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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 9593/2022**

GE ENERGY PARTS INC

..... Petitioner

Through: Mr. Sachit Jolly, Mr. Rishabh Malhotra, Ms. Disha Jham, Ms. Soumya Singh & Mr. Devansh Jain, Advs.

versus

INCOME TAX OFFICER WARD 1 -3- 2, INTERNATIONAL TAXATION & ORS.

..... Respondents

Through: Mr. Sunil Agarwal, SSC with Mr. Shivansh B. Pandya, JSC & Mr. Utkarsh Tiwari, Adv.

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+ **W.P.(C) 10055/2022**

GE GLOBAL PARTS AND PRODUCTS GMBH

..... Petitioner

Through: Mr. Sachit Jolly, Mr. Rishabh Malhotra, Ms. Disha Jham, Ms. Soumya Singh & Mr. Devansh Jain, Advs.

versus

INCOME TAX OFFICER WARD 1 3 2 INTERNATIONAL TAXATION & ORS.

..... Respondents

Through: Mr. Puneet Rai, SSC.

56

+ **W.P.(C) 13633/2023 & CM APPL. 53803/2023 (Interim Relief)**

GE ENERGY PARTS INC.

..... Petitioner

Through: Mr. Sachit Jolly, Mr. Rishabh Malhotra, Ms. Disha Jham, Ms. Soumya Singh & Mr. Devansh Jain, Advs.



versus

INCOME TAX OFFICER, WARD - 1(3)(2),
INTERNATIONAL TAXATION, NEW DELHI & ORS.

..... Respondent

Through: Mr. Sunil Agarwal, SSC with
Mr. Shivansh B. Pandya, JSC &
Mr. Utkarsh Tiwari, Adv.

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+ W.P.(C) 15097/2023 & CM APPL. 60313/2023 (Interim Relief)

GE GLOBAL PARTS AND PRODUCTS
GMBH

..... Petitioner

Through: Mr. Sachit Jolly, Mr. Rishabh
Malhotra, Ms. Disha Jham, Ms.
Soumya Singh & Mr. Devansh
Jain, Advs.

versus

INCOME TAX OFFICER & ORS. Respondents

Through: Mr. Puneet Rai, SSC.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINDR KUMAR

KAURAV

ORDER

03.04.2024

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1. This batch of writ petitions assails the order dated 13 May 2022 passed in terms of Section 197 of the **Income Tax Act, 1961**¹ holding that the petitioner would be entitled to a withholding tax rate of 4% in respect of the receipts received from various customers and asserted to be taxable as business income under Section 9(1)(i) of the Act.

2. Although the writ petitions are governed by different **Double Tax Avoidance Agreements**², since the issues raised were common,

¹ Act

² DTAA's



we propose to notice the following salient facts as obtaining in W.P.(C) 9593/2022. The petitioner is a foreign company incorporated under the laws of the United States and is a U.S. tax resident. It had, for the **Assessment Years**³ in question, entered into independent contracts with various customers for the supply of spare parts from outside India. It was its case that it had no **Permanent Establishment**⁴ and that the revenue earned from the aforementioned supplies would not be taxable in India.

3. For AYs 2001-02 to 2008-09, various assessment orders came to be framed holding that the petitioner had a PE in India. Applying the provisions of Section 44BB and 44BBB, deemed profitability of 10% of the gross receipts from the supply of spares and offshore repairs was assumed by the respondents and 35% of such profits was held as attributable to the PE in India.

4. On the basis of the aforementioned assessments, it is averred that the respondents, starting from **Financial Year**⁵ 2010-11 up to FY 2020-21, had granted a lower withholding tax certificate at the rate of 1.5% of the gross receipts. However, while dealing with cases pertaining to AYs 2001-02 to 2008-09, the **Income Tax Appellate Tribunal**⁶ in terms of its order dated 27 January 2017 held that the petitioner had a PE in India but reduced the rate of profit attribution to 26%. The aforesaid judgment rendered by the ITAT came to be affirmed by this Court in terms of its judgment dated 21 December 2018 passed on ITA No. 621/2018.

5. Although the judgment rendered by this Court was challenged

³ AYs

⁴ PE

⁵ FY

⁶ ITAT



before the Supreme Court by way of a Special Leave Petition, the same came to be subsequently withdrawn since the petitioner opted for settlement under the Direct Tax Vivad se Vishwas Act, 2020. However, and relying upon the assessment orders which had been framed for AYs 2001-02 to 2008-09, similar orders came to be passed for subsequent AYs 2009-10 to 2015-16 and AY 2017-18.

6. For FY 2021-22, the respondents issued a withholding tax certificate dated 23 September 2021 taking the same at 4% of the gross receipts. The aforesaid certificate came to be assailed by way of W.P.(C) 13188/2021 and which was disposed of by an order dated 25 March 2022 in the following terms:-

“1. The above-captioned writ petitions are directed against the order(s) dated 23.09.2021, passed by the Assessing Officer (AO) in respect of the application(s) preferred by the petitioners under Section 197 of the Income Tax Act, 1961 [in short “the Act”]. To be noted, the said application(s) relate to Financial Year (FY) 2021-2022.

1.1. The purpose with which the aforementioned application(s) were preferred by the petitioners for the FY 2021-2022, was that the payer should not withhold any money towards tax i.e., the withholding tax should be pegged at “Nil” rate.

1.2. *Via* the impugned order(s), the AO has concluded that the withholding tax rate should be pegged at 4%.

2. Mr Sachit Jolly, who appears on behalf of the petitioners, submits that the order passed by the AO is wholly erroneous, as, in another proceedings carried on before the Income Tax Appellant Tribunal [in short “the Tribunal”] i.e., ITA No.671 (Delhi) of 2011 concerning the petitioner in W.P.(C) 13188/2021 i.e., GE Energy Parts Inc., the Tribunal has attributed the profits to the Permanent Establishment (PE) of the petitioner therein in India, at the rate of 26%. The said judgment of the Tribunal is dated 27.01.2017.

2.1. According to Mr Jolly, the Revenue cannot, in the very least, veer away from this position/principle, although the petitioners continue to maintain that they have no PE in India.

2.2. Therefore, if the rate of attribution of profits to the PE in India is pegged at 26%, then the withholding rate of tax cannot exceed 1.04%



2.3. It is, therefore, Mr Jolly's contention that the conclusion reached, via the impugned order, by the AO that the withholding rate of tax should be 4%, is completely unsustainable. It is Mr Jolly's contention that this aspect of the matter has not been dealt with by the AO in the impugned order.

2.4. Furthermore, Mr Jolly says that the view taken by the AO that the petitioners have artificially split their contracts with various entities in India cannot improve the cause of the respondents/revenue, for the reason that those entities have already paid the requisite tax demanded of them.

3. On the other hand, Mr Puneet Rai, who appears on behalf of the respondents/revenue, has relied upon the impugned order(s) i.e., order(s) dated 23.09.2021, to support his contention that the conclusion reached by the AO is valid and legally tenable.

3.1. Mr Rai, however, cannot but accept the fact that in the earlier proceedings, to which we have made a reference above, the profitability attributed to the PE, said to be located in India, and connected to the petitioners, is 26%. If that figure is taken into account, then surely the withholding rate of tax cannot exceed 1.04% [26% x 10% x 40%].

3.2. However, Mr Jolly says that since the FY is coming to an end, at this juncture, he does not wish to press the above-captioned writ petitions, but would file a fresh application before the AO for F.Y. 2022-23.

3.3. Mr Jolly says that, if such an application is filed, the petitioners would like the AO to deal with the contentions raised in the writ petitions.

4. Therefore, while closing the present writ petitions, we wish to observe that in case the petitioners were to move an application under Section 197 of the Act for FY 2022-2023, and if the contentions raised in the writ petitions form part of the said application, including what is noted hereinabove by us with regard to the attribution of profits to the PE, the same will be dealt with by the AO, as per law.

5. At this stage, Mr Jolly says that the petitioners will move an application for the F.Y.2022-2023, within four weeks of receipt of a copy of this order. In case, such an application is moved, the AO will dispose of the same within four weeks of the receipt of the application.

6. Needless to add, the aforesaid observations will not impact the decision that the AO would take qua the fresh application. The AO will take a decision in the matter, after affording a hearing to the petitioners, in support of the application.

7. Parties will act, based on the digitally signed copy of this order.

8. The writ petition(s) are disposed of in the aforesaid terms.



9. Consequently, pending application(s) shall stand closed.”

7. The petitioner thereafter applied for withholding tax certificates for FY 2022-23 on 12 and 23 April 2022. The petitioner was accorded a personal hearing on 30 April 2022 pursuant to the directions issued by this Court while disposing of the aforementioned petition.

8. It is thereafter that the impugned order came to be passed. We note that when the writ petition was entertained on 28 July 2022, the Court had passed an interim order in the following terms:-

“1. These writ petitions seek to challenge the order/certificate dated 13.05.2022, passed under Section 197 of the Income Tax Act, 1961 [in short “Act”].

2. As per the impugned order/certificate, the lower rate of withholding tax is pegged at 4%.

3. The petitioner has not only made a prayer that the impugned order/certificate be set aside, but has also sought a direction that the certificate ought to have been issued at ‘nil’ rate.

4. Besides this, the petitioner sought an alternative prayer, which is, that it would be willing to withhold tax at the rate of 1.5% during the pendency of the writ petition. This, admittedly, was the rate of withholding tax for the period spanning between Financial Year (FY) 2018-19 and 2020-21.

5. We may also note that in FY 2021-22, the rate of withholding tax was fixed at 4%.

6. The petitioner had instituted a writ petition in this Court i.e., W.P.(C) 13188/2021, to assail the tax rate in the withholding certificate/order issued for 2021-2022, which was disposed of via order dated 25.03.2022, wherein the following was recorded:

xxx

xxx

xxx

7. Mr Sachit Jolly, who appears on behalf of the petitioner, contends that the aforementioned directions have not been followed while issuing the impugned order/certificate.

8. One of the aspects which has come to fore, is the order dated 27.01.2017 passed by the Income Tax Appellate Tribunal [in short “Tribunal”] in IT Appeal no.671 (Delhi) of 2011, wherein profits attributed to the petitioner have been pegged at 26%.

8.1. This order of the Tribunal concerned the period spanning between Assessment Years (AYs) 2001-02 and 2008-09.



8.2. Mr Jolly informs us, that pursuant to the Tribunal's order, the Dispute Resolution Panel (DRP), via the order dated 05.05.2022, has accepted that profits could be attributed to the petitioner at the rate of 26%.

8.3. Therefore, what is evident is that if the profit attribution rate applicable to the petitioner is kept at 26%, clearly the withholding rate of tax would get pegged at 1.04% [26% x 10% x 40%.]

9. Mr Jolly, correctly points out, that via the impugned order, the profit attributed to the petitioner is 100%.

10. Messrs Sunil Agarwal and Puneet Rai, who appear on behalf of the respondents/revenue, on the other hand, say that the impugned order alludes to the fact that the petitioner has artificially split the subject contracts into offshore and onshore supplies.

11. It is also Messrs Agarwal and Rai's submission, that a rectification application under Section 154 of the Act has been filed with the DRP, vis-à-vis the order dated 05.05.2022.

11.1. We have queried Messrs Agarwal and Rai, as to how the DRP would revise its findings based on the rectification application.

11.2. Messrs Agarwal and Rai say that crucial facts were missed by the DRP while passing the order dated 05.05.2022 and therefore, a rectification application has been filed.

12. Furthermore, we have been asked to stand over the matter, to await the decision of the DRP qua the revenue's rectification application.

13. Mr Jolly, on the other hand, says that he is willing to go on with the matter based on the demurrer that the result of the rectification application would be adverse to the interests of the petitioner.

14. Messrs Agarwal and Rai, however, insist that the matter should be stood over.

15. To enable the revenue to bring the order passed in its rectification application on the record, the matter is stood over.

15.1. Needless to add, the DRP will take an independent decision in the matter de hors the observations made above vis-à-vis the revenue's rectification application.

16. We may also note that despite an opportunity being given to the revenue to file counter-affidavit (s) in the above-captioned matters, it has failed to comply.

16.1 In W.P.(C) 9593/2022, the order to this effect was passed on 24.06.2022. Likewise, in W.P.(C) 10055/2022 via order dated 05.07.2022, time was granted to the revenue to file a counter-affidavit.



17. Since a request is made on behalf of the counsels for the revenue to grant further time to file counter-affidavits in the above-captioned matters, the same is acceded to.

17.1. The counter-affidavits will be filed by the revenue within the next four weeks.

17.2. Rejoinder thereto, if any, be filed before the next date of hearing.

18. However, in the interregnum, we are inclined to direct as follows: the petitioner will receive income from the concerned remitters after imposition of withholding tax at the rate of 1.5%; with the caveat, that if the petitioner were to fail in the aforementioned writ actions, the balance amount calculated at the differential rate of 2.5% will be deposited with the revenue post-haste.

.....”.

9. Pursuant to the aforesaid interim direction, the petitioner has received remittances with a withholding tax at the rate of 1.5%. By the time these writ petitions were taken up for hearing, it was evident that they had essentially been rendered infructuous consequent to the FYs’ themselves having come to an end. However, Mr. Jolly drew our attention to paragraph 18 of the order passed on 28 July 2022 and which had provided that in case the petition were to fail, the balance amount calculated at a differential rate of 2.5% would be deposited. It was on the aforesaid basis that the writ petitioners prayed for the matters being heard and disposed of finally on merits and notwithstanding the FY having come to an end.

10. In our considered opinion, para 18 of our interim order clearly requires a finding on merits being rendered irrespective of the FY having come to an end since the liability of the petitioner for the period in question would have to be adjudged lest it be put to prejudice and be compelled to pay the differential tax @ 2.5%.

11. One of the primary grounds of challenge which was noticed by the Court while entertaining the writ petition was of the respondents



having accepted the profit attribution rate to be 26%. It was in the aforesaid backdrop that the petitioners appear to have contended that the withholding rate of tax would not exceed 1.04%. However, and since they had been adhering to a withholding tax rate of 1.5%, and which was the rate that was admittedly followed for the period spanning FYs' 2018-19 to 2020-21, the Court had in the interim stipulated that the withholding tax rate would be 1.5%.

12. From a reading of the impugned order, we note that the profit attribution rate of 26% does not appear to be disputed. This is evident from a reading of the following passages as appearing in the impugned order:-

“Permanent Establishment in India

The assessee is a company of the GE Group. In assessments made for earlier years in the assessee's case, the Assessing Officer, holding that the assessee has a PE in India, has attributed 3.5% of gross receipts from supply contracts as income of the PE, which is taxable @ 40% as per the Act. The fact of PE has been upheld by various appellate authorities including Hon'ble Delhi High Court with profit attribution rate of 26% of PE in India in those cases of GE Group.

The taxability of GE Energy Parts Inc. in India is, therefore, to be decided as per the provisions of the Income-tax Act and relevant provisions of the India-USA DTAA. From the facts of the case, there is no doubt that the assessee has a "business connection" under section 9(1)(i) of the Act and have a PE' under the provisions of Art. 5(2) of the India-USA DTAA.”

13. Notwithstanding the authority having noticed the profit attribution rate, it proceeded to frame a withholding tax rate of 4%. Since the factum of the withholding tax rate not exceeding 1.04%, when computed alongside the profit attribution rate of 26%, was not seriously questioned, we find ourselves unable to sustain the order impugned.

14. We accordingly allow the writ petitions and quash the



impugned order dated 13 May 2022. However, we hold that the decision taken for FYs 2022-23 and 2023-24, which forms the subject matter of the instant writ petitions, shall consequently not be treated as a precedent for subsequent years. The withholding tax rate question for any other year which may be pending would have to be decided independently.

15. We further observe that since the orders impugned before us stood restricted to an adjudication under Section 197 of the Act alone, all rights and contentions of respective parties on merits are kept open to be addressed in regular assessment proceedings.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

APRIL 3, 2024/neha