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

BEFORE SHRI G.S. PANNU, VICE-PRESIDENT
AND
SHRI SAKTIJIT DEY, VICE-PRESIDENT

ITA No.7926/Del/2018
Assessment Year: 2005-06
With
ITA No.7927/Del/2018
Assessment Year: 2006-07
With
ITA No.7928/Del/2018
Assessment Year: 2007-08
With
ITA No.7929/Del/2018
Assessment Year: 2008-09
With
ITA No.7930/Del/2018
Assessment Year: 2009-10
With
ITA No.7931/Del/2018
Assessment Year: 2010-11
With
ITA No.7932/Del/2018
Assessment Year: 2011-12

M/s. LG Electronics India Ltd., Plot No.51, Udyog Vihar, Surajpur Industrial Area, Greater Noida (UP)	**Vs.**	ITO (TDS), International Taxation, Noida
PAN :AAACL1745Q		
(Appellant)		**(Respondent)**

Assessee by	Sh. Deepak Chopra, Adv. Sh. Ankul Goel, Adv.
Department by	Sh. Virendra Singh, Sr. DR Sh. Sanjay Kumar, Sr. DR

Date of hearing	25.08.2023
Date of pronouncement	21.11.2023

ORDER

Captioned appeals by the assessee arise out of a common order dated 04.09.2018 of learned Commissioner of Income Tax (Appeals)-43, New Delhi, which in turn, arises out of orders passed under section 201(1)/201(1A) of the Income-tax Act, 1961 (in short 'the Act') pertaining to assessment years 2005-06, 2006-07, 2007-08, 2008-09, 2009-10, 2010-11 and 2011-12. Since, facts and issues in all the appeals are more or less common, we propose to deal with the facts involved in appeal for assessment year 2005-06 for the sake of brevity.

2. Ground no. 1 is general ground, hence, does not required specific adjudication.

3. In ground nos. 2 and 3, the assessee has challenged the orders passed under section 201(1)/201(1A) of the Act as invalid, being barred by limitation. Whereas, ground nos. 4, 5 and 6 are on merits.

4. At the outset, we propose to deal with the legal issue raised by the assessee, challenging the validity of the orders passed under section 201(1)/201(1A) of the Act. Briefly the fact are, the assessee is a resident corporate entity stated to be engaged in trading,

assembly, manufacturing, marketing and sales of electronics and home appliances. As stated, the assessee is a wholly owned subsidiary of L.G. Electronics, Korea. A survey operation under section 133A of the Act was conducted in the business premises of the assessee on 24.06.2010 to verify the compliance with Tax Deducted at Source (TDS) provision. In course of survey operation, certain papers and documents were impounded. Based on statements recorded from certain expatriate employees, the Assessing Officer formed a belief that the parent company in Korea i.e. LG Korea and other associated companies had a business connection and Permanent Establishment (PE) in India. Hence, the income derived by the parent company and other group entities is taxable as business income in India. Therefore, the assessee was liable to deduct tax at source in terms of section 195(1) of the Act while making payments to them. Since, the assessee had not deducted tax at source on such payments, the Assessing Officer initiated proceedings under section 201 of the Act, and thereafter, holding the assessee as an assessee in default for not deducting tax at source, passed order under section 201(1)/201(1A) of the Act for assessment years 2005-06 to 2010-11 on 31.03.2011 raising demands against the assessee. Against the orders so passed, the

assessee preferred Writ Applications before the Hon'ble Allahabad High Court. While disposing of the said Writ Applications, the Hon'ble High Court set aside the orders passed by the Assessing Officer, by holding them to have been passed in violation of Rules of Natural Justice. The Hon'ble High Court further directed that the Assessing Officer may issue fresh show-cause notice to the assessee and decide the issue after providing all the materials to the assessee.

5. In pursuance to the directions of the Hon'ble High Court, the Assessing Officer issued fresh show-cause notices under section 201 on 12.07.2011, to which the assessee submitted its reply on 17.08.2011. Thereafter, as it appears, no further steps were taken by the Assessing Officer. Again after almost four years, the Assessing officer issued another show-cause notice on 09.01.2015. In response to the show-cause notice, the assessee filed a detailed reply objecting to the initiation of proceedings, firstly as being barred by limitation and thereafter on various other grounds, including merits. The objections of the assessee, however, did not find favour with the Assessing Officer and ultimately he passed orders under section 201(1)/201(1A) of the Act for assessment years 2005-06 to 2010-11, holding the assessee as an assessee in default

and raised demands. For assessment years 2011-12, he passed an order under section 201(1)/201(1A) on 18.06.2015. The aggregate demand raised by him in respect of assessment years 2005-06 to 2011-12 was to the tune of Rs. 103,36,73,824/-.

6. Against the orders passed under section 201(1)(201)(1A) of the Act, the assessee preferred appeals before learned first appellate authority, inter alia, on the ground that the orders passed under section 201(1)/201(1A) are barred by limitation, the payments made to the parent company is not taxable in India, assuming that the parent company has a PE in India, since, the transactions between the parent company and the Associated Enterprise (AE) in India were found by the TPO to be at arm's length, no further profit can be attributed to the PE etc. Further, relying upon the decision taken by learned DRP in case of LG Korea and other non-resident companies, assessee submitted that attribution of profit to the PE can be made only to the extent of 20% markup on 50% of the salary paid to the expatriate employees.

7. Learned first appellate authority rejected all the contentions of the assessee, except the submission made with regard to attribution of profit to the PE only to the extent of 20% markup over 50% of the salary paid to expatriate employees. As a result of the directions of

learned first appellate authority, the demand raised for assessment years 2005-06 to 2011-12 under section 201(1)/201(1A) was reduced to Rs. 12,36,44,260/-, while giving effect to the directions of learned first appellate authority.

8. Before us, learned counsel appearing for the assessee, at the very outset, submitted that he has not challenged the issue of limitation in respect of initiation of proceedings under section 201 of the Act, but qua completion of proceedings under section 201 of the Act. He submitted, since, the provision under section 201 does not provide any time limit for passing the order, once proceedings have been initiated order has to be passed in terms of section 153(2) of the Act, which is within one year from the end of the financial year, in which such proceeding was initiated. He submitted, in the facts of the present appeals particularly for assessment years 2005-06 to 2010-11, after the initial orders were set aside by Hon'ble Allahabad High Court, the Assessing Officer initiated proceedings on 12.07.2011. Therefore, he had time limit in terms of section 153(2) of the Act to pass the orders on or before 31.03.2012. Whereas, he has actually passed the orders on 24.02.2015. In support of such contention, he relied upon the decision of ITAT, Special Bench, in case of *Mahindra & Mahindra Ltd. Vs. DCIT [2009] 30 SOT 374*

(Mumbai)(SB). He submitted, the aforesaid decision of the Special Bench has been upheld by the Hon'ble Jurisdictional High Court in case of *DIT Vs. Mahindra & Mahindra [2014] 48 taxmann.com 150 (Bombay).* Thus, he submitted, the issue is squarely covered by the decision of the Special Bench and Hon'ble Bombay High Court.

9. In reply, learned Departmental Representative (DR) submitted that, since, section 201 does not prescribe any time limit for passing the order, no such time limit can be read into the provision. In support, he relied upon the decision of the Hon'ble Allahabad High Court in case of *Mass Awas Pvt. Ltd. Vs. CIT (decision dated 10.07.2017 in Misc. Bench No.1088 of 2016).*

10. In rejoinder, learned counsel appearing for the assessee submitted that the decision cited by learned DR is, not at all, applicable, as, it is only on the issue of time limit for initiation of proceedings and not passing of the orders.

11. As far as merits of the issue is concerned, learned counsel submitted, though, the Assessing Officer has passed the orders under section 201(1)/201(1A) by computing the TDS default on the payments made to the parent company and other overseas AEs, however, the CIT(A) has changed the manner of attribution of profit to PE by restricting it to 20% markup over 50% of the salary of the

expatriate employees. He submitted, since, the assessee has not made any payment to the parent company in respect of salary of expatriate employees, the provisions of section 195 cannot be attracted. Thus, he submitted, the assessee cannot be deemed to be an assessee in default in absence of any payment made to the parent company. He submitted, the attribution of profit to the PE as computed by the Assessing Officer is purely on notional basis, based on the directions of DRP in case of the parent company, to whom the payment has been made. He submitted, the attribution of profit to the PE has not been made on account of payments towards goods purchased, but based on mechanism of allocation of cost of expatriates and thereafter applying a markup of 20%. He submitted, since, such attribution has been made on notional basis and not based on any actual payment, the assessee cannot be deemed to be an assessee in default for not withholding tax. Finally, he submitted, in case of parent company, assessments for assessment years 2005-06 to 2010-11 have been quashed by the Tribunal for non-implementation of directions of learned DRP and for assessment year 2011-12, no assessment has been made. Thus, he submitted, when the parent company has no tax liability to be

discharged in India, the assessee cannot be deemed to be an assessee in default for not withholding tax at source.

12. The learned Departmental Representative strongly relied upon the observations of the Assessing Officer and learned Commissioner (Appeals).

13. We have considered rival submissions and perused the materials on record. We have also applied our mind to the decisions cited before us. At the outset, we deem it appropriate to address the issue on merits. Facts on record reveal that in the assessment years under dispute, the assessee had entered into various international transactions with LG Korea and other associated non-resident companies for the purchase of raw materials, finished goods, capital goods etc.

14. While concluding the proceedings under section 201(1)/201(1A) of the Act, the Assessing Officer held that the payments made by the assessee towards purchase of raw-materials, finished goods, capital goods to LG Korea and other non-resident associated companies, are taxable in India, as, all those entities have PE in India. Therefore, the assessee was liable to deduct tax at source under section 195 of the Act. Accordingly, he proceeded to treat the assessee as an assessee in default and by considering the

payments made by the assessee to LG Korea and other non-resident group entities towards purchase of raw materials, finished goods, capital goods etc., computed the default of the assessee and raised demands under section 201(1)/201(1A) of the Act.

15. It will be relevant to observe, simultaneously with the proceedings under section 201(1)/201(1A) of the Act against the assessee, assessment proceedings in case of LG Korea and other non-resident group entities were also taken up and assessment orders were passed holding that LG Korea and other non-resident group entities had PE in India. Accordingly, the Assessing Officer completed assessments by attributing profit to the PE in respect of payments made towards purchase of raw materials, finished goods, capital goods etc. When the dispute reached DRP, it was held that, except LG Korea, no other non-resident group entities had any PE in India. Even, in respect of LG Korea, the DRP directed that the income attributable to the PE has to be determined by taking a portion of the salary cost of expatriate employees and applying an appropriate mark-up. Accordingly, as per direction of the DRP, profits from 20% markup on 50% salary cost of the expatriate employees were attributed to the PE of LG Korea. Basis the aforesaid directions of learned DRP, learned Commissioner

(Appeals), while deciding assessee's appeals against orders passed, held that assessee's TDS default has to be determined on the basis of income computed on a cost plus basis 20% on the payments made as salaries attributed to India operatiors.

16. Thus, from the aforesaid facts it becomes absolutely clear that while passing orders under section 201(1)/201(1A) of the Act, the basis for computation of TDS default was payment to LG Korea and other non-resident group entities towards purchase of raw materials, capital goods, spare parts etc. However, subsequently, the position changed substantially as in case of payee entities the DRP held that only LG Korea had PE and no other non-resident group entities had any PE in India. Even, the method of attribution of profit to the PE of LG Korea was changed from payment made towards purchase of raw material, finished goods, spare parts etc. to a notional payment of 20% mark-up on 50% salary cost of expatriate employees. As a result of the change in manner of attribution of profit to the PE by learned first appellate authority the demand raised by the Assessing Officer got substantially reduced from more than 100 crores to 12,36,44,260/-.

17. Thus, as could be seen from the aforesaid facts, the basis of attribution of profit to the payee, LG Korea is purely notional as it is

the specific case of the assessee that it has not paid any salary cost of expatriate employees to LG Korea. It is the case of the assessee that on the salary cost paid to the expatriate employees, the assessee has deducted tax at source under section 192 of the Act. The aforesaid claim of the assessee remains uncontroverted. Thus, when the assessee has not made any direct payment to the LG Korea towards the salary cost of expatriate employees, in our view, there was no liability on the assessee to deduct tax on such notional payment. Moreso, when the assessee has already deducted tax under section 192 of the Act in respect of salary cost of expatriate employees. Thus, when the basis of attribution of profit to the PE is a notional income, that too, based on a methodology adopted by DRP in case of payee, the assessee cannot be expected to perform an impossible act of computing TDS on a notional payment, a part of which, is to be attributed towards profit of PE of LG Korea.

18. In a case of similar nature, the Hon'ble Delhi High Court in case of Samsung India Electronics Pvt. Ltd. Vs. DCIT [2014] 364 ITR 103 (Del), has held as under:

> *"10. The key to the decision is the answer to the question whether any income arose or accrued to SEC through its PE in India in respect of the sales made in India. If the answer is in the affirmative, both the notices*

would be good notices; if the answer is in the negative, both the notices would be bad. The answer in our opinion should be in the negative, because even as per the revenue, as reflected in the order passed by the DRP in the reassessment proceedings of SEC, no income accrued to SEC in India. In this regard, the DRP rejected the specific request made by that assessing officer in his remand report that the petitioner be treated as the permanent establishment (PE) of SEC and the income of SEC be computed on that basis. The DRP however held that as regards attribution of income to the "fixed place PE", a rough and ready basis would be to estimate 10% of the salary paid to the expat-employees of the petitioner as the mark-up, as was done by the assessing officer in the draft assessment order. The remuneration cost in respect of such employees seconded to the petitioner amounted to Rs. 10,72,24,310; this was taken as the base and a mark-up of 10% had been applied by the assessing officer and the income was taken as Rs.1,07,22,431/-. This was approved by the DRP in its order dated 29-9-2012; the other claims made by the assessing officer in the remand report were rejected.

11. Thus the basis of both the notices (section 148 and 201) has been knocked out of existence by the DRP's order in the reassessment proceedings of SEC for the same assessment year. On the date on which notices were issued to the petitioner under Sections 148 and 201(1)/(1A), there was an uncontested finding by the revenue authorities (i.e., the DRP) in the case of SEC that SEC cannot be taxed in respect of the sales made in India through the petitioner on the footing that the petitioner is its PE. If no income arose to SEC on account of sales in India since the petitioner cannot be held to be its PE in India, two consequences follow:

(i) the payments made by the petitioner to SEC for the goods are not tax deductible under section 195(2) and hence they were rightly allowed as deduction in the original assessment of the petitioner and (ii) the assessee cannot be treated as one in default under section 201(1) and no interest can be charged under section 201(1A). It needs mention here that the notice under section 201 is a verbatim reproduction of the remand report of the assessing officer in SEC's case filed before the DRP."

19. The ratio laid down in the aforesaid decision of the jurisdictional High Court clearly applies to the present appeals. Thus, in our view, in the peculiar facts and circumstances of the present appeals, the assessee cannot be treated as an assessee in default in terms of section 201(1)/201(1A) of the Act. At this stage,

we must observe, against the final assessment orders passed in case of payee, viz., LG Korea, appeals were preferred before the Tribunal. While deciding the appeals, in case of LG Korea, the Tribunal in ITA No. 4559/Del/2018 and others dated 07.02.2022, has quashed the final assessment orders for non-implementation of directions of learned DRP. At the time of hearing, learned counsel for the assessee has made a statement at bar that owing to low tax effect, Revenue has not filed any appeal for assessment years 2005-06 to 2010-11 and for assessment year 2011-12 no separate assessment was framed in case of LG Korea. Thus, the factual position as on date is, there is no tax liability on the payee, viz., LG Korea in the impugned assessment years. Thus, on overall consideration of facts and materials on record, we hold that, there being no obligation of the assessee to withhold tax under section 195 of the Act, the assessee cannot be treated as an assessee in default under section 201 of the Act. Therefore, we direct the Assessing Officer to delete the demands raised under section 201(1)/201(1A) of the Act for the impugned assessment years.

20. In view of our decision on merits, the grounds raised by the assessee on validity of the orders passed u/s 201(1)/201(1A), being

barred by limitation, has become academic, hence, not required to be adjudicated upon.

21. In the result, appeals are allowed, as indicated above.

Order pronounced in the open court on 21st November, 2023

Sd/-	***Sd/-***
(G.S. PANNU)	**(SAKTIJIT DEY)**
VICE-PRESIDENT	**VICE-PRESIDENT**

Dated: 21st November, 2023.
RK/-
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi