* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment reserved on: 10 January, 2025

Judgment pronounced on 17 January, 2025

\+ W.P.(C) 1196/2022

GRID SOLUTIONS OY (LTD) .....Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Aditya Vohra & Mr. Shashvat Dhamija, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX INTERNATIONAL TAXATION & ANR. ..Respondents

Through: Mr. Ruchir Bhatia, SSC with Mr. Anant Mann, JSC.

\+ W.P.(C) 1630/2022

GRID SOLUTIONS OY (LTD) .....Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Aditya Vohra & Mr. Shashvat Dhamija, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX INTERNATIONAL TAXATION CIRCLE 1(3)(1) & ANR. .....Respondents

Through: Mr. Ruchir Bhatia, SSC with Mr. Anant Mann, JSC.

\+ W.P.(C) 1631/2022

GRID SOLUTIONS OY (LTD) .....Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Aditya Vohra & Mr. Shashvat Dhamija, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX INTERNATIONAL TAXATION CIRCLE 1(3)(1) & ANR. .....Respondents

Through: Mr. Ruchir Bhatia, SSC with Mr. Anant Mann, JSC.

\+ W.P.(C) 1639/2022

GRID SOLUTIONS OY (LTD) .....Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Aditya Vohra & Mr. Shashvat Dhamija, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX INTERNATIONAL TAXATION CIRCLE 1(3)(1) & ANR. .....Respondents

Through: Mr. Ruchir Bhatia, SSC with Mr. Anant Mann, JSC.

\+ W.P.(C) 1644/2022

GRID SOLUTIONS OY (LTD) .....Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Aditya Vohra & Mr. Shashvat Dhamija, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX INTERNATIONAL TAXATION CIRCLE 1(3)(1) & ANR. .....Respondents

Through: Mr. Ruchir Bhatia, SSC with Mr. Anant Mann, JSC.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

J U D G M E N T

YASHWANT VARMA, J.

1. This batch of writ petitions impugn the reassessment action initiated by the respondents under Section 148 of the **Income Tax Act, 1961**[1] and cover **Assessment Years**[2] 2013-14, 2014-15, 2015-16, 2016-17 and 2017-18.

2. Undisputedly, insofar as AYs 2013-14, 2014-15 and 2015-16 are concerned the petitioner had been assessed in terms contemplated by Section 143(3) of the Act. Since the reassessment was commenced prior to the introduction of the new scheme of assessment by virtue of Finance Act, 2021, it was the procedure as prevalent prior thereto which was followed by the respondents. In light of the above, although the notices under Section 148 had been issued initially, the reasons to believe which constituted the foundation for formation of opinion that income had escaped assessment was provided to the writ petitioner subsequently. The petitioner is stated to have filed its objections to the assumption of jurisdiction which have ultimately come to be dismissed by the **Assessing Officer**[3], leading to the filing of the instant writ petitions.

3. According to the disclosures made in the petition, the petitioner was formally known as Alstom Grid OY and was part of the Alstom Group till 02 November 2015. On or about the said date the Grid business of Alstom was taken over by GE. It is in the aforesaid backdrop that the petitioners aver that at least up to November 2015 it was not even a constituent of the GE Group. This fact assumes significance in light of the following.

[1] Act
[2] AYs
[3] AO

4. As is manifest from a reading of the reasons which appear to have weighed upon the respondents and were communicated to the writ petitioner, a survey under Section 133A(2A) is stated to have been conducted on 06-07 June 2019 on GE T&D India Limited and which had taken over the **Transmission and Distribution**[4] grid business of the erstwhile Alstom Group. In the course of that survey, the respondents asserted that the nature of activities undertaken by members of the GE Group engaged in T&D business would establish they constituted a Fixed Place and Dependent Agent PE. The aforesaid inference was drawn pursuant to various statements which appear to have been recorded in the course of that survey. This becomes apparent from a reading of paragraphs 4.1, 4.2, 4.3, and 4.4 of the reasons provided to the writ petitioners which are extracted hereinbelow:

> "**4.1** The statement of Mr. Sandeep Zanzaria, Executive (Commercial) in GETDIL was recorded during the survey. As described by Sh Zanzaria in reply to his role is as follows:
>
> *"I am working as Executive-commercial in GE T&D India Ltd. My role and responsibilities include the sales functions and order intake for the company for south Asia. It includes integration with customers, factories, internal functions like finance and legal and to act as one face to the customer. I have a team of about 60 people spread across the country for being in closer to the client. My sphere of activity starts from pre-sales to award of contract. Subsequently after the order is received, it is transferred to the executions group for fulfillment. The pre-sales requires understanding customer needs and proposing GE solutions. Subsequently, participating in tendering process, discussions and negotiations of conditions and prices are also part of the responsibility."*
>
> **4.2** Thus, Sh Zanzaria is in-charge in India for securing contracts/orders and has a large team of people working under him across India for the work of identifying customers, bid related work, negotiations and signing of contracts in the T&D business. To understand the role of the personnel/teams in India in securing orders or conclusion of contracts for foreign companies, the following question was asked "*It is learnt that there are several*

[4] T&D

companies of the GE Group in the T&D sector based outside India, which were earlier a part of the T&D business of the Alstom Group, that supply equipment or goods or machinery to Indian entities/companies. These companies express interest in tenders floated by the Indian entities, 90 through the pre-bid and bid stage, negotiate the terms of the contract, enter into the contract and execute the contract. Do you provide any assistance to these companies in some of these steps?".Sh Zanzaria answered as follows: "As part of the sales Junction, we provide support in some of the steps above. The sales team provide support like participation in meeting with clients when representatives of overseas companies are visiting, closing loop for open communication between customers and overseas units."

4.3 Thus, the person in charge of securing orders in GETDIL has accepted in his statement that the sales team of GETDIL in India supports the foreign companies in securing orders. The personnel of GETDIL also participate in meetings and negotiations and serve as communication channel between the foreign companies and Indian customers.

4.4 During the survey, a copy of the email records of Sh Zanzaria for the last one year was taken. The primary and principal role of the teams in India in securing of contract /orders in India for foreign companies in the Power and T&D (also called "Grid" business within the group) Sectors is established from the internal communication within the Group as recorded in the emails addressed to Sh Zanzaria. It is noticed that the foreign companies rely predominantly on the teams in India (which are constituted by employees of GETDI L) for all steps in securing of an order and entering into sales/services contacts with Indian customers. From identification of potential customers in India, conveying of requirements of the Indian customers, giving inputs on suitability of the potential deal, drafting or vetting of the bid to participation in negoliat1ons/discussions with the customers, the personnel in India (working under GETDIL) have substantial participation. The email records amply establish this. As a representative example, certain relevant emails extracted from the inbox of Shri Zanzaria in a randomly selected period of one week during the past year are reproduced below. These selected emails show the interaction between the functionaries of foreign companies of the group and the employees of Indian AE GETDIL regarding all aspects related to making of sales to Indian customers, in particular, identification of customers in India, inputs for decision making regarding whether to bid, bid preparation, negotiations and finalization of contract. These communications bring out the active and important role of persons located in India in securing and conclusion of contracts by foreign companies. For the sake of clearer appreciation of the nature and purpose of the communications, the identity and role of the employees/personnel of the foreign companies of the

> Group have been ascertained by visiting their profiles on Linkedln, where these individuals have themselves publicly posted their designations, employers and functions/responsibilities."

5. Basis the aforesaid material, as well as the oral statements which came to be recorded, the respondents proceeded to record the following conclusions:

> "**4.7** The fact that performance of senior functionaries of the Indian AEs is monitored, controlled, managed and rated/appraised by senior functionaries of foreign companies of the group is telling. It proves that the Indian AEs work, at least in a significant part, for the business of the foreign companies. Further, the performance targets are set by the foreign companies of the group against which the actual performance of the functionaries of the Indian AEs is rated. As is established from the emails of the senior functionaries, there are monthly and quarterly sales targets for different countries and regions. These targets are for the whole Group (i.e. GE Group) in Grid segments and the teams based in each country, though on the payroll of the locally registered companies (in case of India, GETDIL), work towards meeting of those global sales· targets and not just for their own local company. Their appraisal is also done based on their success and contribution towards meeting those targets. This proves that teams in India do contribute to sales of foreign companies in India.
>
> 5. Hon'ble High Court of Delhi in its recent judgement in *GE Energy Parts v. CIT (ITA 621/2017)* dated 21.12.2018 has held existence of a dependent agent PE in similar circumstances where the personnel in India, even when they do not themselves sign the contract and are not the deciding authority for entering into contracts, play a role that is not auxiliary in the entering of the contract. Importantly, the Court cites India's position on the OECD commentary which is as follows: "a person has attended or participated in negotiations in a State between an enterprise and a client, can, in certain circumstances, be sufficient, by itself, to conclude that the person has exercised in that State an authority to conclude contracts in the name of the enterprise; and that a person who is authorized to negotiate the essential elements of contract, and not necessarily all the elements, can be said to exercise the authority to conclude contracts.". The Court also relied on a decision of Italian Supreme Court in Ministry of Finance (Tax Office) v. Philip Morris (GmBH), Corte Suprema di Cassazione No.7682/02 of May 25 2002, which is as follows: "the participation of representatives or employees of a resident company in a phase of the conclusion of a contract between a foreign company and another resident entity may fall within the concept of authority to conclude contracts in the name of the foreign company, even in the

absence of a formal power of representation." The Hon'ble court thus held in GE Energy Parts Inc and other cases of the GE Group (it was a consolidated order for several companies of the GE Group) that the activities in India relating to entering into of contracts constitute agency PE. DAPE ha been held by Hon'ble Delhi High Court (Jurisdictional High Court) in similar circumstances in several other cases, notably Rolls Royce Pie v DIT 2011 {339) /TR 147 and ZTE Corporation vs. Addi. DIT (2016} 159 ITD 696.

Fixed Place PE:

6. To further establish this conclusion of PE, let us see the business structure of the global Power and T&D (Grid) business of the GE Group, as detailed by Sh Negi, CFO and Director of GETDIL in his statement. His answer is reproduced below: "There are four streams worldwide in the businesses of the GE Group. These are GE Aviation, GE Power, GE Healthcare and GE Renewables. Each of these verticals is run by a global President & CEO, called CE officers. These "CE officers" are responsible for the business of their respective vertical. Each of these verticals has sub verticals which are known as Tier-2 verticals. For example, the T&D Business falls under the CE Renewables vertical and more specifically under the Grid Solutions Tier-2 vertical. The Tier-2 verticals have a regional split of business to cover the entire globe. Each Tier-2 vertical has a global head, who is designated as President and CEO of that Tier-2 vertical. For example, Grid Solutions Tier-2 vertical has its President and CEO as Mr. Reinaldo Garcia, who is based out of Paris. Grid Solutions Tier-2 vertical is divided into various regions, of which South Asia is one. This region covers India, Bangladesh, Sri Lanka, Nepal and Bhutan. The South Asia has a regional head, designated as regional President, CEO and MD. This post is held by Sh. Sunil Wadhwa at present Sh. Sunil Wadhwa reports to the Chief commercial officer of the Grid Solutions Tier-2 vertical, who is Mr. Emanuel Bertoloni. The Chief Commercial Officer reports to Mr. Reinaldo Garcia."

6.1 These statement, similar in the case of CFOs of both the Indian companies, acid to the already clear conclusion that in reality, the Indian AEs serve as mere Indian branches of the foreign companies of the GE Group (erstwhile Alstom group) Power and Grid bus1nesses. The employees of the Indian AEs function not just for the Indian companies (that employ them), but also for foreign companies of the Group that make sales and render services in India. This fact leads to the conclusion that the Indian AE GETDIL, (which share the same main office premises with GEPIL, i.e., the headquarters of both of which are located in Axis House, Sector 128, Jaypee Wish Town, Noida) serve as not only Dependent Agent PE, but also Fixed Place PE of the foreign companies of the Group including Grid Solutions SAS.

> **6.2** Also, extracts of visitor logs in the main premises (sector 128, Noida) GETDIL were taken during the survey. As the premises of the headquarters of both companies are located in the same building, it was learnt that a single visitors log is maintained for both companies. It was observed that there was a regular movement of foreign personnel of GE Group at the premises of GETDIL. From the submission made in response to summons, it was noted that there were 27 visits of employees of foreign companies of the GE Group in those premises of GETDIL (Sector 128, Noida) during the period January-March 2018 alone. Available information so far indicates that the premises of GETDIL are used as a fixed place at the disposal of foreign companies of the group, from where the visiting employees carry out the work of these foreign entities. Thus, the requirement for Fixed Place PE as laid down in the definition in Article 5(1) and 5(2) ('branch' or 'office') of India's DTAAs is met."

6. As a consequence of the above, the AO came to hold that the performance of senior functionaries of associated enterprises in India was monitored, controlled and managed by foreign companies of the GE Group, with Indian AEs playing a significant part in connection with the business of the foreign companies and being indelibly connected in the global business of the GE Group. The opinion with respect to escapement of income also appears to be founded on the decision rendered by this Court in **GE Energy Parts Inc. vs. CIT (International Taxation), Delhi -1**[5]. The aforesaid judgment of the High Court was concerned with the challenge to reassessment initiated against various constituents of the GE Group pertaining to AY 2001-02. The reassessment action was upheld by the **Income Tax Appellate Tribunal**[6] in terms of its judgment dated 27 January 2017 which was thereafter followed in subsequent AYs'. It is common ground that the reassessment action that formed the subject matter of that litigation emanated from a search and survey conducted in 2007 and on the basis of which assessments for AYs 2001-02 to 2008-09 came to be

[5] 2018 SCC OnLine Del 13256.
[6] Tribunal

reopened. The judgment of this Court in *GE Energy* thus spans the period noted above.

7. The subsequent survey which formed the basis for the reassessment initiated and impugned in these writ petitions, however, was one which was independently undertaken in 2019. The issue which thus consequently arises is whether the findings and conclusions which came to be rendered and drawn for the aforesaid block of AYs' would have constituted sufficient ground to reopen assessments pertaining to AYs 2013-14 to 2017-18.

8. Mr. Vohra learned senior counsel appearing in support of these writ petitions had submitted that the petitioner is in fact based in Finland and the only contracts which cover the period forming the subject matter of the impugned reassessment proceedings were concerned with off-shore supplies. It was in the aforesaid backdrop that Mr. Vohra submitted that the respondents were clearly unjustified in seeking to base their decision to reopen on surveys conducted in 2007 and 2019. It was further pointed out that the survey of 2007 was not even concerned with the verticals of GE engaged in the T&D sector and was restricted to the business undertaken by constituents of GE forming part of its aviation vertical. In any case, Mr. Vohra would contend that the surveys as well as the material gathered in 2007 and 2019 cannot possibly be extrapolated to other years.

9. Mr. Vohra also drew our attention to the fact that the assessment for AY 2013-14 to 2015-16 was completed in accordance with Section 143(3) of the Act. It was thus submitted that the decision to reopen and the validity thereof would clearly be liable to be tested on the anvil of the Proviso to Section 147 as it stood at the relevant time and which

would have enabled the respondents to reopen an assessment only if it were found that the petitioner had failed to make a full and true disclosure. Mr. Vohra drew our attention to the First Proviso to Section 147 as it then existed and which read thus:

> "Provided that where an assessment under sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment years:
> Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:
>
> Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment."

10. Our attention was then drawn to the queries that were addressed in the course of assessment and which formed part of a communication dated 07 July 2015 the contents whereof are reproduced hereinbelow:

"OFFICE OF THE
DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE 1(1)(1), INTERNATIONAL TAXATION
ROOM NO. 409, BLOCK E-2, CIVIC CENTRE, MINTO ROAD, NEW DELHI

F. No. DCIT-1(1)(1)/Int. Tax./Delhi/2015-16/ Date: 07.07.2015

To

The Principal Officer
M/S ALSTOM GRID OY (LIMITED)
P.O. BOX 4 , KMPELIKATU 3,
TAMPERE, FOREIGN
PAN:MKCA9196Q

Sub:-: Assessment proceedings in your case for Assessment Year 2013-14 - Regarding-

Sir/Madam,

In connection with the assessment proceedings pending in your case for Assessment Year 2013-14, you are requested to furnish following information: -

1. Please give detailed background of the company and its activities and sources of revenue with particular reference to business model and activities carried out in India during the year under consideration. Give a detailed note regarding nature of your business activities and furnish details in respect of the works undertaken/executed in India during the year.

2. Please file copy of last assessment orders including copies of Assessment Orders framed in your case on or after 01.04. 2011.

3. Please intimate as to whether you had a Permanent Establishment or Business Connection in India during the year. If so, please furnish names and complete addresses of such concerns. Also furnish details of Branch Offices/Project offices/Liaison office/Godowns and Warehouses and construction or other business sites in India.

4. Please furnish names and complete addresses of all associated enterprises and also supply copy of Form 3CEB regarding international transactions entered into with these during the year under consideration.

5. Furnish details regarding the share holding of your company alongwith the name and address of its Directors. Furnish complete set of the return along with its enclosures for the assessment year 2013-14(for the period 01.04.2012 to 31.03.2013). Please file copy of any Tax Return for the period 01.04.2012 to 31.03.2013 filed abroad.

6. Please give details along with bifurcation of all the streams of revenue accruing/ arising/ receipt either directly or indirectly through/ from India.

7. Please furnish copies of all contracts and agreements operative during the year in respect of your activities in India. Copy of agreement/Contracts entered into with Indian customers/clients or any other party in India from whom any payment is received during the year or has accrued or arisen during the year may also be provided.

8. Details of invoices raised to the Indian customers and details of Income or any type of payment received from India or which has accrued or arisen in India.

9. Copy of all orders u/s 197 obtained from the assessing officers relevant to the assessment year in question, if any.

10. Copy of all orders u/s 195(2)/195(3) which have been obtained by payers in relation to payments made to you relevant to the assessment year in question, if any.

11. Please explain whether you have received any payment from any nonresident in connection with any business, of such non-resident in India.

12. Explain the method of accounting employed in your case. Please furnish copies of final accounts in respect of revenues from India.

13. Please explain whether any technical services were provided to the Indian customer/ client during the year? If yes, Please submit the names of employees and other persons who visited India in this regard stating their period of stay, purpose and for which project there services were provided and whether in these projects the assessee has supplied any products. This information must be provided invoice- wise.

14. Furnish the details of all expatriates whose remuneration is charged to the expenses in India and who visited India during the year and also explain who paid for their expenses in India.

15. Furnish the details of salary paid during the year along with name and addresses of the persons to whom the salary was paid exceeding Rs.5 Lakhs and functions/job done by each of them during the said period.

16. Please give a note on completion of various projects and method/manner of accounting being done w.r.t the same.

17. Please submit the names and addresses of sub contractors of the assessee, in connection with the India projects with their PAN nos. and details of their subcontracted activity along with copy of contracts.

18. Furnish a brief summary of the expenses incurred during the year along with relevant documentary evidence.

19. Copy of the tax residency certificate for the relevant Assessment year if Treaty benefits are being claimed.

20. Please confirm whether you have maintained books of accounts for your Indian operation as required u/s 4AA of the Act. If yes, please confirm whether they have been audited as required u/s 44AB of the Act. Please furnish hard u/sA4AA and u/s 44AB of the Act.

21. Furnish computation of income u/s 115JB as applicable.

22. Please furnish the hard copy of complete return of income for the year under consideration alongwith complete audited balance sheet, P & L account including all the schedules, Form 3CD & Form 3CEB.

23. Please give details of TDS in respect of payments made to any sub-contractor and w.r.t. any expenses paid outside India or claimed by the H.O regarding services rendered for projects/business in India.

24. Please furnish copies of bank statements in respect of all the bank accounts maintained by you with any bank or banking institution in India during the period 01.04.2012 to 31.03.2013.

25. Please give details of all the investments made by you or disposed of by you during the year under consideration including those made in purchase or sale of moveable or immoveable assets. The above information may please be furnished before the undersigned in my office at Room No. 409, 4th Floor, Block E-2, MCD Civic Centre, Minto Road, New Delhi on 28.07.2015 at 12.45 PM. A Notice u/s 142(1) of the Income Tax Act, 1961 is enclosed for compliance.

Encl:- As above."

11. Mr. Vohra laid special emphasis on queries 3, 4, 6, 7, 8 and 13 thereof and which were duly responded to by the writ petitioners. We deem it apposite to extract the following parts from the reply which was furnished by the writ petitioner in the course of assessment:-

"**1. Please give detailed background of the company and its activities and sources of revenue with particular reference to business mode] and activities carried out in India during the year under consideration. Give a detailed note regarding nature of your business activities and furnish details in respect of the works undertaken/executed in India during the year. (Question No. 1)**

<u>The assessee is company incorporated and registered under the laws of Finland and is a non-resident under the Act. The assessee provides global solutions for energy savings and improved power quality</u>. The assessee's core competencies include manufacturing of products for efficient power transmission, reactive power compensation and harmonic filtering, as well as related project engineering. The assessee is also engaged in trading activities in Finland reselling the equipment produced by other units of Alstom Grid Sector. The assessee is following cash basis of accounting for recording its income, if any earned in India. <u>During the relevant assessment year, the assesse has been awarded a contract by Power Grid Corporation of India Limited ('PGCIL') dated 04 September 2012 to supply equipments from outside India. The scope of work includes design, engineering, manufacture, testing at manufacturer's works, dispatch, shipment, marine transportation</u>

and insurance and CIF Indi an Port of Entry supply of all Off-shore equipments and materials from outside India, including mandatory spares, Type testing to be conducted outside India and training to be imparted abroad.

xxxx xxxx xxxx

3. Please furnish copies of all contracts and agreements operative during the year in respect of your activities in India. Copy of agreement/Contracts entered into with Indian customers/clients or any other party in India from whom any payment is received during the year or has accrued or arisen during the year may also be provided. (Question No. 7)

The copy of contract entered with PGCIL during the relevant assessment year is enclosed as Annexure 2 for your goodself reference.

4. Details of invoices raised to the Indian customers and details of Income or any type of payment received from India or which has accrued or arisen in India. (Question No. 8)

The copy of the invoice raised to PGCIL for receipt of l0% advance payment during the subject assessment year is already enclosed as Annexure JB for your reference. Further, it has already been submitted in Point 2 above that no incomes have been accrued or arisen to assessee during the relevant assessment year.

5. Please submit the names and addresses of sub-contractors of the assessee, in connection with the India projects with their PAN nos. and details of their subcontracted activity along with copy of contracts. (Question No. 17)

It is humbly submitted that the assessee has not engaged any sub-contractor in India during the relevant assessment year."

12. On the basis of those disclosures the AO proceeded to pass an order in the following terms:

"**ASSESSMENT ORDER**

M/s Alstom Grid OY (Limited) (hereinafter referred to as "assessee") e-filed return of income for the Assessment Year ("AY") 2013-14 declaring Nil income on 30.09.2013. The case was selected for scrutiny under CASS and notice u/s 143(2) of the Income Tax Act, 1961 ("the Act") was issued to the assessee on 04.09.2014. Further, a notice u/s 142(1) of the Act alongwith detailed questionnaire was issued to the assessee on 07.07.2015. In response to various notices and letters, Sh. Manish Bansal and Ms. Shailja Anand, CAs/ ARs, attended the assessment proceedings and

filed necessary information and details. Written submissions and documents filed by the assessee were examined. The case was discussed with the authorised representatives of the assessee.

2. The assessee is company incorporated and registered under the laws of Finland and is a non-resident under the Act. The assessee provides global solutions for energy savings and improved power quality. The assessee's core competencies include manufacturing of products for efficient power transmission, reactive power compensation and harmonic filtering, as well as related project engineering. The assessee is also engaged in trading activities in Finland reselling the equipment produced by other units of Alstom Grid Sector. During the assessment year under consideration, the assessee has been awarded a contract by Power Grid Corporation of India Limited ('PGCIL') dated 04.09.2012 to supply equipments from outside India. The scope of work includes design, Engineering, manufacture, testing at manufacture's works, dispatch, shipment, marine transportation and insurance and CIF India port of Entry supply of all off-shore equipments and materials from outside India, including mandatory spares, type testing to be conducted outside India and training to be imparted abroad. Assessee claimed to have received payment of only 10% advance during the year from the PGCL and, accordingly, has shown nil income. This fact was verified from the PGCL. After considering replies and documents and facts and circumstances of the case, assessee's income as shown in the return of income is accepted.

4. Assessment is, accordingly, made on Nil income. Credit for prepaid taxes is given after due verification. Detail of computation of tax and interest charged as provisions of law is given in the enclosed ITNS-150 which is part of this order. Issue necessary forms."

13. It was in the aforesaid backdrop that Mr. Vohra submitted that the respondents have clearly acted arbitrarily in drawing proceedings for reassessment despite the complete and candid disclosure which had been duly made by the petitioners in the course of the assessment. Mr. Vohra submitted that the facts as placed before the AO were duly examined and lead to the acceptance of the return of income. Learned senior counsel thus contended that there existed no justification for the powers conferred by Section 148 of the Act being invoked especially in light of no incriminating or germane material pertaining to the AYs'

having been discovered or found.

14. Mr. Bhatia, learned counsel representing the respondents on the other hand argued that the decision of this Court in *GE Energy* and other connected matters had unequivocally found a consistent business model having been followed by the various Associated Enterprises of the GE Group and had ultimately upheld the finding of a PE being existent. It was his submission that the facts that were discovered during the course of the survey undertaken in 2007 were found to be common to those that came to light post the 2019 survey. In view of the aforesaid, it was contended that the reopening is not liable to be interdicted at this stage.

15. Mr. Bhatia also sought to draw support from our decision in **GE Nuovo Pignone Spa v CIT**[7] contending that a similar challenge to reopening by a constituent of the GE Group had come to be upheld with the Court refusing to interfere with the reassessment action.

16. Having conferred our consideration on the rival submissions as addressed, we at the outset note that *GE Nuovo Pignone Spa* was a case where we had on facts found that the assessee had clearly failed to assert that its modus of business had changed over the years so as to place its case on a distinct or distinguishable pedestal. This becomes evident from a reading of paragraph 19 of the report which is extracted hereinbelow:-

> "**19.** We, however, note that in the course of the reassessment proceedings, the appellant at no point in time appears to have asserted or taken a position that the facts as they obtained in 2009-2010, were distinct or distinguishable from those which had fallen for detailed examination of the respondents in the litigation which

[7] 2024 SCC Online Del 7902

> had ensued and had ultimately culminated in the passing of a judgment by this Court on 21 December 2018."

17. Contrary to the above, it had been the consistent stand of the present writ petitioners that no PE had existed in the years in question. It is in the aforesaid light that we would have to evaluate and examine whether the findings as recorded in the course of the 2007 or 2019 survey could have been blindly applied and adopted, extrapolated and read as being an accurate recordal of facts as they obtained in the AYs in question. It was conceded before us by the respondents that the reasons as recorded in support of the formation of opinion that income had escaped assessment had not alluded to any facts specific to AYs' 2013-14 to 2017-18. Despite repeated queries Mr. Bhatia who represented the respondents failed to draw our attention to any facet or fact pertaining to the AYs' in question and which could have been read as demonstrative of an application of mind to the facts that prevailed or obtained in the years in question and thus justified a reassessment action being validly initiated. In fact, as we go through those reasons, it becomes more than apparent that the AO has merely proceeded to adopt and reiterate what was found in the course of the survey undertaken in 2007 and 2019 read alongside the judgment of this Court rendered in *GE Energy*. According to Mr. Bhatia, in light of the judgment of this Court in GE Energy, the AO was justified in proceeding on the "assumption" that facts had remained unchanged and that the business model had remained unaltered. Learned counsel in this respect also sought to draw sustenance from the decision of the Supreme Court in **Raymond Woollen Mills Ltd. v ITO**[8] and to the following passages as appearing therein:-

[8] 1997 SCC OnLine SC

> "**1**.The challenge in this case is to the reopening of the assessment of Raymond Woollen Mills Ltd. We have been shown the recorded reasons for reopening under Section 147-A (sic Section 147). The case of the Revenue was that the assessee was charging to its profit and loss account fiscal duties paid during the year as well as labour charges, power, fuel, wages, chemicals, etc. However, while valuing its closing stock, the elements of fiscal duty and the other direct manufacturing costs were not included. This resulted in the undervaluation of inventories and an understatement of profits. This information was obtained by the Revenue in a subsequent year's assessment proceeding.
>
> **2**. Mr Vellapally, learned Senior Counsel appearing on behalf of the appellant, has argued that the Department has made a grievous error in coming to this conclusion.
>
> **3.** In this case, we do not have to give a final decision as to whether there is a suppression of material facts by the assessee or not. We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that the Court cannot strike down the reopening of the case in the facts of this case. It will be open to the assessee to prove that the assumptions of facts made in the notice were erroneous. The assessee may also prove that no new facts came to the knowledge of the Income Tax Officer after completion of the assessment proceeding. We are not expressing any opinion on the merits of the case. The questions of fact and law are left open to be investigated and decided by the assessing authority. The appellant will be entitled to take all the points before the assessing authority. The appeals are dismissed. There will be no order as to costs."

18. Indisputably, there is no principle akin to that of *res judicata* which can be recognized to be applicable to taxing disputes. Though this principle is well settled, we deem it appropriate to refer to the following enunciation of the well-settled legal position in **National Petroleum Construction Co. v Dy. CIT**[9] where the Supreme Court had held as follows:-

> **"37.** The High Court rightly held that the question of whether the appellant had permanent establishment, could not possibly be

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[9] (2022) 446 ITR 382

> undertaken in an enquiry for issuance of certificate under section 197 of the Income-tax Act, having regard to the time-frame permissible in law for deciding an application, more so, when regular assessment had been completed in respect of the immediate preceding year and the appellant found to be taxable under the Income-tax Act at 10 per cent. of the contractual receipts. The assessing authority found that the appellant had permanent establishment in India in the concerned assessment years. The appeal of the appellant is possibly pending disposal."
>
> "**38.** As held by the High Court, it is well settled that the principle that res judicata is not applicable to Income-tax proceedings because assessment for each year is final only for that year and does not cover later years."
>
> "**39.** Whether the appellant had permanent establishment or not, during the assessment year in question, is a disputed factual issue, which has to be determined on the basis of the scope, extent, nature and duration of activities in India. Whether project activity in India continued for a period of more than nine months, for taxability in India in terms of the Agreement for Avoidance of Double Taxation, is a question of fact, that has to be determined separately for each assessment year. * (2010) 327 ITR 456 (SC)."

19. In order to appreciate what the Supreme Court held in *National Petroleum*, it would be apposite to notice the more elaborate discussion which appears in the judgment of this Court in ***National Petroleum Con. Co. v. Deputy CIT***[10], the relevant parts whereof are extracted hereunder:-

> "**24.** The respondents have granted the impugned certificate for deduction at 4 per cent. of the gross receipts. The assessment for the above noted contracts would be undertaken in the future, viz., the assessment years 2019- 20 and 2017-18 respectively. As of now, we are not concerned with a regular assessment proceeding but, with determination of rate of tax deduction. On perusal of reasons, it becomes manifest that during the course of enquiry under section 197 of the Act, the petitioner was asked to furnish the details regarding the scope and nature of the aforenoted contracts. The Revenue contends that for the R-series contracts, the petitioner has made contradictory statement regarding commissioning period and period of as-built documentation etc. The petitioner, in its submission dated June 22, 2019, contends that commissioning work is not undertaken by them for the R-series contracts, and the

[10] 2019 SCC OnLine Del 12357

same is to be performed by the Oil and Natural Gas Corporation. Without going into the question as to whether the petitioner's stand is contradictory, we may note that the Assessing Officer while exercising its power under section 197, during the course of the enquiry, cannot undertake an exhaustive exercise to determine this issue conclusively. We find force in the submissions of Mr. Raghvendra Kumar Singh that the question as to whether the petitioner has constituted a permanent establishment, cannot possibly be undertaken in the enquiry having regard to the time frame permissible under law for deciding the application under section 197 of the Act. The reasons shown to us also take note of the fact that in the immediate preceding years, i.e., the assessment year 2016-17 and the assessment year 2017-18, for which regular assessment has been completed, the petitioner has been held to have a permanent establishment (PE) in India, and its total income from the contracts with the Oil and Natural Gas Corporation have been held to be taxable under the Income-tax Act. Section 44BB of the Act is applied, and 10 per cent. of the contractual receipts were considered as business profits. The rate of tax being 40 per cent., a certificate was, accordingly, issued at 4 per cent. For the other assessment years as well, assessment has been completed and appeal is pending before the appellate authorities. The petitioner, obviously, disputes the finding of the respondent as erroneous and misplaced, on the ground that for the assessment year 2015-16, the first appellate authority following the decision of this court in the petitioner's own case, has held that the petitioner has no permanent establishment in India. Be that as it may, for the assessment years 2016-17 and 2017-18, this question has been determined against the petitioner. It is well-settled proposition that in tax jurisprudence, the principle of res judicata is not applicable to income tax proceedings. "In matters of recurring annual tax a decision on appeal with regard to one year's assessment is said not to deal with eadem questio as that which arises in respect of an assessment for another year and consequently not to set up an estoppel". [Ref : New Jehangir Vakil Mills Co. Ltd v. CIT (1963) 49 ITR (SC) 137]. "It is well settled that in matters of taxation there is no question of res judicata because each year's assessment is final only for that year and does not govern later years, because it determines only the tax for a particular period". [Ref : Installment Supply P. Ltd. v. Union of India [1962] AIR 1962 SC 53 (Constitution Bench)].

25. The petitioner has argued that the need for consistency and certainty requires that there must exist strong and compelling reasons for a departure from a settled position, which must be spelt out and they are conspicuously absent in the present case. Mr. Balbir Singh has strongly argued that the stand taken by the respondents in the previous year should have been followed and in

this regard, he relies upon the decision of the Supreme Court in the case of Radhasoami Satsang v. CIT [1992] 193 ITR321 (SC). Besides, Mr. Singh, as quoted earlier has also led considerable emphasis on the decision of this court dated May 9, 2017, wherein this court directed the respondents to issue certificate under section 197 of the Act, accepting the alternative plea of the petitioner that the Oil and Natural Gas Corporation would deduct tax at 4 per cent. plus surcharge plus education cess on the revenues in respect of only the inside India activities of the petitioner.

26. We are, however, not impressed with the aforesaid contention and do not find the judgment of the Supreme Court in Radhasoami Satsang (supra) to be applicable in the present case. In the said case, the issue arose whether the assessee is a charitable trust, and this position had not been contested by the Income-tax Department from the assessment year 1937- 38 to the assessment year 1963-64. In these circumstances, the court held as under (headnote of 193 ITR 321):

> "Where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

27. In the present case, there cannot be any dispute that existence of permanent establishment is required to be determined by law for each year separately on the basis of the scope, extent, nature and duration of activities in each year. In this regard, the contracts in question, i.e., R-series contracts dated February 7, 2018 and LEWPP series contracts dated September 30, 2016 would have to be taken into consideration. Concededly, this court in its decision dated May 9, 2017 did not have the occasion to consider the R-series contract dated February 7, 2018. The court only considered the contract dated September 30, 2016 as noted in para-1 of the said decision. There is thus, a distinguishing feature - the R-series contract has not been considered by this court in its order dated May 9, 2017. Moreover, in the instant case, the reasons record that the two contracts are indivisible, and the petitioner cannot divide the contractual receipts in two categories, viz., inside India and outside India services. The installation permanent establishment will come into existence, if "project or activity continues for a period of more than 9 months" under Indo-UAE Double Taxation Avoidance Agreement. This question of fact will have to be determined separately for each assessment year, and we are informed that for the assessment year 2016-17 and the assessment year 2017-18, the determination is presently against the petitioner.

We cannot accept the petitioner's contention that the assessment proceedings for the assessment years 2007-08, 2008-09 and 2009-10 have already determined this question in favour of the petitioner and there is no change in any circumstances. This question would require to be determined and finding of the fact would have to be arrived at, by a careful consideration of terms of contract, determination whereof cannot be undertaken in the proceedings under section 197 of the Act."

20. The interplay between the principle of consistency and the facts of each year of assessment was lucidly explained by our Court in **Galileo Nederland BV Vs. Assistant Director of Income Tax (International Taxation)**[11] as under:-

> "**19.** We are aware that each assessment year is separate and distinct and principle of res judicata does not apply to proceedings for subsequent or other years. However, the decision on an issue or question though not binding should be followed and not ignored unless there are good and sufficient reasons to take a different view. Thus, it was/is possible for the Assessing Officer to depart from the finding or a decision in one year as it is final and conclusive only in relation to a particular year for which it is made but as observed in Radhasoami Satsang v. CIT (1992) 193 ITR 321 (SC), when a fundamental aspect pervading through different assessment years has been found as a fact in one way or the other, it would inappropriate to allow the position to be changed in a subsequent year particularly when the said finding has been accepted. The said principle is also based upon the rules of certainty and consistency that a decision taken after due application of mind should be followed consistently as this lead to certainty, unless there are valid and good reasons for deviating and not accepting the earlier decision."

21. The Court also takes note of the succinct enunciation of this legal principle in **Dwarkadas Kesardeo Morarka v Commissioner of Income Tax, Central**[12] where the Supreme Court had held as under:-

> "**7.** The conclusion of the Tribunal was amply supported by evidence. It cannot be said that because in the previous years the shares were held to be stock-in-trade, they must be similarly treated for Assessment Year 1949-50. <u>In the matter of assessment of income tax, each year's assessment is complete and the decision</u>

[11] 2014 SCC OnLine Del 4282

[12] 1961 SCC OnLine CS 221

arrived at in a previous year on materials before the taxing authorities cannot be regarded as binding in the assessment for the subsequent years. The Tribunal is not shown to have omitted to consider the material facts. The decision of the Tribunal was on a question of fact and no question of law arose which could be directed to be referred under Section 66(2) of the Income Tax Act."

22. The position of a PE being a facts-specific issue and thus liable to be examined against the backdrop of what obtained in a particular tax period is one which is underscored even by the OECD Commentary on Article 5 and the relevant part whereof is reproduced hereunder:-

> "8. It is also important to note that the way in which business is carried on evolves over the years so that the facts and arrangements applicable at one point in time may no longer be relevant after a change in the way that the business activities are carried on in a given State. Clearly, whether or not a permanent establishment exists in a State during a given period must be determined on the basis of the circumstances applicable during that period and not those applicable during a past or future period, such as a period preceding the adoption of new arrangements that modified the way in which business is carried on."

23. It is in the aforesaid backdrop that the observations of the Supreme Court in **CIT v Gupta Abhushan (P) Ltd**[13] also assume significance and where it was unambiguously held that a survey report pertaining to a particular tax period cannot *ipso facto* be read or countenanced as being relevant and binding for independent assessment years as is evidenced from paragraph 6 of the report which is extracted hereinbelow:

> **"6.** The second part of the reasons recorded by the Assessing Officer indicate that during the survey, it was noticed that extensive renovation work in the business premises of the assessee had been undertaken and that the renovation in respect of the ground floor had been completed and that the renovation in respect of the first floor was going on. It is further noted that the assessee had not booked any expenses on account of renovation of the said business premises. On the basis of these facts, the Assessing Officer noted that he was satisfied that investments made in the

[13] 2008 SCC OnLine Del 1468

> renovation work had escaped assessment. Here too, we note that the survey was conducted on March 7, 2002, which falls in the year subsequent to the three years in question in these appeals. The fact that the renovation expenses had not been booked in that year, i.e., financial year ending on March 31, 2002, does not by itself indicate that the renovation work had been carried on in the earlier three years and, if so, the expenses in respect of the same had not been booked. The conclusion of the Assessing Officer, based on what was noticed in the course of the survey, cannot be extrapolated to other years. The purported belief of the Assessing Officer, on this aspect of the matter, was not a belief at all but was merely a suspicion.
>
> Such suspicion cannot take the place of a belief and that too a belief which is based on reasons."

24. While and as our Court explained in *Galileo* it may be permissible for an AO to take cognizance of a *"fundamental aspect pervading through different assessment years has been found as a fact in one way or the other...."*, the said precept could have been legitimately invoked provided the AO were satisfied or had come to record its prima facie opinion that the facts which prevailed and obtained in AY 2013-14 upto AY 2017-18 were identical to those which had been found in the course of the two surveys which had been undertaken in 2007 and 2019. However, no such finding has either been returned nor conclusion recorded in the "reason to believe" drawn by the AO.

25. The reliance placed by Mr. Bhatia on *Raymond Wollen Mills* is equally misplaced since the phrase "assumptions of facts" is clearly being misconstrued and read out of context. Learned counsel sought to contend that the said decision is an authority for the proposition that an AO could reopen basis an "assumption" of facts that may have obtained in a particular AY remaining unchanged. The said contention ignores the basic facts on which that decision was founded, namely, of the AO

there having found that the assessee was charging to its profit and loss account fiscal duties *"during the year"* resulting in undervaluation of inventories and understatement of profits. The observation with respect to an assumption being reached is liable to be appreciated in the aforesaid light. The reassessment action is thus liable to be set aside on this short score alone.

26. We accordingly allow the instant writ petitions and quash the following impugned notices issued under Section 148:

WP(C)	**Assessment Year**	**Date of SCN**
1196 of 2022	2013-14	17 March 2021
1630 of 2022	2015-16	31 March 2021
1631 of 2022	2017-18	30 March 2021
1639 of 2022	2016-17	30 March 2021
1644 of 2022	2014-15	31 March 2021

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

JANUARY 17, 2025/kk