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. 4559/DEL/2018 [A.Y 2004-05]
ITA No. 4560/DEL/2018 [A.Y 2005-06]
ITA No. 4561/DEL/2018 [A.Y 2006-07]
ITA No. 1946/DEL/2017 [A.Y 2007-08]
ITA No. 6916/DEL/2017 [A.Y 2008-09]
ITA No. 5020/DEL/2018 [A.Y 2009-10]
ITA No. 5021/DEL/2018 [A.Y 2010-11]
ITA No. 3327/DEL/2018 [A.Y 2013-14]
ITA No. 5022/DEL/2018 [A.Y 2014-15]

M/s L.G. Electronics Inc., Korea [LGEK], LG Twin Towers [West] 128, Yeoui-daero Yeongdeungpo-gu Seol, Republic of Korea 150 721	Vs.	The Dy. C.I.T Circle -3(2)(1) International Taxation New Delhi
PAN: AAACL 7929 E		
(Applicant)		(Respondent)

Assessee By : Shri Ajay Vohra, Sr. Adv
Shri Ankul Goyal, Adv

Department By : Ms. Anupama Anand, CIT- DR

Date of Hearing : 03.02.2022
Date of Pronouncement : 07.02.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

The above captioned nine appeals by the assessee are preferred against the separate orders framed under section 147 r.w.s 143(3) 144C(13) r.w.s of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] pertaining to Assessment Years 2004-05 to 2010-11, 2013-14 and 2014-15

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

3. The common grievance challenging the impugned orders relate to:

i) Reassessment;

ii) Existence of Permanent Establishment [PE];

iii) Attribution of profit; and

iv) Other common grievance relates to th charging of interest u/s 234A, B, C, D, 244A and initiation of penalty u/s 271(1)(c) of the Act.

4. Vide application dated 16.12.2021, the assessee raised an additional ground in the captioned appeals as under:

> "Ground 1.1 - That the assessment order passed is bad in law as the AO erred by not carrying out the binding directions of the Dili[5] which is a clear violation of the binding provisions of section 144C(13) of the Act.
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> The aforesaid additional ground of appeal raises a pure legal issue for which investigation into facts is not required. The said ground is being raised pursuant to the order dated 17.1 1.2021 passed by the Hon'ble Tribunal (ITA No.646/Del/2021) in the case of the assessee quashing the revisionary proceedings under section 263 of the Act for the said assessment year, wherein the Hon'ble Tribunal has been pleased to observe that the assessment order passed in violation of the binding direction of the D.R.P is non-est and null and void . The omission to raise the aforesaid additional ground is neither wilful nor unreasonable. The appellant prays that the additional ground may kindly be admitted and adjudicated on merits, having regard to the discretion vested in your Honours under Rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963 and the decision of the Supreme Court in the case of National Thermal Power Co. Ltd, vs CIT : 229 ITR 383.
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> Appellant trusts that the request shall be acceded to. An opportunity of being heard is prayed for.

5. Since the additional ground goes to the root of the matter, we decided to proceed by addressing to the additional ground so raised.

6. At the very outset, the ld. DR strongly opposed for admission of additional ground. Through her written submissions, the ld. DR raised the following issue:

> "The subject matter of ground of appeal which has been raised now for admissibility is that the AO did not follow directions of the Hon'ble DRP while passing the order, hence order stands to be null and void. This situation was there ever since the day the AO passed the order. The assessee did not raise the issue of admissibility of additional ground in the first round of appeals neither before Hon'ble ITAT nor before the Hon'ble High Court and when the matter is remanded back to ITAT for adjudication on limited purpose this issue has been raised which is contrary to the spirit of law and jurisprudence.
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> 2. That Hon'ble Delhi High Court in its order dated 14.02.2020 in ITA No. 960, 1002, 1003, 1004, 1005, 1006, 1008, 1009, 1010/DEL/2019 categorically directs in Para 2 at Page 3 of said order that the case is remanded back to ITA I for limited purpose of adjudication. The relevant extract is reproduced below:

" We set aside the impugned order in so far as the operative direction contained in paragraph 88 is concerned. We, however, make it clear that the tribunal shall limit its consideration to the aforesaid aspects, since the aspects of issuance of notice u/s 147/148 stands concluded against the assessee."

The questions of law framed in the appeal before Hon'ble High court, were as follows:

"A. Whether the IT AT was correct in law in exercising the power of remand to DRP on the facts and circumstances of the present case?

B. Whether being the final fact finding authority, the ITAT abdicated its duty to give findings on merits of the appeal?

C. Whether in the facts and circumstances of the present case, remand by the ITAT was not warranted when all necessary facts and evidences were before the IT AT and the matter was heard in great details on merits?"

Therefore, the mandate given by Hon'ble High Court to Hon'ble ITAT by remanding back the order was only to decide on the issue of PF and not to examine the case de-novo. The sanctity of the assessment order passed by the AO was never in question.

Neither did the Hon'ble Bench in its order dated 02.09.2019, nor did the Hon'ble High Court make any mention or even a passing reference of the nullity of the assessment order. It is acutely improper to import what is not intended in the judicial pronouncement.

3. The appellant has sought to raise the additional grounds of appeal even in assessment years not covered by the decision of Hon'ble Bench dated 17.11.2021. This is without any basis and therefore, inadmissible.

The Hon'ble High court has given specific directions to the ITAT with regard to its order dated 02.09.2019, to limit its consideration to the issue of existence of PE in India and not to decide the case de novo. Therefore, admission of additional grounds of appeal while giving effect to the order of the Hon'ble High Court is illegal and contrary to the spirit of the directions by the High Court.

As such, it is requested that the additional grounds of appeal may not be admitted."

7. We have given thoughtful consideration to the objections raised by the ld. DR. It would be pertinent to refer to the judgment of the Hon'ble High Court of Delhi in the case of Sony Mobile Communications

India [P] Ltd 127 Taxmann.com 356 where the facts were identical to the facts of the captioned appeals. The facts considered by the Hon'ble High Court and the findings read as under:

> "3. The 1TAT, in the impugned order, has recorded the facts of 1TA No. 554/Del/2015 for the Assessment Year 2010-11 before it and has further recorded that the facts of ITA No. 836/Del/2014 for the Assessment Year 2009-10 are identical. The said facts, as recorded, are (z) that the Respondent-Assessee company is primarily engaged in the business of importing, buying, selling and distributing wide range of mobile phones in India and of providing related post sale support services; *(ii)* on the Respondent-Assessee filing the return of income for the assessment years 2009-10 and 2010-11 (subject assessment years), since the Respondent- Assessee had undertaken international transaction with its Associated Enterprises (AEs), the AO referred the matter to the Transfer Pricing Officer (TPO) for determination of the Arm's Length Price (ALP) of the international transaction entered into by the Respondent-Assessee with its AE; *(Hi)* the TPO determined upward adjustment of Rs. 56,30,78,638/-; *(iv)* the Respondent-Assessee approached Dispute Resolution Panel (DRP). which declined to interfere with the transfer pricing adjustment made by the AO; (v) the Respondent- Assessee thereafter approached the 1TAT and the ITAT gave part relief to the Respondent-Assessee; (vz) both, the Respondent-Assessee as well as the

Appellant-Revenue approached this Court by way of ITA No. 638/Del 2015 and ITA No. 614/Del/2015 respectively; *(vii)* this Court, *vide* order dated 28th January, 2016 restored the matter to the ITAT, with certain directions; and, *(viii)* the Respondent-Assessee, in said second round before the ITAT. made an application under Rule 11 of the ITAT Rules, 1963, seeking admission of the additional ground of appeal *i.e.* that "the assessment order passed under section 143(3) read with section 144C of the Act is void *ab initio,* as the assessment was undertaken in the name of non-existent entity.'"

4. ITAT, vide the impugned order, has held, that (z) since all material necessary for adjudication of the additional ground was available on record and no fresh examination of facts was required to be undertaken, the additional ground raised by the Respondent-Assessee was entitled to be admitted for adjudication; (ii) the Respondent-Assessee filed its return of income for the subject assessment years, in the name of Sony Ericsson Mobile Communications (India) Pvt. Ltd. (zzz) the name of the Respondent-Assessee, w.e.f. 18th April, 2012, was changed to Sony Mobile Communications (India) Pvt. Ltd.; (iv) Sony Mobile Communications (India) Pvt. Ltd., w.e.f. 1st April, 2013, was merged with Sony India Pvt. Ltd.; (v) the Appellant-Revenue, vide letter dated 6th December, 2013 was informed of the merger; (vz) the factum of merger was also mentioned in another letter dated 17th February, 2014 of the Respondent-Assessee to the Appellant-Revenue; (vzz) however

notwithstanding the aforesaid, the AO passed the draft assessment order dated 31st March, 2014, in the name of Sony Ericsson Mobile Communications (India) Pvt. Ltd.; (viii) the Respondent-Assessee, in response to the department's allegation that no intimation about merger was made, wrote a letter dated 30th April, 2014; (ix) the DRP, in its order dated 21st October, 2014 mentioned the name of the Respondent-Assessee as "Sony Mobile Communications (India) Private Limited (now' merged with Sony India Private Ltd)".; (x) however the AO still passed the final assessment order under section 143(3)/144C in the name of Sony Ericsson Mobile Communications (India) Pvt. Ltd.; (xz) thus, the final order was framed on a non-existent company and the question for adjudication was, whether the said defect was curable or made the final assessment order void; (x) in (a) Pr. CIT v. Maruti Suzuki India Ltd. [2017] 85 taxmann.com 330 250 Taxman 409/397 IT R 681 (Delhi), (b) Spice Enfotainment Ltd. v. CIT [2012] 247 CTR 500 (Delhi), (c) CIT v. Dimension Apparels (P.) Ltd. [2014] 52 taxmann.com 356/[2015] 370 ITR 288 (Delhi) (Civil Appeal 4317/2014 whereagainst was dismissed on 2nd November, 2017), (d) CIT v. Norton Motors [2005] 14b Taxman 701 275 ITR 595 (Punjab & Haryana High Court), (e) CIT v. Harjinder Kaur [2009] 180 Taxman 23/3 iO ITR 71 (Punj. & Har.) and (/) Sri Nath Suresh Chand Ram Naresh v. CIT [2005] 145 Taxman 1 56 [2006] 280 ITR 396 (All), it had been held that such a defect cannot be treated as a procedural one and once it is found that the assessment is framed in the name of a non-existent entity, it does not remain a procedural

irregularity of the nature which could be cured by invoking the provisions of section 292B of the Income-tax Act, 1961 (the Act); and, (xz) thus the assessment orders framed by the AO on a non-existent company w ere a nullity in the eyes of law and void and the provisions of section 292B could not rescue the appellant department.

5. The ld. Counsel for the Appellant –Revenue urged two substantial questions for our consideration. Firstly, it was contended that ITAT erred in allowing the additional ground to be urged by the Respondent-assessee. it was argued that the remand by this Court, *vide* order dated 28th January, 2016 in ITA No. 638/Del/201 5, filed by the Respondent-Assessee, and ITA No. 614/Del/2015, filed by the appellant revenue, to the ITAT, was a limited remand and ITAT did not have the jurisdiction to enlarge the scope of enquiry beyond the directions issued by this Court.

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18. However as far as the first substantial question of law urged by the counsel for the Appellant-Revenue is concerned, we find that this Court, vide judgment dated 28th January, 2016 in ITA No. 638/2015 and ITA No. W4 2;)i 5 while setting aside the order dated 27th February, 2015 of ITAT, directed the ITAT to decide the appeal "afresh in light of the directions issued and to examine all the grounds including the one regarding

the existence of an international transactions involving AMP expenses". The aforesaid direction cannot be said to be of limited remand and was of open remand and thus we are of the opinion that the ITAT was entitled to allow the additional ground to be urged before it and to allow the appeal solely on the basis thereof. Thus the first substantial question of law urged does not arise.''

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SANJEEV NARULA

21. Having gone through the judgment of my ld. Colleague Rajiv Sahai Endlaw, J, I am unable to agree with the conclusions reached by him.

22. As noted above, the Revenue has urged two substantial questions of law for our consideration. In so far as the first question of law concerning the scope of enquiry by the ITAT arising out of a remand by this Court is concerned, I am in complete agreement with the conclusion drawn by my esteemed colleague. In addition to the reasoning given, I would like to add that the additional ground of appeal urged by the Respondent-Assessee was purely legal, arising from the facts which were already on record in the assessment proceedings. In these circumstances, I see no good reason to deny the Respondent-Assessee the opportunity to urge a new legal ground dealing with a jurisdictional issue, as it goes to the root of the matter and is necessary to be considered in order to correctly assess the tax liability of an assessee. Therefore, the said question does not arise for our consideration in the present appeal."

8. A perusal of the facts considered by the Hon'ble High Court show that the facts of the captioned appeals are identical. The present appeals were also set aside by the Hon'ble High Court with directions. The relevant findings read as under:

> "We find that the Tribunal in its very detailed order recorded the rival submissions of the parties. In this background, in our view, there was no purpose of remanding the matter back to the DRP on a small aspect, namely whether the appellant had made any concession with regard to the existence of its PE in the India. The same was a matter of record, if at all. The Tribunal could have decided the said issue and all other issues arising from answer to the said issue, or in consequences thereof. We, therefore, answer the question framed in favour of the appellant. We set aside the impugned order in so far as the operative direction contained in paragraph 88 is concerned. We, however, make it clear that the Tribunal shall limit its consideration to the aforesaid aspects, since the aspect of issuance of notice under Section 147/148 stands concluded against the assessee."

9. On finding parity of facts, the additional ground is admitted.

10. This Tribunal in ITA Nos. 646 to 653/DEL/2021 for Assessment Years 2004-05 to 2006-07, 2008-09, 2010-11 and 2013-14 and 2014-15, vide order dated 17.11.2021, has held the impugned assessment orders as non-est. The relevant findings read as under:

> *"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.*
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> *7. Thereafter, the ld. CIT referred to the following directions on this issue by the DRP:*
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> *"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. After addressing to the impugned issues, the Tribunal, following the judgment of the Hon'ble High Court of Delhi in the case of PCIT Vs Head Strong Services 125 Taxmann.com 362 held as under:

"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."

12. Thus, this Tribunal held the impugned assessment order as non-est.

13. Sublato Fundamento Cadit Opus, meaning thereby, that in case the foundation is removed, the super structure falls.

14. Before closing, the ld. DR raised another issue that Assessment Year 2007-08 was not considered by this Tribunal while quashing the assessment order. We do not find force in this contention of the ld. DR because basis Assessment Year 2007-08, the assessments of the captioned appeals were done as can be seen from the orders of the authorities below.

15. The captioned appeals are allowed on the additional grounds itself. Therefore, we do not find it necessary to dwell into the merits of the case.

16. In the result, the appeals of the assessee in:

ITA No. 4559/DEL/2018 [A.Y 2004-05]	-	Allowed
ITA No. 4560/DEL/2018 [A.Y 2005-06]	-	Allowed
ITA No. 4561/DEL/2018 [A.Y 2006-07]	-	Allowed
ITA No. 1946/DEL/2017 [A.Y 2007-08]	-	Allowed
ITA No. 6916/DEL/2017 [A.Y 2008-09]	-	Allowed
ITA No. 5020/DEL/2018 [A.Y 2009-10]	-	Allowed
ITA No. 5021/DEL/2018 [A.Y 2010-11]	-	Allowed
ITA No. 3327/DEL/2018 [A.Y 2013-14]	-	Allowed
ITA No. 5022/DEL/2018 [A.Y 2014-15]	-	Allowed

The order is pronounced in the open court on 07.02.2022.

Sd/-	**Sd/-**
[ASTHA CHANDRA] **JUDICIAL MEMBER**	**[N.K. BILLAIYA]** **ACCOUNTANT MEMBER**

Dated: 07th February, 2022.

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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	
Date on which the final order is uploaded on the website of ITAT	
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Date on which the file goes to the Head Clerk	
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