

## **ITAT justified reassessment as Foreign Co. had failed to disclose revenue earned from its PE in India**

**Summary – The Delhi ITAT in a recent case of GE Nuovo Pignone SPA., (the Assessee) held that where on basis of materials gathered, during survey at India Liason Office of non-resident assessee, it was evident that assessee had a PE in India and it had failed to disclose revenue received from sales made to Indian customers through its Indian Office, income having escaped assessment, reassessment proceedings were justified**

**Where in case of assessee non-resident, business was mainly carried out from Indian Liason Office GEIOC which was not merely preparatory or auxiliary in nature, it was to be held that GEIOC constituted fixed place PE for assessee**

**Where PE of assessee an Italy based company in India, conducted core activities and extent of activities by assessee in making sales in India was roughly one fourth of total marketing effort, 26 per cent of total profit in India would be attributable to operations carried out by PE in India**

### **Facts**

- The assessee was a non-resident incorporated in Italy. It was a leading supplier of compressor/pumps and related services in oil and gas industry, and during the year under consideration, the assessee supplied spare parts/equipments to various customers in India, in addition to returned income.
- During relevant year under consideration, the assessee filed its return of income declaring total income of Rs.65.18 crores, being revenue from onshore services as royalty and FTS, under provisions of section 44DA.
- Subsequently, notice under section 148 was issued by the Assessing Officer, after taking necessary approval as required under section 151, on ground that assessee had earned income from the business activities which was, attributable to the established PE of the assessee in India and the same had escaped assessment within the meaning of section 147.
- The assessee in response to aforesaid notice, filed return of income, declaring income, already disclosed in original return. Thereafter, assessee requested for reasons recorded for reopening of assessment, which were provided to assessee. The assessee raised objections on reasons recorded for reopening of assessment which were rejected by the Assessing Officer.
- During re-assessment proceedings, the Assessing Officer observed that, assessee belonged to GE Group overseas entities, and survey under section 133A, was conducted at office premises of India Liason Office(GEIOC), during which various documents/evidences in form of Draft MOUs, correspondence, pertaining to assessee was gathered and statements of various persons working with Indian Office GE India Industrial Private Limited (GEIPL) and expatriates working at GE International Operation Company Inc. (GEIOC) were recorded.

- From materials collected during survey proceedings and post survey enquiries, the Assessing Officer concluded that, GEIOC was the fixed place PE for assessee in India, which was not just engaged in activities of auxiliary and preparatory nature but functioned more than what a Liaison Office was supposed to do. The Assessing Officer was also of opinion that through GEIPL assessee had business connection with Indian counterparts and, thus, GEIPL was held to be Agency PE for assessee, through which assessee carried out offshore supply of spare parts, against which revenue was not declared in return of income originally filed by assessee and it deserved to be attributed to GEIPL and, accordingly, he worked out revenue from offshore supplies.
- On appeal, the DRP upheld attribution of income by the Assessing Officer.
- On appeal to the Tribunal the assessee challenged initiation of reassessment proceedings under section 147/148 on ground that there was no material on the basis of which the belief could be formed that income has escaped assessment.

#### Held

- The legal position on this issue is that Assessing Officer should have a prima facie ground for forming belief that there is some escapement of income which is a condition precedent for initiating reassessment. Also that, there must be some material to indicate that income chargeable to tax has escaped assessment for a particular year, which are trite law, and cannot be interfered with.
- Admittedly, the assessee itself has submitted before the Assessing Officer that returns originally filed did not include sale proceeds received on supply of spare parts/equipments to various customers in India. Further from consolidated order passed by this Tribunal in case of a group entity of GE Overseas being *GE Energy Parts Inc. v. Addl. DIT [2017] 78 taxmann.com 2 (Delhi - Trib.)*, it is observed that the documents/evidences/materials gathered by survey team during survey proceedings and post survey enquiries also included documents pertaining to assessee and various sales proposals that had been exchanged between assessee and the Indian office being GEIPL since year 2001 onwards. Further, there is no denial on behalf of assessee that expats stationed in India having office at premises of GEIOC were not working for assessee in India. It is observed from reply filed by assessee, that, details of Directors of assessee has been provided wherein, personnel called Claudio Santiago was communicating for assessee which is evident from the consolidated order passed by this Tribunal, in case of *GE Energy Parts Inc. (Supra)*. Thus, it can be safely concluded that, there were expats working on making sales for assessee, even prior to years under consideration through GEIPL, which has already held to be Fixed place PE for all GE Overseas entities, and having business connection through GEIPL in terms of article 5(4) and (5) of India-Italy DTAA, there is no income that could be deemed to have accrued or arisen in India under section 9.
- Admittedly assessee was engaged in various sales activities in India through expats with support staff provided by GEIPL during preceding years as well as year under consideration. From draft assessment order passed by the Assessing Officer, it is observed that assessee was called upon to file figures of offshore supply for year under consideration and it was submitted by assessee that, due to change in accounting software figures of offshore supply for year was not available. These documents/materials found during survey which has been related to assessee by the revenue

sufficiently establishes existence of sales team, formed by employees of GEIPL and expat of assessee, which secured orders in India for non-resident assessee, thereby constituting a dependent agent PE.

- Admittedly, onshore supply services received have been offered to tax by assessee in India, by assessee. However, offshore supplies made to Indian customers by assessee through GEIPL, in India has not been declared in return of income and has amounted to escapement of income for year under consideration.
- It is opined that at the stage of issuance of notice to initiate reassessment proceedings, sufficiency of correctness of material is not a thing to be considered.
- Thus, on basis of above discussions and factual observations, it is opined that assessee had failed to disclose revenue received from sales made to Indian customers through GEIPL, on basis of materials gathered during survey for the Assessing Officer to form *prima facie* reason to believe by the Assessing Officer, of income having escaped assessment, for year under consideration, as per *Explanation 2(b)* to section 147.
- The assessee further contended that, the Assessing Officer failed to prove in reasons to believe, existence of PE of assessee in India, and hence, reassessment is bad in law. However, documents gathered during survey proceedings, which have been elaborately discussed in order passed by this Tribunal in case of *GE Energy Parts Inc. (supra)*, are sufficient to compel a person, reasonably instructed in law, to form a view about existence of PE of assessee, along with employees of GEIPL for all GE Overseas entities in India.
- Thus the contentions advanced by the assessee, that the Assessing Officer was not justified in initiating reassessment proceedings is not acceptable. The fact that assessee had a PE in India and that there was an understatement of income to the extent of sale receipts received by assessee from Indian customers towards sale of spare parts/equipments, issuance of notice under section 148 brings case of assessee within fold of *Explanation 2(b)* to section 147. In view of the above, the Assessing Officer was justified in initiating reassessment proceedings.