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

% ***Judgment delivered on: 24 February, 2025***

\+ W.P.(C) 1294/2022

GE GRID (SWITZERLAND) GMBH .....Petitioner

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

versus

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

Through: Mr. Ruchir Bhatia, SSC, Mr. Anant Mann, JSC and Ms. Aditi Sabharwa, Adv.

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\+ W.P.(C) 1625/2022

GE GRID (SWITZERLAND) GMBH .....Petitioner

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

versus

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

Through: Mr. Ruchir Bhatia, SSC, Mr. Anant Mann, JSC and Ms. Aditi Sabharwa, Adv.

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\+ W.P.(C) 1738/2022

GE GRID (SWITZERLAND) GMBH .....Petitioner

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

versus

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

Through: Mr. Ruchir Bhatia, SSC, Mr. Anant Mann, JSC and Ms. Aditi Sabharwa, Adv.

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\+ W.P.(C) 1743/2022

GE GRID (SWITZERLAND) GMBH .....Petitioner

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

versus

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

Through: Mr. Ruchir Bhatia, SSC, Mr. Anant Mann, JSC and Ms. Aditi Sabharwa, Adv.

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\+ W.P.(C) 1750/2022

GE GRID (SWITZERLAND) GMBH .....Petitioner

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

versus

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

Through: Mr. Ruchir Bhatia, SSC, Mr. Anant Mann, JSC and Ms. Aditi Sabharwa, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. This batch of writ petitions impugn the reassessment action initiated by the respondents in the purported exercise of powers conferred by Section 148 of the **Income Tax Act, 1961**[1] in respect of **Assessment Years**[2] 2013–14 to 2017–18. The challenge in the individual writ petitions and the AYs to which they pertain stands encapsulated in the following table: -

WP(C)	Assessment Year	Date of SCN
1294 of 2022	2013-14	17 March 2021
1625 of 2022	2014-15	31 March 2021
1738 of 2022	2016-17	30 March 2021
1743 of 2022	2015-16	31 March 2021
1750 of 2022	2017-18	30 March 2021

2. The reassessment action was commenced prior to the introduction of the new statutory scheme which came to hold the field post the promulgation of Finance Act, 2021. In view of the above, while the notice under Section 148 came to be issued on 17 March 2021, the reasons in support of the formation of the requisite opinion came to be provided to the petitioner later. For purposes of brevity, we propose to notice the reasons as recorded for invocation of Section 148 with respect to AY 2013-14.

3. The **Assessing Officer**[3] as per the reasons provided to the writ petitioner had taken note of the fact that the assessee was a company incorporated and registered under the laws of Switzerland and a non-

[1] Act
[2] AY
[3] AO

resident in the concerned financial year. It noted that it was engaged in the business of supplying equipments and spares to Indian entities. The petitioner is stated to have not filed any returns of income for AY 2013-14. It was thus alleged that although the petitioner was deriving profits from the supply of equipment and spares to Indian companies and entities, it had failed to acknowledge the said income asserting that it had no **Permanent Establishment**[4] in India.

4. The AO then proceeded to allude to a survey action that was conducted on the Transmission and Distribution Division of GE on 06-07 June 2019. GE T&D India Ltd., it becomes pertinent to note had taken over the businesses of the erstwhile Alstom Group. The AO thereafter proceeds to record the following conclusions: -

> "3. It was found from the survey proceedings that the foreign companies of the erstwhile Alstom group in the Transmission & Distribution business have Dependent Agent PE and Fixed Place PE in India. This was established after perusing the statement of several individuals of GE T&D 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.
>
> 4. The following findings establish that GE T&D India Limited (GETDIL) services as a dependent agent PE of Foreign companies of erstwhile Alstom group companies including GE Grid (Switzerland) GMBH making sales in India in the T & D (Grid) sector. The statements of senior functionaries of GETDIL were recorded, email backups of key functionaries of GETDIL were taken."

5. Thereafter and on a consideration of the copious material which was gathered in the course of that survey, the AO came to hold as follows:-

> "7. The findings detailed above conclusively establish that the

[4] PE

> foreign companies of the T&D Segments of the GE Group (erstwhile Alstom group companies) including GE Grid (Switzerland) GMBH have Dependent Agent PE and Fixed Place PE in India and that a part of their business profits arising from India deserves to be taxed in India as income of PE.
>
> 8. In view of the above I am satisfied that assessee has a business connection as per Income Tax Act as well as a PE in India as per India Switzerland DTAA and the PE is engaged in activities which cannot be termed as auxiliary and preparatory. Thus it is held that the activities carried out by the Assessee through the PE in India are in the nature of marketing and sale of the equipments/production in India and these activities were the core activity of marketing, pre bid, bid and post bid negotiation, identification of customer & selling of the products and the amounts received by the Assessee from its customers in India is held to be attributable to its PE in India."

It was on the aforesaid basis that the AO formed the opinion that income liable to tax for AY 2013-14 had clearly escaped assessment.

6. Similar reasons are assigned in support of the proposed re-opening for the other AYs which form the subject matter of the present challenge. Before us, learned counsels for parties were ad idem that the challenge as raised would be covered by the judgment that we had rendered in **Grid Solutions OY (Ltd.) v Assistant Commissioner of Income Tax International Taxation and Another**[5]**.**

7. In *Grid OY*, we had an occasion to deal with an identical challenge to reassessment which too was based on the survey conducted on 06-07 June 2019. Answering the issues that stood raised in that batch and where too the reassessment was based entirely on what was found in the course of that survey, we had observed and held as follows:-

[5] 2025 SCC OnLine Del 183.

"**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**[6] 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, 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

[6] 1997 SCC OnLine SC

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**[7] 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 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

[7] (2022) 446 ITR 382

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***[8], 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 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

[8] 2019 SCC OnLine Del 12357

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 considerable emphasis on the decision of this court dated May 9, 2017, wherein this court directed the respondents to issue certificate under section 197 of the Act, accepting the alternative plea of the petitioner that the Oil and Natural Gas Corporation would deduct tax at 4 per cent. plus surcharge plus education cess on the revenues in respect of only the inside India activities of the petitioner.

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

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

27. In the present case, there cannot be any dispute that existence of permanent establishment is required to be determined by law for each year separately on the basis of the scope, extent, nature and duration of activities in each year. In this regard, the contracts in question, i.e., R-series contracts dated February 7, 2018 and LEWPP series contracts dated September 30, 2016 would have to be taken into consideration. Concededly, this court in its decision dated May 9, 2017 did not have the occasion to consider the R-series contract dated February 7, 2018. The court only considered the contract dated September 30, 2016 as noted in para-1 of the said decision. There is thus, a distinguishing feature - the R-series contract has not been considered by this court in its order dated May 9, 2017. Moreover, in the instant case, the reasons record that the two contracts are indivisible, and the petitioner cannot divide the contractual receipts in two categories, viz., inside India and outside India services. The installation permanent establishment will come into existence, if "project or activity continues for a period of more than 9 months" under Indo-UAE Double Taxation Avoidance Agreement. This question of fact will have to be determined separately for each assessment year, and we are informed that for the assessment year 2016-17 and the assessment year 2017-18, the determination is presently against the petitioner. We cannot accept the petitioner's contention that the assessment proceedings for the assessment years 2007-08, 2008-09 and 2009-10 have already determined this question in favour of the petitioner and there is no change in any circumstances. This question would require to be determined and finding of the fact would have to be arrived at, by a careful consideration of terms of contract, determination whereof cannot be undertaken in the proceedings under section 197 of the Act."

20. The interplay between the principle of consistency and the facts of each year of assessment was lucidly explained by our Court in **Galileo Nederland BV Vs. Assistant Director of Income Tax (International Taxation)**[9] as under:-

"19. We are aware that each assessment year is separate and distinct and principle of res judicata does not apply to

[9] 2014 SCC OnLine Del 4282

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**[10] 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 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

[10] 1961 SCC OnLine CS 221

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**[11] 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 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

[11] 2008 SCC OnLine Del 1468

> 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."

8. The facts as they obtain in this batch are similar to those which we had found to exist in *Grid OY*. It becomes pertinent to note that the respondents have woefully failed to establish, that the formation of opinion was based on any independent inquiry or material that the AO may have collated for the purposes of forming an opinion as to whether income in AYs 2013-14 to 2017-18 had escaped assessment. As is ex facie evident from a reading of the reasons which stood assigned for invoking Section 148, the solitary basis was the survey conducted on 06-07 June 2019.

9. Accordingly, and for all the reasons assigned by us in our judgment rendered on *Grid Solutions OY*, we find ourselves unable to sustain the impugned action. We accordingly allow the instant writ petitions and quash the following impugned orders:

WP(C)	**Impugned Order**
1294 of 2022	31 December 2021
1625 of 2022	31 December 2021
1738 of 2022	31 December 2021
1743 of 2022	31 December 2021
1750 of 2022	31 December 2021

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

FEBRUARY 24, 2025/DR