

**IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'D' NEW DELHI**

**BEFORE SHRI G.S. PANNU, PRESIDENT AND SHRI
SAKTIJIT DEY, JUDICIAL MEMBER**

ITA No. 34/DDN/2019
Assessment Year: 2014-15

Samsung C & T Corporation, Room No. 405, 4 th Floor, E-2 Blcok, Pratyakshkar Bhawan, Civic Centre, J.L. Nehru Marg, New Delhi-1100 02	Vs.	CIT (International Taxation)-3, Dehradun
PAN :AAHCS4920M		
(Appellant)		(Respondent)

Assessee by	S/Shri Girish Dave & Tanzil Padvekar, Adv. & C.P. Singh, CA
Department by	Smt. Sapna Bhatia, CIT(DR) & Shri Sanjay Kumar, Sr. DR

Date of hearing	26.12.2022
Date of pronouncement	24.03.2023

ORDER

PER SAKTIJIT DEY: JUDICIAL MEMBER:

Captioned appeal by the assessee arises out of an order dated 27.03.2019 of learned Commissioner of Income-Tax (International

Taxation-3), New Delhi passed under Section 263 of the Income-Tax Act, 1961 pertaining to assessment year 2014-15.

2. The grounds raised by the assessee are as under:

1. On the facts and in the circumstances of the case and in law, Ld. CIT has erred in invoking the jurisdiction under Section 263 of the Income-Tax Act, 1961 and in holding the assessment order dated 01.12.2016 as erroneous as well prejudicial to the interest of revenue on frivolous grounds.
2. On the facts and in the circumstances of the case and in law, the Order passed under Section 263 of Act by the CIT is void-ab-initio, without jurisdiction and untenable in law.
3. On the facts and in the circumstances of the case and in law, Ld. CIT erred in passing the order under Section 263 of the Act in gross violation of the principles of natural justice.
4. On the facts and in the circumstances of the case and in law, Ld. CIT has erred in directing the Assessing Officer to make enquiries regarding existence of PE which issue was already examined by the Ld. Assessing Officer to his satisfaction in the course of assessment proceedings.
5. On the facts and in the circumstances of the case and in law, Ld. CIT erred in directing the Ld. Assessing Officer to make verification of items contained in Paras (10) to (13) of his order which items were already examined by the Ld. Assessing Officer in the course of regular Assessment Proceedings.
6. On the facts and in the circumstances of the case and in law, the notices issued by Ld. CIT are vague, cryptic and

confusing resulting into roving inquiries which is against the settled law in this regard.

7. Each of the grounds above is to the exclusion of each others.
8. The appellant craves the right to add, amend, alter, modify or substitute any of the grounds at the time of hearing.

3. Briefly, the facts are, the assessee is a non-resident corporate entity incorporated in South-Korea and a tax-resident of South Korea. On 01.10.2012 Delhi Metro Rail Corporation (DMRC) issued a tender notice inviting bids for work of design verification, detail engineering, supply, installation, testing and commissioning of Environmental Control System (ECS) and Tunnel Verification System (TVS) for underground stations of Line 6 and Line 7 of Delhi Mass Rapid Transportation System Project Phase III. The assessee along with its Indian subsidiary viz. Samsung C & T India Pvt. Ltd. (Samsung India) formed a consortium to jointly bid for the work proposed by DMRC. Being successful in the bid, DMRC awarded the work by executing two separate contracts with the consortium partners on 21.10.2013. Contract with the assessee was for offshore CIF supply of plant and equipment to be made in foreign currency, including, design

verification and engineering. Whereas, the contract with Samsung India is for on shore supply and services to be paid in Indian currency including customer clearance, transportation to site, erection, installation, testing and commissioning of ESC and TVS including integrated testing.

4. For the assessment year under dispute, assessee filed its return of income on 28.11.2014 declaring nil income. The reason being, according to the assessee, for offshore supply of plant and equipment having been made outside Indian Territory and transfer of title over goods having taken place overseas outside India no taxable event has happened in India. Hence, the income earned from offshore supply of plant and equipment is not taxable in India. Further, to get a clear picture on taxability of the amount received against offshore supply of plant and equipment, the assessee sought an advance ruling from the Authority for Advance Ruling (AAR) by filing an application on 24.12.2013. Vide order dated 05.10.2015 the AAR admitted the application of the assessee. Be that as it may, during pendency of application before the AAR, the Assessing Officer initiated assessment proceedings under Section 143(3) of the Act by issuing notices under

Section 142(1) and 143(2) seeking/calling for various information and details as well as explanation of the assessee on various issues. In response to the queries raised by the Assessing Officer, the assessee furnished the necessary details as well as submissions from time to time. Ultimately, the Assessing Officer completed the assessment under Section 143(3) of the Act vide order dated 01.12.2016 accepting the income returned by the assessee. Subsequent to the completion of assessment, learned CIT, in exercise of powers conferred under Section 263 of the Act, called for and examined the assessment record and while doing so was of the view that the assessment order is erroneous and prejudicial to the interest of the Revenue as the Assessing Officer has not carried out necessary inquiries and investigation on certain issues. Accordingly, she issued a show-cause-notice, purportedly, under Section 263 of the Act to the assessee seeking response on the following four issues:

- a) Why shouldn't Contract A (Offshore supply) & Contract B (Onshore services) be regarded as one composite contract and assessment be framed accordingly.
- b) That in light of the GSA why shouldn't the presence of business PE be presumed to be in India and the income be brought to tax accordingly.

- c) That why shouldn't the Surety Commission and other such receipts be brought to ax in India.
- d) That why shouldn't Transfer Pricing adjustment be crried out in respect of the transactions with M/s. Samsung C & T India P Ltd. and M/s. Samsung C & T Corporation India P. Ltd.

5. In response to the show-cause-notice, the assessee furnished its reply with supporting details. Further, in course of revisionary proceedings, learned CIT issued couple more notices seeking further clarifications/details from the assessee.

6. After considering the submissions of the assessee, learned CIT opined that assumption of jurisdiction for initiating proceedings under Section 263 of the Act is valid as the assessment order passed is erroneous and prejudicial to the interest of the Revenue due to lack of proper inquiry by the Assessing Officer. In this context, she observed, while completing the assessment, the Assessing Officer has failed to examine the following:

- i) Existence of Permanent Establishment (PE) and the role and involvement of PE in offshore supply of plant and equipment. According to learned CIT, both the contracts relating to offshore supply of plant and equipment and onshore services and supply are interlinked in the sense that

non-execution of one of the contracts will have a direct impact on the other;

- ii). The books of accounts of Samsung India reveal that the Indian subsidiary has been paying salary to assessee's personnel located in India. This is suggestive of the fact that for executing the DMRC Project, the assessee is maintaining a fixed place of business through a project office which constitutes a PE under Article 5 of India-Korea Double Taxation Avoidance Agreement (DTAA). Therefore, profit earned from the project should be attributed to the PE;
- iii) Though, the assessee offered an amount of Rs.39,84,88,792 as FTS and paid tax under Section 115A of the Act, however, from the financial statement by Samsung India with the Ministry of Corporate Affairs available in the website of the Ministry, it was found that the actual receipts of the assessee was to the tune of Rs.41,86,43,064. Thus, there is a difference of Rs.2,01,54,272 between the receipts shown by the assessee in the return of income and actual receipts as per books of accounts of Samsung India;
- iv) The Assessing Officer failed to examine whether the receipts of more than Rs. 4,00,00,000 on account of surety was offered to tax; &
- v) The Assessing Officer failed to examine whether the assessee had any transaction with its Indian AEs and accordingly failed to examine the case from the point of view of transfer pricing issue.

7. Thus, on the aforesaid premises, she ultimately concluded that the assessment order passed is erroneous and prejudicial to the interest of Revenue and accordingly cancelled and set aside the assessment

with a direction to make a proper enquiry on the issue enumerated in the revision order and frame a fresh assessment order.

8. Before us, learned counsel appearing for the assessee submitted, none of the issues on which learned CIT has held the assessment order to be erroneous and prejudicial to the interest of the Revenue are valid issues for invoking jurisdiction under Section 263 of the Act. He submitted, the amount received against offshore supply of plant and equipment cannot be made taxable in India, as, in terms of the contract, the material and equipments were supplied to DMRC from outside India and the sale consideration was paid to the assessee outside India in foreign currency. Thus, he submitted, the sale transaction having completed outside the territory of India, the income is not taxable in India. He submitted, the conclusion drawn by the revisionary authority that two separate and independent contract entered by DMRC for offshore supply of material and equipment and onshore services and supply, installation, commissioning etc. is a composite contract is not based on material on record. He submitted, when the contractee has entered into two separate and distinct contracts, one for offshore supply and the second one for onshore

services, both cannot be clubbed together to consider as a single contract. He submitted, the scope of work under both the contracts is well defined and has to be performed by the concerned entities. Therefore, the offshore supply contract has no link with the contract for onshore services, supply, installation, commissioning etc. He submitted, for getting a clarity on this particular issue, the assessee had filed application seeking a ruling from AAR and the AAR had admitted the application of the assessee.

9. Drawing out attention to section 153(1)(vii), of the Act, he submitted, the Assessing Officer should not have proceeded to complete the assessment as the assessment was not getting barred by limitation in view of exception provided in the aforesaid provision.

10. Proceeding further, he submitted, while commenting upon the application filed by the assessee before AAR, the Assessing Officer in his reply dated 04.03.2014 had observed that the contracts awarded by the DMRC to the consortium is composite contract which has been divided to two contracts with the intention of claiming tax benefit. He submitted, in a further report dated 18.12.2017, the Joint Commissioner of Income Tax with reference to proceedings before

AAR pointed out that despite the pendency of proceedings before AAR, assessment has been completed. He submitted, after receiving the report of the JCIT, the CIT in letter dated 18.12.2017 forwarded the report of the JCIT and also intimated that notice under Section 263 of the Act has been issued to revise the assessment order. Thus, he submitted, when the proceeding was pending before the CIT on the issue of taxability of receipts from offshore supply of plants and equipments, proceedings under Section 263 of the Act could not have been initiated.

11. Without prejudice, learned counsel submitted, in course of assessment proceedings, the Assessing Officer had conducted necessary inquiry with regard to the nature and character of receipts from offshore supply of plants and equipment by calling for copies of contracts, invoices raised and various other details. In this context, he drew our attention to notice dated 13.07.2016 issued under Section 142(1) of the Act. He submitted, in response to the notice issued, the assessee furnished his reply on 12th October, 2016 with all the details called for. He submitted in the reply, the assessee had very clearly and categorically submitted that it is a non-resident company and its entire

control and management is situated outside India. He submitted, after considering the nature of contract, various other details and the submissions of the assessee, the Assessing Officer completed the assessment accepting the claim of the assessee. Thus, he submitted, it cannot be said that the assessment order is erroneous and prejudicial to the interest of the Revenue for non-examination of taxability of amounts received towards offshore supply of plants and equipment having reference to the PE. He submitted, in any case of the matter, taxability of amounts received towards offshore supply of goods/material is a highly debatable issue in view of the decision of the Hon'ble Supreme Court in case of Ishikawajma-Harima Heavy Industries Pvt. Ltd. 288 ITR 408 (S.C) AIR [2007] 929. He submitted, Hon'ble Supreme Court while examining identical nature of dispute has held that offshore supply of plant and equipment, wherein, title over goods was transferred outside India cannot be made taxable in India. He submitted, keeping in view the ratio laid down by the Hon'ble Supreme Court, the view taken by the Assessing Officer can be considered to be a plausible view. He submitted, as regards the issue relating to PE, the assessee has clarified the position in course of

assessment proceedings. He submitted, once it is established that there is no PE of the assessee in India, the offshore supply cannot be linked to any PE. As regards, the allegation of learned CIT that the Assessing Officer has not examined whether the receipts of Rs.4,00,00,000 on account of surety commission were offered to tax or not, learned counsel for the assessee submitted, in reply dated 12.02.2018 to the notice issued under Section 263 of the Act, the assessee had very clearly and categorically submitted that the surety commission amounting to Rs.4,04,15,466 was reported in Form 3CEB as corporate guarantee and offered to tax in the return of income. Thus, he submitted, the allegation of the revisionary authority on the issue is contrary to facts on record. As regards the allegation of learned CIT that the Assessing Officer has not examined whether the transactions with related parties are subject to transfer pricing adjustment, learned counsel submitted that in Form 3CEB report, that transaction with the AE has been reported and there is no transaction with M/s. Samsung C & T Corporation India Pvt. Ltd. during the year. As regards the allegation of the revisionary authority that Indian subsidiary has been paying salary to the personnel of the assessee based in India, learned

counsel submitted, this issue was never put to the assessee either in the show cause notice or in course of hearing. Thus, he submitted, the order passed under Section 263 of the Act on such an issue is without jurisdiction. As regards the allegation of the learned CIT regarding the difference in the receipts offered to tax as FTS and the actual FTS received by the assessee as per the information available in the financial of the subsidiary with the Ministry of Corporate Affairs website, learned counsel submitted, the issue was never confronted to the assessee either in the show cause notice issued under Section 263 of the Act or in course of the revisionary proceedings. Thus, he submitted, powers under Section 263 of the Act having been erroneously exercised,, the revision order should be declared as invalid and the assessment order be restored.

12. Strongly supporting the observations of the learned CIT in the revision order, learned Departmental Representative submitted that even during the pendency of proceeding before AAR, the Assessing Officer can proceed with the assessment and complete assessment, as, the exception provided under Section 245RR applies only to the resident applicant. Proceeding further, She submitted, as per

Explanation 2(a) to section 263 of the Act, the revisionary authority can revise the assessment order, if, he is of the opinion that the order was passed without making inquiry or verification which should have been made. She submitted, while entering into contracts with DMRC, a composite contract has been artificial split to two to derive maximum tax benefit. She submitted, though, the assessee was very much part of execution of both the contracts, since, the contracts are interlinked, the Assessing Officer has not examined the taxability of receipts of offshore supply of equipment by making necessary inquiries and investigation. She submitted, even, whether a PE is in existence or not has not been inquired into by the Assessing Officer by calling for necessary documentary evidences. Thus, she submitted, for not making proper inquiry on these issues, the assessment order is erroneous and prejudicial to the interest of the Revenue.

13. As regards the other issues raised in the revision order, learned Departmental Representative relied upon the observations of the learned CIT.

14. We have considered rival submissions and perused material on record.

15. As discussed earlier, learned CIT has considered the assessment order to be erroneous and prejudicial to the interest of Revenue on four broad issues. However, the major issue relates to non-consideration of taxability of receipts from offshore supply of material/equipment in India having regard to the fact whether they are linked to the PE of the assessee, if any, in India.

16. Learned CIT has observed that the Assessing Officer while completing the assessment has not properly examined and enquired into either the issue of taxability of receipts from offshore supply keeping in perspective the fact that the contracts entered into by DMRC for offshore supply and onshore services in reality is composite contract and secondly, whether the offshore supply can be linked to the PE of the assessee in India. Though, we have discussed the facts earlier, however, at the cost of repetition, we must reiterate that DMRC has executed two distinct and separate contracts with the assessee and a subsidiary in India viz. Samsung C & T India Pvt. Ltd. The contract with the assessee is for offshore supply of plant and equipments. Whereas, the contract with the Indian subsidiary is for onshore services. In so far as the offshore supply contract is

concerned, factually, there is no dispute that the goods have been supplied from outside India and the transfer of title over the goods passed in favour of DMRC outside India. Even, the payments for offshore supply of plant and equipment were made in foreign currency through letter of credits and received by the assessee in Korea. Copies of the invoices, bill of lading and bill of entry demonstrate that goods have been consigned directly to DMRC from Korea. Thus, facts and material on record, prima facie, establish that offshore supply of plants and equipments concluded outside the territory of India. It is observed, the assessee had moved an application before AAR seeking a ruling on taxability of receipts under offshore supply contract. The specific issue admitted by the AAR is whether offshore and onshore services contract can be treated as composite contract. While the issue was pending before AAR, the Assessing Officer proceeded to complete the assessment under Section 143(3) of the Act, though, he was conscious of the fact that the issue relating to taxability of offshore receipts from offshore supply contract is pending before AAR. Probably, the Assessing Officer proceeded to complete the assessment under a misconception that the assessment is getting barred by limitation,

being oblivious to the exception provided under Section 153(1)(vii) of the Act. Be that as it may, the report of the Assessing Officer in response to the application filed by the assessee before AAR is suggestive of the fact that the Assessing Officer was very much aware of the issue relating to taxability of the receipts from offshore supply contract. However, while completing the assessment under Section 143(3) of the Act, the Assessing Officer did not bring to tax the receipts from offshore supply of plants and equipments. This can be for two reasons, firstly, the issue was pending before the AAR and secondly because of the ratio laid down by the Hon'ble Supreme Court in case of Ishikawajima-Harima Heavy Industries Pvt. Ltd. 288 ITR 408 (S.C) and various other decisions following the ratio laid down by the Hon'ble Supreme Court.

17. It is further observed, in course of assessment proceedings, the Assessing Officer had issued a notice under Section 142(1) of the Act seeking the following details/evidences:

1. Copies of Contracts entered into during the relevant period or already in force. Please explain the nature of activities involved under the contracts.

2. Copies of balance sheet and profit and loss account/statement of computation of income as disclosed in the Income Tax Return. Please produce books of accounts maintained by you.
3. Details of gross receipts along with the evidences thereof viz copy of invoices raised and statement thereof.
4. Details of other incomes entered by you.
5. Details of other income earned by you but not offered for taxation by way of any reason. Please state the reason thereof.
6. Copies of order u/s. 195 and 197 of I.T. Act, 1961 issued in your case.
7. Details of expenses involved in execution of articles/works.\
8. Details of mob-demob, reimbursements received by you.
9. Details of payments made to NR's for which no TDS has been made.
10. Details of payments made to NR's (by whatever name called) even in the form of reimbursements related to the projects carried by you in India. Give details of Service Tax payments receipts and explain why the same has not been offered to tax and also why the service tax be not brought to tax.
11. Details of Associated enterprises/subsidiaries in India.
12. Details of work executed by associated enterprises/subsidiaries.

13. Please note that the above details are called for all the payments made by you whether in India or abroad in respect of the contracts/agreements executed by you in India. Details to be filed along with documentary evidence wherever necessary.
18. As could be seen from the aforesaid notice, the Assessing Officer made detailed inquiry by calling for the copies of contract invoices, the nature of work executed under the contract, details of AEs and subsidiaries in India, details of work executed by AEs/subsidiaries.
19. In response to the queries raised by the Assessing Officer, the assessee furnished a detailed reply with supporting evidences. In so far as receipts from offshore supply contract, the assessee specifically submitted that the transfer of goods having taken place outside the territory of India, receipts are not taxable. Thus, the allegation of learned CIT that the Assessing Officer has not examined the issue is not borne out from the facts and material on record. In any case of the matter, whether the receipts from offshore supply contract are taxable in India or contracts are in the nature of composite contract or whether such receipts are linked to the PE are highly debatable issues which cannot be considered for exercising jurisdiction under Section 263 of

the Act. Even, on the issue of existence or otherwise of PE in India, not only before the Assessing Officer, but, in reply to the notice issued under Section 263 of the Act, the assessee had categorically submitted that it has no PE in India. Except making vague allegation that the assessee has a project office in India which is in the nature of PE, learned CIT has not demonstrated how it fits into the definition of PE as per the treaty. Even assuming that there is a PE, unless, the offshore supplies made are with active involvement of the PE, profit in relation to such contract cannot be attributed to the PE. Therefore, merely on conjecture, surmises and suspicion, PE cannot be established.

20. In so far as the issue of taxability of surety commission is concerned, facts on record clearly establish that the assessee had offered the surety commission to tax in the return of income. Therefore, the allegation of learned CIT in this regard is completely unfounded. In so far as the allegation made regarding non-examination of transaction with Indian subsidiary from the point of view of transfer pricing, it is observed that in the year under consideration, the assessee has reported the transaction with Indian AEs in Form 3CEB. In the said report, the assessee has claimed the

transaction to be at arm's length. Learned CIT has not demonstrated even remotely how the transactions are not at arm's length. From the following observations of learned CIT in paragraph 13 of the order, "it is further observed from the record that there was possibility of the assessee of having transaction with its AEs", it appears that learned CIT was totally oblivious of the fact that the assessee has furnished report in Form 3CEB reporting the transaction with the AEs. Therefore, the observations of learned CIT are in the nature of roving and fishing inquiry without examining the facts and material on record. In so far as the allegation of learned CIT that there is difference in the quantum of FTS offered to tax by the assessee and actually received and further that the Indian subsidiary M/s. Samsung C & T India Pvt. Ltd. was paying salary to the personnel of the assessee based in India, it is observed, these allegations were neither made in the first show cause notice issued under Section 263 of the Act dated 11.12.2017 nor they are part of subsequent notices issued by the learned CIT on 31.01.2019 and 12.02.2019. Though, learned CIT is empowered to consider fresh issues in course of proceedings under Section 263 of the Act, even, if they are not part of the show cause

notice issued under Section 263 of the Act, however, it is trite law, learned CIT has to issue fresh show cause notice to the assessee confronting the fresh issues on which the revisionary authority seeks to revise the assessment order. This is not the case in the present appeal.

21. It is also relevant to observe, at the time of exercise of jurisdiction under Section 263 of the Act on the date of issuance of show cause notice i.e. on 11.12.2017, admittedly, proceedings before AAR was pending on the issue of taxability of receipts from offshore supply contract. That being the case, learned CIT being conscious of the fact that proceeding is pending before AAR should not have initiated proceedings under Section 263 of the Act as two parallel proceedings on the same issue, cannot be initiated at a given point of time.

22. Thus, on overall analysis of facts and material on record and in view of discussion made in the foregoing paragraphs, we are inclined to conclude that the assessment order passed cannot be held to be erroneous and prejudicial to the interest of the Revenue in the given facts and circumstances of the case. Therefore, exercise of powers

under Section 263 of the Act in the facts of the present appeal is invalid. Therefore, we are inclined to set aside the impugned order passed under Section 263 of the Act and restore the assessment order.

23. In the result, the appeal is allowed as indicated above.

Order pronounced in the open court on 24th March, 2023.

Sd/-
(G.S. PANNU)
PRESIDENT

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Dated: 24th March, 2023.

Mohan Lal

Copy forwarded to:

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

Asst. Registrar, ITAT, New Delhi