

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

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 6300/DEL/2017 [A.Y 2008-09]
ITA No. 6301/DEL/2017 [A.Y 2009-10]
ITA No. 6302/DEL/2017 [A.Y 2010-11]
ITA No. 6303/DEL/2017 [A.Y 2011-12]

M/s Bentley Nevada Inc.
Corporate Trust Centre
County of New Castle
Delaware, City of Wilmington
USA

Vs. The Dy. C.I.T
Circle -1(1)(2)
International Taxation
New Delhi

PAN: AADCB 8118 J

(Applicant)

(Respondent)

Assessee By : Shri Sachit Jolly, Adv
Department By : Ms. Anupama Anand, CIT- DR

Date of Hearing : 31.01.2022
Date of Pronouncement : 03.02.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above captioned four separate appeals by the assessee are preferred against the order dated 29.08.2017 framed under section 144C(13) r.w.s 147 r.w.s 143(3) the Income-tax Act, 1961 [hereinafter

referred to as 'The Act'] pertaining to Assessment Years 2008-09 to 2011-12.

2. Since the underlying facts in issues are common in all these four appeals, they were heard together and are disposed of by this common order for the sake of convenience and brevity.

3. The common challenge in all the above captioned appeals is that the Dispute Resolution Panel [DRP] erred in upholding the action of the Assessing Officer [AO] in initiating proceedings u/s 147/148 of the Act without appreciating that there was no material on the basis of which any belief could be formed that income has escaped assessment.

4. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the Id. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book. Judicial decisions relied upon duly considered.

4. Briefly stated, the facts of the case are that the appellant is a foreign company, incorporated in USA, and is engaged in the business of supplying of goods and software to its various customers in India. The assessee is a wholly owned subsidiary of General Electric Company.

5. Since the underlying facts in issues are identical, we have considered the facts of Assessment Year 2008-09 in ITA No. 6300/DEL/2017.

6. On the basis of information in his possession, the Assessing Officer reached to the conclusion that the assessee's income has escaped assessment and in order to tax such income, he initiated proceedings u/s 147 of the Act and after recording reasons in writing, issued a notice u/s 148 of the Act which is under challenge before us.

7. The reasons recorded for reopening of the assessment read as under:

Annexure-AReasons for issue of notice u/s 148 of the Income Tax Act, 1961 :-

BENTLY NEVADA LLC (PAN - AADCB8118J)
(AY 2008-09 to AY 2011-12)

1. Bently Nevada LLC, the Assessee (Now known as Bentley Nevada Inc.) is a company incorporated in United States of America (USA). The assessee is engaged in business of supplying goods, software and related support.
2. As per the assessment order passed for AY 2006-07 and for AY 2002-03 to AY 2005-06, it was held that the Assessee was having business connection as well as Permanent establishment (PE) in India and the PE was engaged in activities which cannot be termed as auxiliary and preparatory. Further, it was held that 35% of the total business profits pertain to marketing activities. Out of this 35% profit, 75% of the marketing activities, i.e., 26.25% were attributed India (the business profits were calculated @ 10% on the sales prices to the customers in India). Accordingly, 2.625% of the total sales in India was taxed as business profits in India.
3. Further, reliance is placed on the reasons recorded for issue of notice u/s 148 of the I.T.Act in the case of the Assessee, issued by my predecessor wherein it was stated that the survey was carried out at the office premise of General Electric International Operation Company Inc., India Liaison office (GEIOC) located at AIFACS, 1 Rafi Marg, New Delhi -110001 on 02.03.2007 and that the GE group companies have business connection as well as the PE in India as per the provisions of Article 5 of Tax treaty and the income attributable to the PE/business connection is taxable in India. (Copy enclosed)
4. The Assessee has submitted during the course of the Assessment Proceedings for AY 2012-13 vide submission dated 10 March 2015 that it had sought assistance from M/s GE India Industrial Pvt Ltd ('GEI IPL'), i.e., an associated entity of the Assessee, for providing local marketing support. It is also observed that during the course of assessment proceedings for AY 2012-13, the Assessee has submitted vide submission dated 25 March 2015 that there has been no change in their business activities as compared to the earlier years. Accordingly, there are reasons to believe that there is income escaping

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(c) where an assessment has been made, but -

(i) income chargeable to tax has been under-assessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed." (Emphasis supplied)

5. As discussed above, I have reason to believe that the Assessee always had a business connection and PE in India even during the period from AY 2008-09 to AY 2011-12 for which the assessee's taxable income has escaped assessment within the meaning of clause (a) to Explanation 2 of section 147 of the Act. Further in the light of facts stated above it appears that the assessee's taxable income more than Rs. 1 Lac has escaped assessment for AY 2008-09 to A.Y. 2011-12.

In view of the above, if approved, notice under section 148 of the Act may be issued in this case for AY 2008-09 to A.Y. 2011-12.

8. A careful perusal of the aforesaid reasons show that the Assessing Officer has been heavily influenced by the assessment orders passed for Assessment Years 2006-07, 2002-03 to 2005-06. Taking a leaf out of these assessment orders, the Assessing Officer was of the opinion that the assessee was having business connection as well as Permanent Establishment [PE] in India and the PE was engaged in activities which cannot be termed as auxiliary and preparatory. We further find that strong reliance was placed on the reasons recorded for issue of notice u/s 148 of the Act issued in earlier Assessment Years.

9. We further find that the Assessing Officer has also derived support from the submissions made by the assessee during the proceedings for Assessment Year 2012-13 that there has been no change in their business activities as compared to earlier years.

10. The ld. counsel for the assessee vehemently stated that what it meant was that the assessee was carrying on same business activities from past many years and has nowhere accepted the facts which were there in the earlier Assessment Years.

11. On further perusal of the reasons recorded for reopening of the assessment, extracted hereinabove, we find that there is not even a whisper of facts pertaining to the Assessment Years under challenge before us. It would be pertinent to refer to the reasons recorded for reopening the assessment for Assessment Year 2001-02. The relevant part reads as under:

"During the course of survey it was found that various employees of GE overseas entities are working in India. Some of these employees are on the payroll of GE International Inc., USA. These are:

- Dan Nalawade
- Riccardo Procacci
- William Blair
- Ashfaq Nainar
- Kenneth Peirson
- Sameer Aggarwal
- Prat Kumar

These persons are working for various direct businesses of the GE group in India, which are neither being conducted through a subsidiary or joint venture company. These persons are India Head of different businesses and they are being supported by a team of persons, who are employed by either GE India Industrial Pvt. Ltd. or other group concern. The employees working on the

payroll of GEIOC are also supporting the various direct businesses of GE group. The assessee was asked to submit the information regarding the above employees particularly the copy of employment (assignment) letters, job responsibilities, self appraisal etc., part of this information was submitted by the assessee vide letter dated 16.03.2007/09.04.2007

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From the information available during the surveyor afterwards, it is clear that various employees of GE India Industrial Pvt. Ltd. are working with the expatriates so as to constitute Indian teams looking after the GE overseas entities businesses. The detail of such employees is also available in Annexure-C, discussed earlier.

The assessee was asked to submit the copy of self appraisal of the 7 employees of the GE group, who are on the payroll of GE International Inc. The same is replied vide para 3.4 of the letter dated 16.03.2007 and self appraisal of Kenneth Peirson was submitted as Annexure-16 of the letter.

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7. The business of various GE group non-resident companies in India is being conducted by the expatriate employees of GE Group (who are employed by GE group company and deputed to

India as India Head of the specific business like oil & gas, energy, aviation, transportation etc.), with the support and help of employees drawn from GE Indian entities. Such expatriates are responsible and look after the business of GE group as a whole irrespective of the any GE group company making sales in India. The bifurcation of sales by various entities is decided by the GE management, as is evidenced by the Reliance order referred above. These expats and their team have at their disposal a fixed place of business in the form of office premises at AIFACS, 1 Rafi Marg, New Delhi. This office premise is taken on lease by GEIOC from AIFACS (All India Fine Arts and Craft Society) and lease from the period prior to 01.04.2000. The information regarding the employees of GE in India prior to the present expats is not given by the GE group, however, there have been the persons working for such sales throughout the period 01.04.2000 to till date. To summarize the expats deputed in India for undertaking the marketing activities including price negotiation, supervision, administration, sale functions and after sales activities and their team were continuously carrying out the business of various entities of the GE group, which made sales in India from the above stated office premises in Delhi and other places of businesses in India. Since:

- A place of business is available at disposal of the GE group entities in India.
- The place of business was fixed and the business was carried out through that place of business.

Some employees of the GE group Indian entities forming part of the sales team were also carrying out the business through other fixed place of business in the form of other offices of the GE group in India.

In view of the above, it is clear that the various GE group entities, being tax residents of different countries had fixed place PE in India as per the provisions of respective tax treaties. The office as well as the premises used as a sales outlet or for receiving or soliciting orders also constitutes the PE as provided in paragraph 2 of Article 5 of respective tax treaties. The activities of the non-resident GE group entities being conducted from the fixed place of business referred above are not of the preparatory or auxiliary character.

The employees of GE India Industrial Pvt. Ltd. forms the sales teams of the GE entities, such employees along with the expats have habitually secured orders in India, wholly or almost wholly for the non-resident GE group entities. The correspondence discussed above also indicates that such employees have also participated in the price negotiations. The various documents in the form of agreements/purchase orders/copies of contracts also proves the active involvement of the employees of Indian company and expats in the conclusion of contracts on behalf of such non-resident GE group entities, therefore, GE India Industrial Pvt. Ltd. also constitutes the agent other than an agent of independent status of the non- resident GE group entities. This results into the creation of the dependent agent

PE as per; the provisions of the tax treaties and business connection as per the provisions of Explanation 2 to Section 9(l)(i) of the Income Tax Act, 1961. The activities of the third parties working for the GE group as mentioned above also may constitute agency PE/ business connection of the GE group entities.

It is possible that in respect of various projects relating to rendering of services/supervisory services, such GE group entities will be considered to have the PE as per the other paragraphs of the Article relating to the PE of the respective tax treaties.

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9. The non-resident GE group company, namely GE Energy Part Inc., USA has made a sale of USD 21,83,146/- during F.Y. 2000-01 in India. As mentioned above, the assessee has business connection as well as the PE in India as per the provisions of Article 5 of the tax treaty between both the countries and the income attributable to the PE/ business connection is taxable in India. Since the assessee has not filed return of income in India to that extent the income chargeable to tax has escaped assessment. On the basis of material collected during or after survey operations and discussed above, I have reason to believe that income chargeable to tax has escaped assessment for A. Y. 2001-02. This belief is formed on the basis of fact that assessee has not furnished return of income although its income earned in India during the previous year was chargeable to

income tax. Considering the quantum of sales made, I have reason to believe that income chargeable to tax, which has escaped assessment amounts to or is likely to amount to more than Rs. 1 lakh for the year."

12. On the basis of the aforesaid reasons, specific to the facts and more specific to the evidence gathered, this Tribunal in ITA No. 671/DEL/201 order dated 27.1.2017, has upheld the reopening, which order was followed by this Tribunal in a batch of appeals for Assessment Years 2002-03 to 2008-09 in respect of GE Group of appeals wherein this Tribunal, following the findings given by it in Assessment Year 2001-02, has confirmed its decision on four issues, namely,

- a) Initiation of reassessment is valid;
- b) Fixed place as well as Agency PE of all the GE overseas is established in India.
- c) Attribution of income to the PE should be 2.6% of the sales made by GE Overseas entities in India; and
- d) Interest u/s 234B of the Act is not chargeable.

13. Since the Tribunal has not given any independent findings while deciding the appeals for Assessment Years 2002-03 to 2006-07 and has simply followed the findings given in Assessment Year 2001-02, let us consider the relevant findings given in Assessment Year 2001-02 which read as under:

"8.6. Having gone through the above referred two judgments, it is patent that there must be some material to indicate that income chargeable to tax has escaped assessment for a particular year. If material in the possession of the AO divulges escapement of income for year 'A', no inference can be drawn, *de hors* some other relevant material, that similar income escaped assessment for year 'B' as well. In the case of *Gupta Abhushan (P) Ltd. (supra)*, some renovation was carried out in the earlier years and on the presumption that such renovation must have been done in the later years as well, the AO initiated reassessment. The Hon'ble High Court approved the view taken by the Tribunal that the escapement of income by means of renovation carried out in later years was not borne out from the material on record. Similarly, in the case of *SGS India Pvt. Ltd. (supra)*, the assessee incurred research and development expenses in the year one, which were disallowed because of the transfer pricing adjustment and the AO's inference of escapement of similar income for the earlier year, was held to be not sustainable. In our considered opinion, the position as

stated on behalf of the assessee is trite, which cannot be interfered with.

8.7. However, on the facts and circumstances of the instant case, we find that these judgments have no application. It is pertinent to note that in the post-survey enquiries, but, prior to the issue of notice, the assessee group, vide its letter dated 16.3.2007, provided name of seven expats of GEII who were working for GE overseas in India. Such persons, as per their Assignment letters, were deputed in India for looking after the business operations of GE overseas entities in India for a specific period ranging from 2-5 years. The AO has noted in para 7 of the reasons that the information regarding the employees of GE in India prior to the present expats was not given by the GE group, but, there were persons working for such sales throughout the period 1.4.2000 to till date.

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8.10. A plain reading of this para signifies that there is no denial of the assertion recorded by the AO in para 7 of the reasons in this regard. Notwithstanding the fact that the reasons were recorded on 26.3.2008 and the assessee did not raise any objection about the said aspect of the matter and accepted the separate order passed by the AO rejecting such objections, the assessee did not even challenge this aspect before the AO during the course of assessment proceedings as well."

14. In light of the afore-stated facts emanating from the orders of earlier Assessment Years, and keeping in mind the findings of this Tribunal, we find that in the appeals under challenge before us, the assessee had raised specific objections to the notice issued u/s 148 of the Act qua the reasons recorded therein. Therefore, the findings of the Tribunal given on specific facts of those Assessment Years are totally distinguishable on the facts of the years under consideration.

15. As mentioned elsewhere, in the reasons recorded for reopening the assessment, we do not find any mention of any expat employee present during the relevant year nor there is any mention of such employees in the assessment order. In our considered opinion, there needs to be close nexus between the material before the Assessing Officer and the belief which he has formed.

16. The Hon'ble Supreme Court in the case of Ganga Saran & Sons 130 ITR 1, has remarked "The words "has reason to believe" are stronger than the words "is satisfied.". The belief entertained by the Income Tax Officer must not be arbitrary or irrational. It must be reasonable or, in other words, it must be based on reasons which are relevant and material.

17. In light of the afore stated observations, we are of the view that the belief of the Assessing Officer is a condition precedent for assuming jurisdiction and without such belief, the Assessing Officer would not have jurisdiction to initiate proceedings u/s 147 of the Act. We are of the view that the fulfillment of this condition is not a mere formality but it is mandatory and failure to fulfill that condition would vitiate the entire proceedings.

18. There must be direct nexus or live link coming to the notice of the Assessing Officer and formation of his belief that there has been escapement of income of the company from assessment in a particular year. Therefore, for every Assessment Year, there should be some tangible material evidence to form such a belief which we find absent in the reasons recorded mentioned elsewhere for the years under appeal.

19. We find that there is no rationale connection between the information in the possession with the Assessing Officer and formation of belief that there has been escapement of income for Assessment Years 2008-09 to 2011-12.

20. On a perusal of the assessment order/DRP order, we find that strong reliance has been placed on various documents found during the course of survey which was carried out at the premises of General Electric International Operations India Liaison Office on 02.03.2007 whereas the assessment orders under challenge pertain to Assessment Years 2008-09 to 2011-12. Therefore, evidence being sought to be used for initiating fresh enquiry against the assessee does not even pertain to the Assessment Year under consideration. In our considered opinion, whether a PE exists or not is a fact specific issue and is to be decided on year on year basis.

21. The Hon'ble Supreme Court in the case of Dwarka Das Kesardeo Morarka 44 ITR 529 has held that each Assessment Year is separate and, therefore, judgment adjudicated by the taxing authorities in one Assessment Year on the basis of substance before them cannot be regarded as binding in the assessment of subsequent years.

22. After considering the facts in totality, in light of the reasons recorded for reopening assessment and after considering the specific objections raised by the assessee, we are of the considered view that for the Assessment Years under challenge, no new tangible material

has been brought by the Assessing Officer to justify the reopening and as mentioned elsewhere, the reason why reopening was upheld by this Tribunal in Assessment Year 2001-02 which was followed by it in subsequent years i.e. 2002-03 to 2006-07 are totally distinguishable, in as much as, in those years in the reasons itself, as mentioned elsewhere, the Assessing Officer had given specific findings in respect of expat employees present in India, which fact finding is absent in the Assessment Years under consideration.

23. We must also refer to the decision of the Hon'ble Supreme Court in the case of New Delhi Television Ltd 424 ITR 607 wherein the Hon'ble Supreme Court has held as under:

"That in the notice dated March 31,2015 there was no mention of any foreign entity. There was only mention of section 148. There was nothing in the reasons to indicate that the Department was intending to apply the extended period of 16 years. It was only after the assessee filed its reply to the reasons given, that in the order of rejection for the first time reference was made to the second proviso by the Department. This was not fair or proper procedure. If not in the first notice, at least at the time of furnishing the reasons the assessee should have been informed that the Department

relied upon the second proviso. The assessee must be put to notice of all the provisions on which the Department relies upon. If the Department had issued a notice to the assessee stating that it relied upon the second proviso, the assessee would have had a chance to show that it was not deriving any income from any foreign asset or financial interest in any foreign entity, or that the asset did not belong to it or any other ground which may be available. The assessee could not be deprived of this chance while replying to the notice. The notice and reasons given thereafter did not conform to the principles of natural justice and the assessee did not get a proper and adequate opportunity to reply to the allegations which are now being relied upon by the Revenue. The notice issued to the assessee and the supporting reasons did not invoke provisions of the second proviso to section 147 of the Act and therefore at this stage the Department could not be permitted to take benefit of the second proviso."

24. This means that the reasons for reopening the assessment cannot be improved in the body of the assessment order.

25. Therefore, the notice issued u/s 148 is liable to be quashed and so also, the orders consequent to such notice. Since we have quashed the assessment order, we do not find it necessary to dwell into the merits of the case.

26. In the result, all the four appeals of the assessee in ITA Nos. 6300 to 6303/DEL/2017 are allowed.

The order is pronounced in the open court on 03.02.2022.

Sd/-

**[ASTHA CHANDRA]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 03rd February, 2022.

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Copy forwarded to:

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

Asst. Registrar,
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Date of dictation	
Date on which the typed draft is placed before the dictating Member	
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Date on which the approved draft comes to the Sr.PS/PS	
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