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

\+ ITA 969/2018 & CM Nos.35890-91/2018

Date of decision : 4th September, 2018

SAMSUNG ELECTRONICS CO. LTD. ..... Appellant

Through: Mr. Bhuwan Dhoopar, Advocate

versus

DEPUTY COMMISSIONER OF INCOME TAX (INT. TAX) ..... Respondent

Through: Mr. Ruchir Bhatia, Advocate

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

The afore-captioned appeal under Section 260A of the Income Tax Act, 1961 (the Act, for short) has been filed by Samsung Electronics Co. Ltd., a non-resident company and resident of Republic of South Korea. The appeal relates to Assessment Year 2007-08 and impugns a common order dated 22nd March, 2018 passed by the Income Tax Appellate Tribunal (Tribunal).

2. The appeal challenges findings of the Tribunal upholding initiation of proceedings by the Assessing Officer under Section 147 read with Section 148 of the Act.

3. The appellant-assessee, who has substantially succeeded before the Tribunal on the questions of permanent establishment in India and attribution of income has not challenged the said findings.

4. For convenience and to examine the contentions raised, we would reproduce the “reasons to believe” recorded by the Assessing Officer for the Assessment Year 2007-08. The "reasons to believe" for the Assessment Year 2007-08 read as under:-

> “A survey in this case was conducted on 24/06/2010. During the course of survey it was found that M/s Samsung India Electronics Ltd is a subsidiary of M/S Samsung Electronics Co. Ltd., South Korea.
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> M/s Samsung India Electronics Ltd is in the business of manufacturing as well as trading of consumer electronics. The items manufactured by the company are washing machine, televisions, air-conditioners, refrigerators and mobile phones. These items are manufactured under the technical assistance of the present (sic. parent) company for which the parent company receives fees for technical services. The parent company M/s Samsung Electronics Co Ltd, South Korea has not been paid any royalty for use of its brand name 'SAMSUNG' by the subsidiary company. Thus, income of the Korean company in the form of royalty has escaped assessment. As per information available on internet, the sales of M/s Samsung India Electronics were Rs.8,000 Crores during the previous year relevant to A.Y.2007-08. The amount of royalty can be taken as Rs.160 Crores by taking the figure of royalty @ 2% of sales.
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> Further, during post survey proceedings, statements of Mr. Jung Soo Shin, President & CEO of the Indian company was recorded on 14.07.2010. It was observed that he is also head of South West Asia operations of the parent company. Thus he is

representing not only Samsung India but also Samsung Korea in his capacity as South West Asia head. The countries covered India, Bangladesh, Sri Lanka, Nepal, Bhutan and Maldives. He is not paid anything extra to perform his duties in the capacity of South West Asia Head. In addition to statement of Mr. Jung Soo Shin, the statements of the following employees of Samsung India Electronics Ltd were recorded.

(i) B D Park, Director Mobile Biz & IT Biz

(ii) Sachin Baweja, Company Secretary

(ii) C S Choi, Vice President, Corporate Marketing

(iv) Y H Cho, Vice President, Sales, North Region
(v) HK Seo, Vice President, CE Sales & Marketing
(vi) J H Kyung, Director, CEO

A close analysis of these statements further reveals that:

(i)There is no evidence in the minutes of the board meetings showing any important policy decisions being taken by the board members in India.

(ii) The Indian company has to regularly update the reasons for ageing stock to the parent company. The parent company regularly overviews the performance of the Indian company.

(iii) The team at Indian company collects information from Indian consumers and sends that information to the parent company so as to develop Indianised Product e.g. two vegetable boxes in refrigerators, sound focused LCD TVs and Semi

Automatic Washing Machines are some of the products which has been Indianised by the parent company on the request of the Indian company.

(iv) Samsung Korea has different Global Business Managements (GBMs) to look after the different categories of products. Each GBM develops new products which are initially marketed from Samsung Korea and then later on localized to be manufactured in the different global subsidiaries.

(v) In deciding which product is to be imported or traded a confirmation is required from the parent company.

(vi) The purchase price of an imported item is decided by a reverse calculation in which first a tentative sale price is determined there after taking into account the dealer margins and the Indian company's overhead the purchase price is negotiated with the headquarters i.e. Samsung Korea.

(vii) (vii) Even the sale price of the products manufactured in India is decided after discussion with the headquarters.

(viii) From the above it can be seen that the Indian company's office is being used as place of management for South Asia operations by the parent company M/s Samsung Electronics Co. Ltd, South Korea therefore the Indian company would constitute PE of the foreign parent company under Article 5(2)(a) of the DTAA and a part of income from sales in South Asian countries such as Bangladesh, Nepal, Bhutan and Maldives should be attributed to Samsung Electronics, Korea.

> *(ix)* Further, it can be inferred from the above that the Indian company is acting as a dependent agent of the foreign company in terms of Article 5(5) of the DTAA, and the transactions between the two are not at arm's length. Hence an adjustment is needed in this regard.
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> *(x)* A perusal of records shows that the assessee has not filed its return of income in India for AY 2007-08.
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> *(xi)* In view of the above, I have reasons to believe that income chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose fully & truly all material facts necessary for its assessment. The short levy of tax exceeds Rs.1,00,000/-. As such the case is covered by provision of clause (c) of Explanation 2 of section 147 of the IT Act, 1961."

5. Appellant accepts that the "reasons to believe" correctly record that survey was conducted in the premises of the Indian subsidiary of the appellant company in June, 2010. The appellant also accepts that the Indian subsidiary had manufactured consumer products like washing machines, refrigerators, air-conditioners, televisions, mobile phones etc. under technical assistance of the appellant and on which fee for technical services was payable. Use of the brand name "samsung" by the Indian subsidiary in trading and sales on which royalty was payable to the appellant is not denied. The Indian subsidiary had substantial turnover of more than Rs.8,000 crores and royalty payable @ 2% of sales would approximately be Rs.160 crores. Turnover as recorded is not disputed and challenged. Another aspect

recorded in the "reasons to believe" had emerged from the statements of officers of the Indian subsidiary recorded during the survey operations and inquiries made thereafter. The statements had revealed that the Indian subsidiary had also covered operations in Bangladesh, Sri Lanka, Nepal, Bhutan and Maldives for which no extra or additional payment was made. "Facts" as then ascertained and known were highlighted in the reasons and grounds to hold that the appellant had permanent establishment in India.

6. It was submitted that the "reasons to believe" had erroneously recorded that the appellant had failed to file their return of income, whereas the returns had been duly filed. At the same time, it is accepted that the returns were filed by the branch office of the appellant under the name of "Samsung Electronics Co. Ltd.- India Software Operations". The returns had included income earned by the branch office from the software operations, as is accepted in paragraph 2.2 in the grounds of appeal. Income earned by the appellant from the Indian subsidiary by way of fee for technical services and royalty was not disclosed and included in these returns. Thus, the returns were in a different name with prefix "India Software Operations" and were in respect of taxable income earned by the branch office in the said operations as a distinct and separate assessee. Pertinently, the appellant-assessee in response to the notices under Section 147/148 of the Act had filed returns of income for the assessment year 2007-2008 including and accounting for fee from technical services and royalty received from the Indian subsidiary. This income though earned and taxable in India, had not been disclosed and accounted for in the

returns filed by the branch office in relation to their operations and earnings. Thus, even if it is assumed that the returns filed by the branch office at Bangalore were returns filed by the appellant, the appellant had disclosed new and additional source of income and also the income earned from the said sources in the returns filed in response to notice under Section 147 read with Section 148 of the Act. This was true for the assessment year 2007-08.

7. Aspect and question of permanent establishment and attribution of income to the permanent establishment were issues examined by the Assessing Officer and adverse findings against the assessee were recorded. No doubt, the said findings have been overturned by the Tribunal, but when we examine the question of initiation of re-assessment proceedings under Section 147/148 of the Act, in the present case, we would hold that the appellant has accepted that the "original returns" filed by "them" were incorrect for they had failed to disclose income earned by way of royalty and fee for technical service. This is material and relevant.

8. It is in this context and in terms of the above finding, we would observe that the judgment of the Delhi High Court in ***Ranbaxy Laboratories Ltd. Vs. Commissioner of Income Tax*** (2011) 336 ITR 136 would not be applicable as the appellant themselves, pursuant to notice for re-assessment, had declared additional income and accepted their failure to disclose earned income by way of royalty and fee for technical services.

9. The contention that "Tax at Source" had been deducted on royalty and fee for technical services would not matter, as the returns

filed were wrong and required a correction and modification. Failure to disclose fully and truly all material facts, without debate is correct and established. Deduction of tax at source would not matter, as "the return of income" by "the branch office" was not filed in terms of the provisions of the Act to include income of the appellant and, therefore, the Revenue did not have any opportunity to examine and consider the taxable income of the appellant. Deduction of tax at source and failure to disclose taxable income are different and distinct aspects. Escapement and short levy of tax has to be objectively and reasonably estimated by the Assessing Officer at the stage of recording of reasons. This was done and objectively ascertained as is clear from the "reasons to believe" recorded which refer to the turnover and sales of the Indian subsidiary. In ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri stock Brockers Private Limited*** (2007) 291 ITR 500 (SC), it was observed that at the stage of issue of notice/recording of reasons the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Conclusive proof and finding on escapement is neither mandated nor required.

10. The Tribunal while rejecting the contention of the appellant-assessee on the question of re-opening had observed:-

> "13. Now we shall proceed to deal with the objection of the assessee to the reopening proceedings. First of all, from the reasons recorded, we understand that this is not a matter of reopening proposed solely basing on the statements of the expatriate employees. Apart from the statements, the non disclosure of receipt of

royalty as disclosed by the tax returns of the branch indicated that the royalty received from SIEL was not disclosed. Ld. AO considered the explanation of the assessee and observed in letter dated 18.11.2011 (page No 45 of the Paper book) that the manufacturing Royalty/FTS received by the assessee from the Indian subsidiary as reflected in the tax returns filed by the SIEL was not reported by the assessee, and it is only in the returns filed in response to the notices issued u/s 148 of the Act, such an income was reported. Assessee admitted the fact that they did not declare this income in the original return of income. This fact is borne by the Assessment order dated 18.10.2012 vide paragraph No.7.1 to 7.3, wherein Ld.AO recorded that, to the notice issued u/s 148 of the Act, the assessee replied that the royalty/FTS received from SIEL was omitted by the assessee due to inadvertence to be declared in the original tax return u/s 139(1) of the Act.

14. Following are the details relating to the income as per original return of income, income as per return filed under section 148, furnished by the assessee

"**Assessment Year**	**Income as per original return of income (in INR)**	**Income as per return filed under section 148 (in INR)**	**Amount of addition made by AO (in INR)**	**Assessed income (in INR)**
AY 2004-05	NIL	183,792,647	6,639,512	190,432,159
AY 2005-06	86,592 was offered to tax under "Other Income"	180,897,736	9,894,848	190,792,584

AY 2006-07	MAT paid on Book Profits (13,10,35,049) u/s 115JB	229,261,833	10,722,431	239,984,264
AY 2007-08	NIL (operations ceased to exist)	354,257,732	44,789,046	399,046,778
AY 2008-09	NIL (operations ceased to exist)	564,889,589	57,863,051	622,752,640
AY 2009-10	No return filed (Branch was closed)	727,560,470	80,918,894	808,479,364
AY 2011-12	1,480,742,857	N.A.	84,758,114	1,565,500,971
AY 2012-13	1,976,164,087	N.A.	111,836,425	2,088,000,512
AY 2014-15	6,210,353,870	N.A.	167,753,195	6,378,107,065

15. A perusal of the figures in the statement furnished in respect of the income as reported in the original return of income and the return furnished u/s 148 of the Act leaves no doubt that there is huge difference and in this context it cannot be said that the notice u/s 148 of the Act is not supported by any valid reason or reasons proposing to re-open the assessment for the assessment years between 2004-05 and 2009-10. It is only after re-opening the matter and verification of the re-conciliation of royalty and FTS income as declared in the return u/s 147 of the Act with the TDS details of SIEL, the AO recorded that the Royalty/FTS income as offered to tax in such returns was acceptable. It cannot be said that there is no escapement of income from computation in the original returns of income filed by the assessee for the Assessment Years 2004-05 to 2009-10. It is only because the SIEL affected TDS on such Royalty, FTS income, whose benefit was availed

> by the assessee in the revised returns that no further tax liability was incurred though income escaping assessment got taxed in fresh proceedings.
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> 16. We, therefore, find that this aspect of non-reporting of the receipt of income on account of royalty is a valid ground for the Ld. AO to propose the reopening of the assessment, and it cannot be said that there was no escapement of income merely because tax was deducted at source on such income.
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> 17. When it is open under Explanation 3 to section 147 of the Act for the Ld. AO to reassess the income on any issue which newly comes to his notice subsequent to the issuance of notice under section 148 of the Act, it cannot be said that mere wrong mentioning of the provision of law relating to the other issues in the reasons recorded would vitiate the proceedings. We, therefore, reject the contention of the assessee that the reopening proceedings are bad under law.

11. For reasons recorded above, we agree. Accordingly, we do not find any merit in the present appeal and the same is dismissed. We clarify that dismissal of the present appeal would not in any way reflect on the appeal, if any, which may have been preferred by the Revenue for the same years.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

SEPTEMBER 04, 2018
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