DRP by the Assessing Officer failing which the assessment order would become non-est. In our considered view, the Assessing Officer passed the impugned final assessment orders not carrying out the binding directions of the DRP which is a clear violation of the binding provisions of section 144C(13) of the Act. Therefore, in our humble opinion, the impugned assessment orders are non-est. We are of the further opinion that once the assessment orders have been held to be non-est, the ld. CIT could not have assumed jurisdiction u/s 263 of the Act over a non assessment order which can never be erroneous and prejudicial to the interest of the Revenue.

17. The contention of the ld. DR that the Assessing Officer has followed the directions of the DRP but somehow over looked the directions issued. We are of the considered view that there is no choice given to the Assessing Officer to follow one part of the directions of the DRP and not to follow the other part.

18. Now the query arises as to whether the assessee can challenge the validity of the assessment order in collateral proceedings u/s 263 of the Act. In our considered opinion, the assessee can challenge the validity of the assessment order in the collateral proceedings u/s 263 of the Act since the assessment order itself is bad in law. Therefore, such an order cannot be revised u/s 263 of the Act.

19. Our view is fortified by the decision of the co-ordinate bench in the case of Krishna Kumar Saraf 4562/DEL/2011, 3156/MUM/2018, 688/MUM/2016, 766/Kol/2014 Super Sonic Technologies 197 TTJ 889.

20. Considering the factual matrix in light of the decisions discussed hereinabove, we are of the considered opinion that the ld. CIT has

erroneously assumed jurisdiction u/s 263 of the Act when the impugned assessment orders were non-est.

21. Before parting, the Id. CIT has heavily drawn support from the concession made by the assessee during the appellate proceedings before the DRP for Assessment Year 2007-08. In our considered view, concession, if any, was given in Assessment Year 2007-08 and the same cannot be assumed for the captioned Assessment Years.

22. Since we have decided the appeals, the captioned Stay Applications become infructuous.

23. In the result, the appeals filed by the assessee in ITA Nos. 646 to 653/DEL/2021 are allowed.

The order is pronounced in the open court on 17.11.2021.

Sd/-

[SUDHANSHU SRIVASTAVA]
JUDICIAL MEMBER

Sd/-

[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: 17th November, 2021

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
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