Ge Hydro France vs Assistant Commissioner Of Income Tax & ... on 12 February, 2025

Author: Yashwant Varma

Bench: Yashwant Varma

$~24 to 26
* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P.(C) 1560/2022
GE HYDRO FRANCE
Through:

versus

ASSISTANT COMMISSIONER OF INCOME TAX & ANR.
.....Respondents
Through: Mr. Ruchir Bhatia, SSC alon
with Mr. Anant Mann, JSC an
Mr. Pratyaksh Gupta, Adv.

25
+ W.P.(C) 1629/2022
GE HYDRO FRANCE
Through:

versus

ASSISTANT COMMISSIONER OF INCOME TAX
INTERNATIONAL TAXATION CIRCLE 1(3)(1) & ANR.
.....Respondents
Through: Mr. Ruchir Bhatia, SSC alon
with Mr. Anant Mann, JSC an
Mr. Pratyaksh Gupta, Adv.

26
+ W.P.(C) 1638/2022
GE HYDRO FRANCE
Through:

versus

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

W.P.(C) 1560/2022, W.P.(C) 1629/2022 & W.P.(C) 1638/2022

Through:

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

ORDER

% 12.02.2025

1. These three writ petitions seek to impugn the reassessment action which has been initiated by the respondents pertaining to Assessment Years 1 2013-14, 2014-15 and 2015-16.

2. For purposes of brevity, we propose to take note of the facts as they obtain in the lead writ petition being W.P.(C) 1560/2022.

3. From the disclosures which are made before us, we find that the petitioner had filed a Return of Income for AY 2013-14 which came to be subsequently revised on 19 February 2014. On 19 March 2021, a notice under Section 148 of the Income Tax Act, 1961 2 came to be issued against the writ petitioner. As is manifest from a reading of the notice dated 19 March 2021, the same was based on various survey reports and the findings that came to be recorded in the course thereof pertaining to various constituents of the GE group.

4. Since, we are in the present case concerned with the reassessment regime which existed prior to the promulgation of Finance Act, 2021, the respondents appear to have followed the procedure as mandated by the Supreme Court in GKN Driveshafts (India) Ltd. v. Income Tax Officer and Ors 3. The reasons which are AY Act (2003) 1 SCC 72 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:18 stated to have formed the basis for the formation of opinion that income had escaped assessment appear on our record as Annexure-C. From a reading thereof, we find that the reopening was principally founded on the survey, which was conducted on 06-07 June 2019 on various entities forming part of the Energy and Transmission & Distribution (Grid) business of the erstwhile Alstom Group which was subsequently acquired by GE. This becomes apparent from a reading of paragraphs 2 and 3 of the reasons and which are reproduced hereinbelow:-

> "2. In this case Survey I 33A(l) was conducted on 06-07 June, 20 I 9 alongwith the following three other entities which engaged in the Energy and Transmission & Distribution (Grid) business of the erstwhile Alstom Group (this business of Alstom group have now been acquired by the GE Group):
>
> (i) GE T&D India Limited u/s I 33A(2A), (ii) GI Power India Limited u/s 133A (1), (iii) Grid Solutions SAS u/s 133A (1).

3. It was found from the survey proceedings that the foreign companies of the erstwhile Alstom group in the Energy business including GE Hydro France have Dependent Agent PE and Fixed Place PE in India. This was established after perusing the statements of several individuals of GE Power India Limited, copies of certain documents and backup copies of email accounts of certain individuals of these two companies. For the sake of brevity only a few emails are reproduced hereinafter as representative basis."

5. The respondents thereafter proceeded to allude to the material which was gathered in the course of the survey including the statements of various individuals that came to be recorded. It was ultimately concluded that although the assessee appears to have conceded to the existence of a Permanent Establishment 4 in India, the profits derived from the receipt of income which was assumed to accrue, had not been offered to tax.

6. Basis the above, the Assessing Officer5 observed as follows:-

> "12. To conclude after examining the material available on record and past assessment history of the assessee and after due application of mind. I have reason to believe that income or Rs. 92,56,452/- being 3.5% of total receipts of Rs 26,44,70.080/- from contracts with Indian entities has escaped assessment during AY 2013-14. Hence it is a fit case for initiation of proceedings under Sec 147 of the Income-tax Act, 1961 so as to bring to tax the income escaping assessment of Rs 92,56,452/- and any other income which comes to the notice of the Assessing Officer subsequently during the course of reassessment proceedings. The income has been computed considering the past assessment history and the actual profit and attribution rate will be assessed at the time of scrutiny assessment proceedings after considering the submission of' the assessee."

7. Responding to the aforesaid notice, the petitioners filed detailed objections assailing the assumption of jurisdiction itself based on a survey which was conducted in 2019. It also appears to have been urged by the petitioners that the earlier judgments rendered by the Court in GE Energy Parts Inc vs. Commissioner of Income-tax (International Taxation) 6 and which had emanated from a survey which was conducted in 2007 would also clearly not be applicable nor could the same be mechanically applied. Insofar as the question of the existence of a PE is concerned, the petitioner explained that it had admittedly set up a Project Office in respect of onshore supplies and that all revenues attributable to that Project Office had been duly offered for taxation and had, in fact, been duly assessed and accepted.

8. It was further contended that insofar as the revenue of the petitioner was concerned, the same was confined to offshore supplies which were undertaken in the relevant AYs' and thus clearly not

exigible to tax, in light of the judgment of the Supreme Court in Ishikawajma-Harima Heavy Industries Ltd vs DIT 7. This becomes AO 2018 SCC OnLine Del 13256 2007 SCC 2481 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 evident from a reading of the following extract of the objections which were submitted:-

> "(j) No income escaping assessment It is further submitted that, even otherwise, the present case is not amenable to invocation of reassessment proceedings for the reason that the fundamental, jurisdictional condition of 'income escaping assessment' is not satisfied in the present case, for the reasons elaborated hereunder:
>
> It is submitted that the assessee is in the business of supplying equipment and spares to Indian entities and during the year, made offshore supplies amounting to Rs.26,44,70,080 to customers in India. In respect of the said offshore supplies, title in the plant and equipment transferred outside India and sales were concluded outside India, thereby not giving rise to any income taxable in India. Accordingly, the assessee did not disclose the payments received for the aforesaid offshore supplies in the return of income as the same were not chargeable to tax in India.
>
> Regarding taxability of offshore supplies, it is submitted that the title to and property in the goods shipped by the Petitioner at the foreign port stood transferred at the port of shipment. The event of sale took place clearly outside the territory of India. The income arising out of such sale cannot be said to have accrued or arisen in India. The accrual of income derived from offshore supplies cannot be attributed to any operation in India and therefore, no income can be deemed to accrue or arise in India.
>
> In respect of taxability of receipts relating to offshore supply, the Hon'ble Supreme Court in the case of Ishikawajma-Harima Heavy Industries Ltd vs DIT: [2007] 288 ITR 408 (SC) held as under: "98. We, therefore, hold as under:
>
> (A) Re: Offshore supply (1) That only such part of the income, as is attributable to the operations carried out in India can be taxed in India. (2) Since all parts of the transaction in question i.e. the transfer of property in goods as well as the payment, were carried on outside the Indian soil, the transaction could not have been taxed in India. (3) The principle of apportionment, wherein the territorial jurisdiction of a particular State determines its capacity to tax an event, has to be followed.
>
> (4) The fact that the contract was signed in India is of no material consequence, since all activities in connection with the offshore supply were outside India, and therefore cannot be deemed to accrue or arise in the country.

> (5) There exists a distinction between a business connection and a permanent establishment. As the permanent establishment cannot be said to be involved in the transaction, the aforementioned provision This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 will have no application. The permanent establishment cannot be equated to a business connection, since the former is for the purpose of assessment of income of a non-resident under a Double Taxation Avoidance Agreement, and the latter is for the application of Section 9 of the Income Tax Act.

(6) Clause (a) of Explanation 1 to Section 9(1)(i) states that only such part of the income as is attributable to the operations carried out in India, is taxable in India.

(7) The existence of a permanent establishment would not constitute sufficient "business connection", and the permanent establishment would be the taxable entity. The fiscal jurisdiction of a country would not extend to the taxing of entire income attributable to the permanent establishment.

(8) There exists a difference between the existence of a business connection and the income accruing or arising out of such business connection.

(9) Para 6 of the Protocol to the DTAA is not applicable, because, for the profits to be "attributable directly or indirectly", the permanent establishment must be involved in the activity giving rise to the profits."

(emphasis supplied) It has been held likewise in the following decisions:

> • Linde AG, Linde Engineering Division vs DDIT; [2014] 365 ITR 1 (Del) • DIT vs LG Cable Ltd: [2011] 237 CTR 438 (Del) In the reasons to believe, allegedly relying on the statement of Sh. Vijay Sharma, CFO, GEPIL, it is stated that entire insurance cost is borne by the foreign company, even after the title in the goods have been passed to the Indian Company and therefore, the sales made by the assessee are not 'offshore sales' (refer para 7.3 of reasons recorded).
>
> At the outset, it is submitted that this paragraph does not specify any particular GE entity and instead states in a generic manner that insurance cost is borne by foreign entities till the last stage. There is no finding to the effect that the assessee pays insurance costs till the last stage.
>
> Without prejudice to the above, it is submitted that even where insurance cost is borne by foreign entity(s) while title and delivery has been completed outside India, the same has to be regarded as offshore sales as the beneficiary of insurance in such cases is always the customer.

> In this regard, it is submitted that as per the contracts entered into with the Indian companies, title in the goods are transferred to the Indian company outside India and therefore, such sales are offshore sales, not taxable in India; bearing of insurance cost does not impact the transfer of ownership of the goods as held by the AAR, Delhi in This is a digitally signed order.
>
> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 the case of Technip France SAS: 432 ITR 338 (AAR); relevant extracts reproduced hereunder:
>
> "19. It was thus agreed in the contract that the ownership of offshore equipment and materials will be transferred to the company upon FOB shipment for the imported supply. Though, the Applicant was responsible for insurance of all the materials including cargo transit insurance as well as for transportation and safe storage of the equipments and materials to the contract site, these obligations had no impact on the transfer of ownership of the imported materials. It is apparent from the terms of the contract that ownership of the equipments and materials under offshore supply part of the contract was transferred outside India....."

(emphasis supplied) AAR in the case of Mitsubishi Electric Corporation: 278 Taxman 395 (AAR, Delhi) held as under:

> "3. We do not find any design to avoid tax by any illegal or improper means. The submission of the Revenue is mostly on the merits of the case which has to be considered in the course of merit hearing. Merely because the applicant has taken over the responsibility of risk of loss or damage till the equipments were delivered in Delhi and also that of insurance etc; it does not establish that the transaction was designed prima facie for avoidance of tax....."

(emphasis supplied) Since no income with regard to offshore supplies is taxable in India, no income in any case be attributed to alleged PE of the assessee in India.

In view of the foregoing, it is submitted that reassessment proceedings initiated in the present case in absence of any income chargeable to tax escaping assessment renders the same without jurisdiction, bad in law and liable to be dropped."

9. Those objections ultimately came to be rejected by the respondents in terms of an order dated 31 December 2021. While dealing with the objection of the surveys conducted in 2007 and 2019 not being liable to be mechanically extrapolated to the AYs in question, the AO has held as follows:-

> "V. The assessee has claimed, in essence, that the survey was not undertaken in the case of the assessee, that the statements recorded were not of employees of the assessee, that GEPIL and GETDIL do This is a digitally signed order.

> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 not belong to the business-vertical of the assessee, that the assessee's name was not mentioned in the statements, and that the material gathered from the survey does not pertain to the relevant assessment year. In light of these claims, the assessee opines that there is no material which substantiates that income has escaped assessment in the hands of the assessee.
>
> As discussed in the reasons recorded, the survey actions were conducted on June 6 and June 7in 2019 on the following entities engaged in the Energy and Transmission & Distribution (Grid) business of the erstwhile Alstom Group (these business of Alstom group have now been acquired by the GE Group). Surveys were done in the case of the following entities:(i) GE T&D India Limited u/s 133A(2A), (ii) GE Power India Limited u/s 133A(1), (iii) GE Hydro France u/s 133A(1), and (iv) Grid Solutions SAS u/s 133A(1). To quote directly:
>
> "In this case Survey 133A(1) was conducted on 06-07 June, 2019 alongwith the following three other entities which engaged in the Energy and Transmission & distribution (Grid) business of the erstwhile Alstom Group (these business of Alstom group have now been acquired by the GE Group):
>
> (i) GE T&D India Limited u/s 133A(2A), (ii) GE Power India Limited u/s 133A(1), (iii) Grid Solutions SAS u/s 133A(1) It was found from the survey proceedings that the foreign companies of the erstwhile Alstom group in the Energy business including GE Hydro France have Dependent Agent PE and Fixed Place PE in India. This was established after perusing the statements of several individuals of GE Power India Limited, copies of certain documents and backup copies of email accounts of certain individuals of this company. For the sake of brevity only a few emails are reproduced hereinafter as representative basis."

In the first instance, the survey was conducted on the assessee itself u/s 133A(1) of the Act. To claim otherwise is incorrect. Further, the statement of Mr. Vijay Sharma, CFO of GEPIL was recorded, who said:

> "There are 4 streams worldwide in the business 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 and CEO', called 'GE officer'. These 'GE officers' are responsible for the business of their respective verticals. Each vertical has Tier-2 businesses. GEPIL has regional organization of Steam Power Tier 2 Business and Hydropower Tier-2 business of GE Renewables. The steam power tier 2 business is led by Mr Andreas Lusch, President and CEO. The Hydropower Tier 2 business is led This is a digitally signed order.

> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 by Mr Pascal Radue, President and CEO."

Thus, clearly, the assessee's vertical is covered directly by the survey findings. Further, the statement of Mr. Apratim Sen, as presented in the reasons, is reproduced below:

> "I work in the tendering segment of the business. I propose the bids in response to the tenders issued by clients. I deal with bids related to tenders for services. I also interact with customers for potential future contracts.
>
> [...] In such cases [to the question, where GEPIL and a foreign entity of the GE Power business jointly enter into a contract with an Indian client for supply and installation of machinery or other equipment, do the employees of GEPIL provide inputs to the foreign entity of the GE group for preparation and finalization of its part of the bid?], the Indian customers float tenders and in response GEPIL and the foreign entity of the GE Power business, after discussing between themselves the requirements of the tender, prepare a joint bid. In the preparation of this bid, discussions are carried out and the roles of the 2 partners, that is, GEPIL and the foreign GE entity are finalized. This process does involve sharing of inputs between the 2 group entities."

Further, email extracts, particularly from Sen's e-mail record, as shared in the reasons recorded, are instructive. To the question, "Please refer to email trail from 17.1.2019 to 6.5.2019, on the subject "Requested MRPL IST Configuration and scope information" in your inbox. Please explain the contents of the correspondences," Sen responded by saying, "Baker Hughes GE is quoting to MRPL Indian customer for Steam turbine spares. GE Power India Limited is supporting Baker Hughes GE with the quote. Since GEPIL does not have the capability, it is in turn seeking support from GE Global Parts & Products GmbH to supply the required parts through GEPIL. However later on it was decided that the parts would not be supplied through GEPIL." Sen's statement clearly demonstrates the modus operandi of the Group in the Energy sector insofar as the so-called specialization of different group companies is executed in an ad-hoc manner so as to avoid taxation. Other e-mails extracted from Mr. Baradia's email, as reproduced in the reasons recorded, demonstrate the same, particularly at serial number 2, 3, 4, 5, 6, and 7 - incriminating evidence and findings of the survey operation. They detail how the surveyed parties assist Alstom/GE Group companies in the Energy and Transmission and Distribution sector in India. The assessee, in its objections against the reasons recorded has filed the following description of itself:

> This is a digitally signed order.
>
> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 The Assessee, a company registered in France, is a hydro power equipment supplier. It had opened a Project Office in India in March 2005; for limited purpose of executing contracts awarded by National Hydroelectric

Power Corporation Limited (NHPC) for Ex- works supply of all equipment & materials for Subansiri Project and Chamera Hydroelectric Project.

Its business description and group membership are squarely covered under the facts emanating from the survey findings, reproduced both above and in the reasons supplied to the assessee. In similar facts, the hon'ble Delhi High Court in the case of GE Energy Parts Inc. vs. CIT [ITA No. 621 of 2017] had held that even though the survey action was conducted on the premises of General Electric International Operations Company Inc. ('GEIOC'); GE India Industrial Pvt. Ltd and ('GEIIPL'), the PE as held by the court was for all GE Group companies. The court held that where 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.

Similarly, in the case of Rolls Royce Plc vs. DIT 2011 (339) ITR 147 (Del), the hon'ble Delhi High Court held a PE of Rolls Royce Plc where the survey action was undertaken on Rolls Royce India Ltd. A similar set of facts was, once again, upheld by the hon'ble Delhi High Court in ZTE Corporation vs. ADIT [2016] 159 ITD 696 (Del). Again, in the case of Huawei Technologies Co. Ltd vs. DCIT, Circle Gurgaon, (International Taxation) [ITA No. 8263/DEL/2019], while the survey operation was conducted on Huawei Telecommunications India Company Pvt. Ltd. the PE was This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 held for Huawei Technologies Co. Ltd. (PRC). Therefore the assessee's objections are incorrect. Consequently, they are dismissed."

10. Proceeding then to reject the objections taken with respect to offshore supplies, the AO has held as under:-

> "X. The assessee has contended that no income has escaped assessment as receipts in its hands are arising from the offshore supply of goods. At the outset, it is stated that the Assessing Officer has shown exactly how income has escaped assessment from the above-mentioned transactions in paragraph 12 of the reasons recorded for reopening [reproduced in reply to Objection VII]. Relying on the past assessment history of the assessee by way of decision of Hon'ble Delhi ITAT in the case of Rolls Royce Plc. V. DDIT (2008) 113 TIJ 446 and seeking guidance from section 44BBB of the Income-tax Act, 1961, the Assessing Officer, in the reasons recorded, has clearly stated in paragraph 12, "I have reason to believe that income [...] has escaped assessment [...]"

Consequently, the assessee's objections are misplaced. The assessee's reliance on Ishikawajma-Harima Heavy Industries Ltd vs DIT: [2007] 288 ITR 408 (SC) is premature and incorrect. In any case, it is differentiable on facts as that case involved a consortium of unrelated parties.

The assessee's reliance on Linde AG, Linde Engineering Division vs DDIT: [2014] 365 ITR 1 (Del) is premature and incorrect. In any case, it is differentiable on facts as the consortium was dealt with as an Association of Persons.

The assessee's reliance on Adobe Systems Incorporated (supra), is once again, incorrect. In that case, the reasons to believe referred to income-escapement arising from the transfer pricing analysis leading to inadequate compensation arising from a cost-plus model, whereas the Revenue's contention was premised on a greater share of income in the hands of the non-resident company as decided through the use of the Profit Split Method. As discussed above, the disposal test is satisfied in the instant case.

The assessee's reliance on Swastic Safe Deposit and Investments Ltd vs ACIT: [2019] 265 Taxman 164 (Bom) is incorrect as it is differentiable on facts. The issue under consideration in that case was of taxability of capital gains arising from sale of shares and its concomitant exemption u/s 10(38) of the Income-tax Act, 1961. Consequently, the assessee's objections in this matter are summarily dismissed.

Having disposed all objections on merit, facts, and legal bases, all the objections raised by the assessee are disposed-off in accordance with the judgment of the Supreme Court of India in the case of GKN This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 Driveshafts (lndia) Ltd. vs. Income tax Officer (259 ITR 19)."

11. We note that the validity of a reassessment action based on previous and subsequent surveys, which were conducted by the respondents in respect of entities forming part of the GE group, had recently fallen for our consideration in Grid Solutions OY (Ltd.) v Assistant Commissioner of Income Tax International Taxation and Another 8. While dealing with that challenge, we had held as follows:

> "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 9 and to the following passages as appearing therein:-
>
> "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, 2025 SCC OnLine Del 183.
>
> 1997 SCC OnLine SC This is a digitally signed order.
>
> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 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 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 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 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 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, 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 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 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 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 question 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 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 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 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 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) 10 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 11 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. In the matter of assessment of income tax, each year's 2014 SCC OnLine Del 4282 1961 SCC OnLine CS 221 This is a digitally signed order.
>
> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 assessment is complete and the decision 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 12 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 renovation work had escaped assessment. Here too, we note that the survey was conducted on March 7, 2002, which falls in the year 2008 SCC OnLine Del 1468 This is a digitally signed order.

> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 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. "

> 12. We are thus constrained to observe that the entire action of reassessment was based solely on the past surveys which had been conducted. There has been an abject failure on the part of the AO to record any finding on how the material gathered in the course of those surveys would impact the assessment of income for the years in This is a digitally signed order.
>
> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19 question. As was observed by us in Grid Solutions OY, PE is a fact specific issue and that facts gathered in the course of a survey cannot be mechanically adopted or applied as relevant to an assessment wholly unconnected and separate. The AO also fails to record any satisfaction to the effect that the facts

gathered in the course of those past surveys have been, on a prima facie evaluation, found to exist in the AYs' in question.

13. Accordingly, and for all the aforesaid reasons, we allow the instant writ petitions and quash the following impugned notices issued under Section 148:

WP(C)	Assessment Ye
1560 of 2022	2013
1629 of 2022	2015
1638 of 2022	2014

HARISH VAIDYANA

FEBRUARY 12, 2025/RW

This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 18/02/2025 at 21:39:19