

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

**BEFORE SHRI G.S. PANNU, HON'BLE PRESIDENT
AND
SHRI SAKTIJIT DEY, VICE PRESIDENT**

ITA No.2033/Del/2022
Assessment Year: 2019-20
With
ITA No.2034/Del/2022
Assessment Year: 2018-19

GE Energy Parts Inc., C/o-Plot No. 1-14, Tower 5, Jaypee Wishtown, Sector 128, Noida	Vs.	ACIT, Circle 1(13)(1), International Taxation, New Delhi
PAN :AACCG2798N		
(Appellant)		(Respondent)

With
ITA No.2035/Del/2022
Assessment Year: 2019-20
With
ITA No.2036/Del/2022
Assessment Year: 2018-19

GE Global Parts & Products GMBH, Plot No. 1-14, Tower 5, Jaypee Wishtown, Sector 128, Noida	Vs.	ACIT, Circle 1(3)(1), International Taxation, New Delhi
PAN :AAGCG3668K		
(Appellant)		(Respondent)

Assessee by	Sh. Sachit Jolly, Advocate Ms. Disha Jham, Advocate
Department by	Sh. Vizay B. Vasanta, CIT(DR)

Date of hearing	25.07.2023
Date of pronouncement	25.07.2023

ORDER

Captioned appeals have been filed by two different assesseees challenging the final assessment orders passed under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (in short 'the Act') for the assessment years 2018-19 and 2019-20, in pursuance to the directions of learned Dispute Resolution Panel (DRP).

2. Since the issues arising in these appeals are more or less common, for the sake of convenience, the appeals have been clubbed together and disposed of in a consolidated order. Though, multiple issues have been raised in these appeals, however, the major controversy is with regard to existence or otherwise of a Permanent Establishment (PE) in India. Once this controversy gets resolved, other issues may either become academic or redundant. Therefore, at the outset, we proceed to address the issue whether the assesseees had PE in India in the assessment years under dispute.

3. The brief facts of the case are, the assesseees, hitherto, are non-resident corporate entities. The first named assessee is a tax resident of USA. Whereas, the second named assessee is a tax resident of Switzerland. As stated by the Assessing Officer, both

the assessees are engaged in the business of offshore supply of plants, equipments, spare parts and related offshore services to customers in India in relation to maintenance of power plants. While dealing with identical nature of transactions in past assessment years, notably, assessment years 2002-03 to 2006-07 and 2008-09, the Assessing Officer held that the assessee had a PE in India in the form of premises of General Electrical International Operation Company (GEIOC) taken on lease at AIFACS building, 1 Rafi Marg, New Delhi, wherefrom, the assessees carried on solicitation of orders and conclusion of contract by deputing expatriate employees. It was further held that remuneration paid to the Indian AE, viz., GE India Industrial Pvt. Ltd. (GEIPL) was only cost + 5%. The decision taken by the Assessing Officer in the aforesaid assessment years, though, were contested by the assessees upto the Hon'ble High Court, however, they failed. Relying upon the decision taken in the assessment years 2002-03 to 2006-07 and 2008-09, the Assessing Officer went on completing assessments for the subsequent assessment years till assessment year 2017-18 and the decision taken by the Assessing Officer was upheld by the higher appellate authorities, including the Tribunal. Based on the past assessment history, the

Assessing Officer, while completing the assessments for the impugned assessment years, held that the assessee had a PE in India and accordingly attributed profit from offshore supply and services to the alleged PE. However, it was the case of the assessee before the Assessing Officer as well as before learned DRP that the factual position in the assessment years under consideration have substantially changed due to the following reasons:

- i. AIFACS building had been vacated by GEIOC on 01.05.2012;
- ii. No expatriate employee was present in India in these assessment years; and
- iii. The remuneration paid to GEIPL had increased substantially from cost + 5% to cost + 25%.

3. Be that as it may, the aforesaid contention of the assessee did find favour with the departmental authorities. Thus, in pursuance to the direction of learned DRP, the draft assessment orders were finalized in terms of section 143(3) read with section 144C(13) of the Act.

4. Before us, learned counsel appearing for the assessee reiterated the stand taken before the departmental authorities

and submitted that the issue is squarely covered by a decision of the Coordinate Bench in case of another assessee having identical nature of dispute. In this context, he drew our attention to order dated 13.06.2023 passed in ITA No.999/Del/2022 in case of Nuovo Pignone International SRL Vs. DCIT.

5. Learned CIT(DR), though, fairly agreed that the issue relating to existence or otherwise of PE is covered by the decision of the Tribunal as cited by learned counsel for the assessee, however, he relied upon the observations of Assessing Officer and learned DRP.

6. We have considered rival submissions and perused the materials on record. As discussed earlier, the short issue arising for consideration is whether the assessees had PE in India during the assessment years under consideration? From the facts and materials on record, it is observed, not only before the Assessing Officer, but even before learned DRP, the assessees have vehemently urged that since the factual position in the impugned assessment years have substantially changed, the decision taken in past assessment years cannot be followed blindly. It was the case of assessees before the departmental authorities that as per the facts of the impugned assessment years, the assessees had no

PE in India as the AIFACS building considered as the PE of the assessee was vacated by GEIOC on 01.05.2012. It was pleaded by the assessee that in these years, no expatriates have visited in India. As it appears, the departmental authorities have turned a blind eye to all the submissions and facts brought on record by the assessee. Merely following the decision taken by the appellate authorities and Hon'ble High Court in past assessment years, the departmental authorities have concluded the existence of PE without looking into or examining the facts and evidences brought on record, which are very much relevant for deciding the existence of PE in the impugned assessment years. It is observed, while deciding identical issue in case of Nuovo Pignone International SRL Vs. DCIT (supra) involving identical facts, the Coordinate Bench has held as under:

“10. We have considered rival submissions and perused materials on record. We have also applied our mind to the judicial precedents cited before us. The short issue arising for consideration is whether the assessee had a PE, either fixed place PE or dependent agent PE, in India during the year under consideration. No doubt, the past assessment history of the assessee reveals that existence of PE in India was upheld by the Tribunal and Hon'ble jurisdictional High Court in assessment years 2002-03 to 2006-07 and 2008-09. Perusal of facts on record including the discussion made by the Assessing Officer and learned DRP would reveal that the reason why the existence of PE was upheld in earlier assessment years are as under:

(i) The assessee has an office premises at AIFACS building;

- (ii) *Expatriates along with employees of GEIPL have engaged themselves in the activities of soliciting business and concluding contracts.*
- (iii) *Remuneration paid to GEIPL was at arm's length.*

11. *However, as far as the facts relating to impugned assessment year are concerned, AIFACS building, which earlier constituted the fixed place PE of the assessee in India, was vacated on 01.05.2012. In fact, this was brought to the notice of both the Assessing Officer and learned DRP in course of proceedings before them. In fact, on 29th May, 2018, the assessee has furnished annual statement u/s. 285 of the Act in Form 49C for the financial year 2017-18, clearly indicating that since no activity was undertaken by the liaison office, the Management does not intend to continue the liaison office and is to file for closure of the liaison office. Thus, the fact that AIFACS building has been vacated, no expatriates visited India during the year and the liaison office has been closed were brought to the notice of the departmental authorities in course of proceedings to demonstrate that the reasons for which the departmental authorities as well as the Tribunal and Hon'ble jurisdictional High Court held existence of PE, no longer exists in the impugned assessment year.*

12. *This is clearly evident from the submissions made and documents filed before the departmental authorities. Despite such submissions and evidences produced by the assessee, the departmental authorities have remained oblivious to such facts and materials brought on record and proceeded to conclude existence of PE merely relying upon the past orders passed by them and higher appellate authorities. It is trite law, the existence or otherwise of PE has to be determined on year to year basis, as the existence of PE has to be decided based on the definition of PE in the relevant tax treaty. Merely because in one year, the assessee had a PE in India, that by itself cannot lead to the conclusion that the assessee must be having a PE in subsequent assessment year, without looking into the relevant facts. In this context, we refer to the decision in the case of M/s. Bentley Nevada Inc. (supra). Further, in case of E-Funds IT Solution Inc. (supra), Hon'ble Supreme Court has very clearly and categorically held that the onus is entirely on the Revenue to establish existence of PE.*

13. *Adverting to the facts of the present appeal, undisputedly, the assessee brought on record all material and evidences to establish that it does not have any PE in India. As it appears from the respective orders of the departmental authorities, without dealing with the submissions of the assessee and evidences brought on record through proper reasoning or by bringing any contrary material to controvert them, the departmental authorities have merely followed their earlier decision without making any effort to look into the specific facts of the impugned assessment year. As discussed earlier, the assessee has brought on record cogent evidence to demonstrate that there is substantial change in facts in*

impugned assessment year qua the existence of PE. The specific averment of the assessee regarding vacation of office premises at AIFACS building and no visit by expatriates in India during the year, have not been controverted by the departmental authorities by any specific factual finding. In case of Blackstone Capital Partners (Singapore) VI FDI Three Pte. Ltd. (supra), Hon'ble jurisdictional High Court, while dealing with the issue of reopening of assessment based on information received from third party, observed, though such information can form basis for an examination/investigation by the Assessing Officer, but the decision to reopen the assessment has to be of the Assessing Officer and not of the third party. The Assessing Officer cannot merely do a cut and paste job for reopening the assessment without independent application of mind or verification or investigation. The aforesaid ratio laid down by Hon'ble jurisdictional High court squarely applies to the facts of the present appeal, as the departmental authorities have merely followed the decision taken by them and higher appellate authorities in assessee's cases in past assessment years without independent application of mind to the facts brought on record by the assessee or making proper verification/investigation of the evidences.

14. Thus, essentially, the evidences brought on record by the assessee remain uncontroverted. When the evidences brought on record by the assessee are before the departmental authorities, it is the duty of the departmental authorities to examine them on merits and thereafter, either to accept them or to reject them with proper reasoning by bringing on record contrary material/evidence. In the facts of the present appeal, the departmental authorities have failed to undertake such exercise. Therefore, in our view, it has to be concluded that the departmental authorities have not found anything amiss or adverse in the facts and material brought on record by the assessee. In such a scenario, we do not find any reason to again remit the matter back to the Assessing Officer to provide him a second inning to improve upon the deficiencies in the original assessment order. In view of the aforesaid, we are inclined to hold that keeping in view the facts and materials peculiar to the impugned assessment year, it has to be concluded that the assessee did not have any PE, either fixed place PE or dependent agent PE, in India in the year under consideration. We again reiterate, our aforesaid conclusion is purely based on the facts involved in the impugned assessment year.”

7. Akin to the case referred to above, in the facts of the present appeals also, the departmental authorities have failed to controvert either the submission or the materials and evidences

brought on record by the assesseees to demonstrate that they did not have any PE in India in these assessment years. In fact, even at the stage of Tribunal, no contrary material has been brought on record by the Revenue to rebut the claim of the assesseees that no PE existed in these years.

8. That being the factual position emerging on record, we hold that the decision taken in case of Nuovo Pignone International SRL Vs. DCIT (supra) would squarely apply to the facts of the present appeals. Accordingly, we hold that the assesseees did not have any PE in India in the assessment years under dispute so as to attribute profit to such PE.

9. In view of our aforesaid decision, all other issues raised in the appeal, being of pure academic interest, do not require adjudication.

10. In the result, all the appeals are partly allowed, as indicated above.

Order pronounced in the open court on 25th July, 2023

Sd/-
(G.S. PANNU)
PRESIDENT

Sd/-
(SAKTIJIT DEY)
VICE PRESIDENT

Dated: 25th July, 2023.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent

3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi