

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

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

**ITA No.3199/Del/2023
[Assessment Year: 2021-22]**

GE Energy Parts Inc., Wildwood Parkway Atlanat GA US, C/o- Plot No.1-14, Tower-5, Jaypee Wishtown, Sector 128, Noida-201304 PAN-AACCG2798N	Vs	Assistant Commissioner of Income Tax, (International Taxation) Circle-1(3)(1), Floor, E-2 Block, Pratyakshkar Bhawan, Civic Centre, New Delhi-110002
Assessee		Revenue

Assessee by	Shri Ravi Sharma, Adv.
Revenue by	Shri Vijay B. Vasanta, CIT-DR

Date of Hearing	12.02.2024
Date of Pronouncement	15.02.2024

ORDER

PER SHAMIM YAHYA, AM,

This appeal by the assessee is directed against the order of the Assessing Officer dated 11.09.2023 passed u/s 143(3)/144C(13) of the Income Tax Act, 1961 (hereinafter 'the Act') arising out of order of Dispute Resolution Panel (in short 'DRP') dated 08.08.2023 pertaining to Assessment Year 2021-22.

2. The grounds of appeal reads as under:-

Grounds relating to the tenability of the impugned final assessment order.

1. On the facts and circumstances of the case & in law, the Final Assessment Order dated September 11, 2023 ("Impugned Order") passed by the Learned Assistant Commissioner of Income-Tax Circle-1(3)(1), International Taxation, Delhi ("Ld. AO") under section 143(3) read with section 144C of the Income tax Act, 1961 ("Act") pursuant to

the directions issued by the Learned Dispute Resolution Panel ("Ld. DRP") is bad in law and liable to be quashed.

2. On the facts and circumstances of the case & in law, the Impugned Order, giving effect to the directions of the Hon'ble DRP dated August 8, 2023 is bad in law and barred by limitation in view of the provisions of Section 153 of the Act.

Grounds relating to the taxability of Appellant in India under the Act and the Tax Treaty.

3. On the facts and circumstances of the case & in law, the Ld. AO/ DRP grossly erred in holding that the receipts from offshore supply of parts is taxable in India both under section 9(1)(i) of the Act and Article 5 read with Article 7 of India-USA Double Taxation Avoidance Agreement ("Tax Treaty").

4. On the facts and circumstances of the case & in law, Ld. AO/ DRP erred in holding that the Appellant has a business connection in India under section 9(1)(i) of the Act without appreciating that the Appellant is governed by the beneficial provisions of DTAA in view of section 90 of the Act.

5. On the facts and circumstances of the case & in law, the Ld. AO/ DRP erred in holding that contracts entered by the Appellant with the Indian customers are a part of a composite contract which have been artificially split into separate and independent contracts in order to avoid taxation in India. In doing so,

(a) the Ld. AO/ DRP erred in holding that since the Appellant already has a Permanent Establishment

('PE') in India, the offshore supply of spare parts being part of a composite contract would also form part of PE; and

(b) the Ld. AO/ DRP erred in relying on information from open domain enquiry without confirming the veracity of such information and accordingly violating the sound principles of jurisprudence.

6. On the facts and circumstances of the case & in law, the Ld. AO/ DRP holding that the Appellant has a business connection as well as PE in India by mechanically placing reliance on the AY 2020-21 without bringing on record any corroborative evidence to substantiate the findings of PE in the case of the Appellant for the relevant AY,

Grounds relating to attribution of income.

7. On the facts and circumstances of the case & in law, the Ld. AO/ DRP grossly erred in taxing 10% of the receipts from

offshore supply of spare parts to India by mechanically relying on the order passed for AY 2020-21. In doing so,

(a) the Ld. AO/ DRP erred in not appreciating the fact that the impugned receipts are neither taxable in India under the provisions of the Act or the Tax Treaty

(b) the Ld. AO / DRP erred in ignoring that no functions are performed by the Appellant in India towards the offshore supply of goods, whilst determining the attribution rate for the revenue earned by the Appellant from such supplies.

(c) the Ld. AO/ DRP erred in placing reliance on the provisions of section 44BBB of the Act for computing the taxability of revenue earned towards offshore supply; which is only applicable on revenue earned towards civil construction, erection, testing or commissioning activities.

8. Without prejudice to above,

(a) the Ld. AO/ DRP, erred in attributing 100% of deemed profits from offshore supply transactions to alleged PE / business connection in India without considering the apportionment principle and further, did not allow any deduction for compensation paid to the Indian affiliate of the Appellant, in respect of marketing and sales support provided to the Appellant.

(b) the Ld. AO erred in not following the directions of the Ld. DRP and incorrectly computed the total receipts from offshore supply for the concerned year as INR 1,24,96,28,023, in place of INR 1,18,26,08,690.

(c) the Ld. AO/ DRP erred in changing the attribution rate as compared to the earlier assessment years and accordingly grossly erred in violating the principles of Article 7(5) of Tax Treaty.

Other grounds.

9. On the facts and circumstances of the case & in law, the Ld. AO has erred in determining the tax payable by the Appellant as INR 6,79,49,370 without providing any computation.

10. That on the facts of the case and in law, the Ld. AO erred in levying interest under section 234A and 244B of the Act.

11. That on the facts of the case and in law, the Ld. AO erred in initiating penalty under section 270A of the Act.

That the above grounds of appeal are without prejudice to each other and the Appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal.”

3. At the outset, in this case, learned counsel for the assessee submitted that facts in this case are identical to Assessment Year 2020-21, wherein, the Tribunal has decided the issue in favour of the assessee.

4. Per Contra, ld. DR agreed the issue is covered in favour of the assessee by the Tribunal in assessee's own case.

5. Having heard both the parties and perused the records, we find that the Assessing Officer in this case, has relied upon the finding of his predecessor in Assessment Year 2020-21, involving identical fact and pattern and issues, to hold that the assessee has a Permanent Establishment (PE) in India and accordingly proceeded to attribute 10% of the receipts to the alleged PE in India. The DRP also confirmed the order of the Assessing Officer and had followed his own order for Assessment Year 2020-21.

6. We find that it is undisputed fact that the facts of the present case are identical to Assessment Year 2020-21. In the said case, the Tribunal, in ITA No.736/Del/2023 for Assessment Year 2020-21 has decided the issue in favour of the assessee by concluding as under:-

“5. Learned Departmental Representative, though, agreed that the issue is covered by the decision of the Tribunal in assessment years 2018-19 and 2019-20, however, he relied upon the observations of the Assessing Officer and learned DRP.

6. We have considered rival submissions and perused the materials on record. There is no dispute that the factual

position qua the issue whether the assessee had a PE in India in the impugned assessment year, is identical to assessment years 2018-19 and 2019-20 as the departmental authorities, while coming to conclusion that the assessee had a PE in India, have entirely relied upon the assessment history of the assessee in assessment years 2018-19 and 2019-20. It is observed, while deciding identical issue of existence or otherwise of PE of the assessee in India, the Tribunal in ITA Nos. 2035 & 2036/Del/2022, dated 25.07.2023 has dealt with identical issue and held as under:

“6. We have considered rival submissions and perused the materials on record. As discussed earlier, the short issue arising for consideration is whether the assessee 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 assessee has 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 assessee before the departmental authorities that as per the facts of the impugned assessment years, the assessee 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.”

4. Due to parity of facts in the impugned assessment year, respectfully following the decision of the Coordinate Bench, we hold that the assessee had no PE in India in the year under consideration. Hence, no profit can be attributed to such non-existent PE. The Assessing Officer is directed to delete the addition.”

7. Respectfully following the precedent, we hold that the assessee has no PE in India in the year under consideration; hence, no profit can be

attributed to such non-existent PE. Accordingly, the Assessing Officer is directed to delete the addition.

8. In the result, the appeal of the assessee stands allowed.

Order pronounced in the open court on 15th February, 2024.

Sd/-
[ANUBHAV SHARMA]
JUDICIAL MEMBER

Sd/-
[SHAMIM YAHYA]
ACCOUNTANT MEMBER

Dated: 15.02.2024

Shekhar

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

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