

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.07.2016

CORAM

THE HONOURABLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.Nos.5499 and 9629 of 2016
and

W.M.P.Nos.4840, 11713, 8658 and 11712 of 2016

M/s.Gamesa Renewable Pvt. Ltd.,
(Formerly known as Gamesa Wind Turbine Pvt. Ltd.)
No.334, Future IT Park, B Blck 8,
Old Mahabalipuram Road, Sholinganallur,
Chennai - 600 119. ... Petitioner in both W.Ps

Vs

- 1.Dispute Resolution Panel-2, Bangalore
7th Floor, Income Tax Office, BMTC Building,
80 Feet Road, Koramangala, Bangalore.
- 2.The Assistant Commissioner of Income Tax,
OSD
Corporate Circle 2, Chennai,
121, Uthamar Salai, Nungambakkam,
Chennai - 600 034.
- 3.The Principal Commissioner of Income Tax-2
Chennai,
121, Uthamar Salai, Nungambakkam,
Chennai - 600 034.
- 4.The Commissioner of Income Tax-TP,
(Transfer of Pricing, Chennai),
121, Uthamar Salai, Nungambakkam,
Chennai - 600 034. ... Respondents in both W.Ps

Prayer in W.P.No.5499 of 2016: Writ Petitions filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records of the first respondent culminating in the passing of the directions/order dated 23.12.2015 in F.No.244/DRP-2-BNG/2015-16 and quash the same and consequently direct the 1st respondent to consider the objections afresh after affording adequate opportunity of hearing including production of evidence, objections, in the manner known to law.

Prayer in W.P.No.9629 of 2016: Writ Petitions filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records of the second respondent in PAN No.AACCG6027C dated 29.01.2016 relating to the Assessment Year 2011-2012 and quash the same.

For Petitioner
in both W.Ps : Mr.V.T.Gopalan
Senior Counsel
for Mr.Rajnish Pathiyil

For Respondents
in both W.Ps : Mr.T.Promod Kumar Chopra
Senior Standing Counsel

COMMON ORDER

Heard Mr.V.T.Gopalan, learned Senior Counsel, assisted by Mr.Rajnish Pathiyil, learned counsel appearing for the petitioner and Mr.T.Pramod Kumar Chopra, learned Senior Standing Counsel appearing for the respondents and with their consent, the writ petitions are taken up for disposal.

2.The petitioner is a Private Limited Company, who is an assessee on the file of the second respondent, namely, the Assistant Commissioner of Income Tax, OSD, Corporate Circle 2, Chennai. In W.P.No.5499 of 2016, the petitioner has challenged the proceedings of the Dispute Resolution Panel-2, Bangalore dated 23.12.2015 for the assessment year 2011-12. In W.P.No.9629 of 2016, the petitioner has challenged the order of assessment passed by the second respondent dated 29.01.2016 for the assessment year 2011-12. The impugned assessment order has been completed based upon the order passed by the Dispute Resolution Panel in exercise of its powers conferred under Section 144C(5) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") and such direction being implemented by the Assessing Officer in terms of Section 144C(13) of the Act and complete the assessment. Therefore, the result of W.P.No.5499 of 2016 would have a direct bearing on W.P.No.9629 of 2016 and therefore the correctness of the proceedings of Dispute Resolution Proceedings (hereinafter referred to as "DRP") is first taken up for consideration.

3.The impugned order has been challenged on the ground of violation of principles of natural justice. The learned senior counsel appearing for the petitioner has not advanced any arguments on the merits of the order passed by the DRP or on the merits of the assessment completed by the second respondent.

The contention raised is that the DRP had hurriedly passed the order within a period of seven days after having directed the petitioner to appear for personal hearing on 16.12.2015 and on the said date, a request for adjournment was made by the petitioner by their letter handed over in person to the DRP mentioning about the floods which had affected their factory premises and as a result of which they are unable to retrieve the records from the factory and in the said communication, the petitioner had requested for 30 days time. However, the DRP did not adjourn the hearing and the assessee had been compelled to appear before the DRP and produce whatever documents which are available with them in the form of additional submission on 16.12.2015 and 17.12.2015 and the manner in which, the order came to be passed by the DRP, it has to be held that there is total violation of natural justice.

4.The DRP being a Panel, it cannot be expected to file a counter affidavit. However, the second respondent, the Assessing Officer has filed a counter affidavit in W.P.No.9629 of 2016 in which a stand has been taken that the objections were filed by the petitioner before the DRP on 17.04.2015 and the date of appearance for personal hearing was fixed on 16.12.2015 and the assessee could very well have kept all the documents ready. But on 16.12.2015 they sought for 30 days time which will go beyond the time limit fixed under Section 144C(12) of the Act which empowers the DRP to pass orders before nine months before the end of the month in which the draft order is forwarded to the eligible assessee. Therefore, there will be no violation of principles of natural justice, more particularly, when written submissions were made on 16.12.2015 as well as on 17.12.2015 and copies of which have been placed before this Court for consideration. Hence, it is submitted that the DRP has considered the submissions and in paragraph 6.5 and 7.1, the DRP has granted relief to the assessee. Therefore, it is not a case where there is violation of principles of natural justice. It is further submitted that the petitioner has an effective alternative remedy by filing an appeal before the Tribunal (ITAT) challenging the assessment order dated 29.01.2016 as appeal is provided to the Tribunal against such orders under Section 253(1)(d) of the Act.

5.The learned senior counsel appearing for the petitioner contended that it may be true that their representatives had appeared before the DRP and made a request for adjournment and since the same was not being properly entertained, they had submitted their written submissions on 16.12.2015 and 17.12.2015 with the available materials and that does not mean that there is no violation of principles of natural justice especially taking into consideration the fact that the proceedings were

completed within a short span of seven days and the petitioner have specifically pleaded violation of principles of natural justice and in the impugned order of DRP, the same having not been dealt with that the request for adjournment has either been accepted or had been rejected, the same cannot be improved by way of a counter affidavit, that too, by the Assessing Officer. The learned senior counsel appearing for the petitioner has placed reliance on the decision of the Hon'ble Supreme Court in the case of Mariamma Roy vs. Indian Bank and others reported in (2009) 16 SCC 187. He has also relied upon the decision of the Division Bench of High Court of Karnataka in the case GE India Technology Centre Pvt. Ltd. by G.V.Ramanna, Chief Financial Officer vs. Dispute Resolution Panel and Assistant Commissioner of Income Tax reported in MANU/KA/0936/2011 to explain the scope of Section 144C of the Act.

6. In reply, the learned Senior Standing Counsel appearing for the respondents contended that the DRP passed an order on 23.12.2015 and the Assessing Officer has completed the assessment by order dated 29.01.2016 thereby giving effect to the order of the DRP and therefore, the order of the DRP impugned in W.P.No.5499 of 2016 has worked itself out and the same cannot be challenged.

7. After hearing the learned counsels appearing for the parties, the short issue which falls for consideration in these cases is whether there is violation of principles of natural justice in the proceedings before the DRP and whether the petitioner was afforded fair and reasonable opportunity before the DRP? Undoubtedly, as the name indicates the Panel is a Dispute Resolution Panel, a special mechanism created under the Act by Finance (No.2) Act, 2009 with retrospective effect from 01.04.2009. In GE India Technology Centre Pvt. Ltd. (supra), the learned senior counsel who had appeared for the appellant before the High Court of Karnataka had placed for consideration of the Court the very purpose of introducing Transfer Pricing under Section 92C and it was pointed out that Clause 55 of the Bill seeks to insert a new Section 144C in the Act relating to Dispute Resolution Panel. The subjects of Transfer Pricing audit and the taxation of foreign company are at nascent stage in India and often the Assessing Officers and Transfer Pricing Officers tend to take a conservative view and the correction of the view takes very long time with the existing appellate structure. Therefore, with a view to provide speedy disposal it is proposed to amend the Income Tax Act so as to create an alternative dispute resolution mechanism within the Income Tax Department and accordingly, Section 144C has been proposed to be inserted so as to provide inter alia the Dispute Resolution Panel as an alternative dispute mechanism. Thus going behind

the object with which the aforementioned provision has been introduced, it has to be seen as to whether the manner in which the petitioner has been dealt with by the Panel is proper and whether they had full and effective opportunity to put forth their submissions?

8. The undisputed facts are that the Draft Assessment Order dated 30.03.2015 was received by the petitioner on 04.04.2015. In terms of sub-section (2) of Section 144C, the petitioner had options to file their acceptance of the variations as done by the Assessing Officer in terms of Clause (a) of sub-section (2) of Section 144C or file their objection to such variations with the Dispute Resolution Panel and the Assessing Officer in terms of Clause (b)-(i) and (ii) of sub-section (2) of Section 144C of the Act. The Assessee in the instant case opted for the second option under Clause (b) and filed their objections before the Dispute Resolution Panel and the Assessing Officer on 17.04.2015. At this stage we may note that in terms of sub-section (12) of Section 144C, no direction under sub-section (5) shall be issued (by DRP) after nine months from the end of the month in which draft order is forwarded to the eligible assessee. The learned senior standing counsel submit that the period of nine months should be computed from 30.05.2015. But in my view the time should be computed from the date on which the Draft Assessment Order is received by the assessee as sub-section (12) of Section 144C uses the expression "Draft order is forwarded".

9. Be that as it may, even accepting for the sake of argument that the time limit commences from 30.05.2015, no order could have been passed beyond 31.12.2015 by the DRP in view of the embargo under sub-section (12) of Section 144C of the Act. However, this aspect was within the knowledge of the DRP. Nevertheless, for nine months, the DRP did not fix the date for hearing the objections of the petitioner. But only on 16.12.2015 the petitioner was directed to appear. It is not in dispute that on 16.12.2015 the petitioner appeared and submitted a letter, in which the following had been stated:

"....."

While the arguments in support of the Company's claim had already been submitted both before the Transfer Pricing Officer ("TPO") and had also formed part of the submissions made by the Company in their Form 35A, filed on 24.04.2015, additional evidences marking the support availed by the Company from its Head Quarters at Spain were being gathered, for an effective presentation before the DRP.

Unfortunately, on account of the recent

floods, caused by the incessant rains, our Corporate Office on the Old Mahabalipuram Road, Chennai, went out of action for nearly a week, and had to be without power as well as communication lines. The server located at Spain could not be accessed and there were no other modalities of any data retrieval.

It was equally unfortunate that our record room at Mamandur, 60 KMs away from Chennai, where our records are kept, had also been inundated and we could not retrieve some of the important files required in this connection with the present reference.

.....
At this juncture, the Company is left with no option to plea to your good offices, to allow 30 (thirty) days' time, to be able to retrieve the necessary records, appear before you and present the case.

.....
For your kind information, the Draft Assessment Order was served on the Company on April 4, 2015 and the reference before the DRP was filed on April 22, 2015."

10. From the above, it is evidently clear that the petitioner requested for time to make effective submissions. In the above referred communication, the petitioner had clearly indicated that the Draft Assessment Order was served on them on 04.04.2015 and the reference before the DRP was filed on 22.04.2015. Therefore, the DRP was well aware as to when the period of nine months would expire. If such is the case, the DRP ought to have taken a realistic view in the matter. But nevertheless the petitioner is stated to have been made to participate in the proceedings and therefore, they submitted a written submissions/objections dated 16.12.2015 (copy of which was placed before this Court by the learned senior standing counsel appearing for the respondents), wherein apart from the merits of the proposed Draft Assessment, the following was stated:

.....
In view of the above discussions and judicial precedents, the Company respectfully submits that it is entitled to produce additional evidence in support of its valid claim and your Honour would be acting within your jurisdiction to accept the same in the interest of justice and fair play and to decide the issues on merits.

The Company respectfully submits that the DRP proceedings has been inserted in Chapter XIV of the

Income Tax Act, 1961 which relates to assessment proceedings. Therefore, the DRP is a part of the assessment machinery and the proceedings before the DRP are a mere extension and part of the assessment proceedings. These are neither appellate nor settlement nor arbitration process. Hence, by virtue of Section 144C(7) of the IT Act, your Honours has ample powers to review and consider the additional evidence, which would have substantial consideration in deciding the issues under objection."

11. Not stopping with that, on 17.12.2015 the petitioner filed another objection. No doubt in these objections, factual contentions were raised. But it has to be seen as to whether the Dispute Resolution Panel which is said to have been constituted as alternative dispute resolution mechanism under the Act could have dealt with the matter in the manner done in the instant case. The petitioner cannot be blamed for the delay of nine months during which objections were kept pending before the DRP i.e., from 22.04.2015 to 16.12.2015. Therefore, the DRP while considering the request for adjournment could not have disbelieved the same as it is an admitted fact that entire Chennai was flooded and suburban were sub-merged. Hence, a realistic approach should have been taken on the petitioner's request or request for adjournment should have either refused or granted time. Undoubtedly, the DRP had sufficient time to pass orders till 31.12.2015 i.e. when the period of nine months comes to an end reckoning the starting point of limitation as 30.03.2015 when the Draft Assessment Order was prepared. Therefore, the DRP could have passed an interim order and rejected the request for adjournment which would have enabled the petitioner to work out their remedies available under law. However, it appears that in a hurried manner, the entire proceedings were closed on 17.12.2015 and orders were passed on 23.12.2015. It may be true that in terms of Section 253(d) of the Act, the petitioner is entitled to canvas the correctness of the order of DRP before the Tribunal while challenging the Assessment Order dated 29.01.2016. However, the order passed by the DRP, if it has been passed in violation of the principles of natural justice, the petitioner would be entitled to question the same before this Court invoking the jurisdiction under Article 226 of the Constitution of India.

12. In such circumstances, the availability of alternate remedy is not a bar to approach this Court. In the facts and circumstances of the case, this Court is satisfied that there has been violation of principles of natural justice inasmuch as the opportunity granted to the petitioner was not effective.

The impugned order passed by the DRP does not specifically state that the request for adjournment was made and for certain reasons they have either accepted or refused to accept such request. This is a pre-requisite before the DRP could have passed an order on merits affecting the rights of the assessee. Furthermore, the object for constituting the DRP would stand defeated if the matters are to be given a summary disposal. The transaction done by the petitioner having international ramification, the interest of revenue would require careful scrutiny of the objections and the same dealt with in accordance with law, failing which the object with which the DRP has been constituted would stand defeated and therefore, this Court is of the view that the matter requires re-consideration. It may be true that the DRP while considering the materials placed by the petitioner before them had granted certain reliefs to the assessee, but that by itself will not validate the order and to state that the petitioner had been afforded an opportunity by the DRP. The concept of principles of natural justice which has been provided under the scheme of Section 144C of the Act should be an effective opportunity as the direction issued by the DRP binds the Assessing Officer and he would be required to complete the assessment as per the orders of the DRP. Therefore, an opportunity of hearing should be adequate, effective and reasonable. Having gone through the facts elaborately, this Court is fully convinced that the petitioner/Assessee has not been given an effective opportunity to place their submissions.

13. For all the above reasons, W.P.No.5499 of 2016 is allowed and the impugned order passed by the DRP is set aside. Consequently, the assessment order dated 29.01.2016 is set aside and the matter is remanded to the DRP for fresh consideration. Accordingly, W.P.No.9629 of 2016 is allowed. No costs. Consequently, connected miscellaneous petitions are closed.

14. In the light of the orders passed by this Court remitting the matter to the DRP, the petitioner/assessee is not entitled to raise the plea of limitation against the Assessing Officer as well as the DRP while proceeding afresh to complete the assessment.

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Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

cse

To

1.Dispute Resolution Panel-2, Bangalore
7th Floor, Income Tax Office, BMTC Building,
80 Feet Road, Koramangala, Bangalore.

2.The Assistant Commissioner of Income Tax,
OSD
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(Transfer of Pricing, Chennai),
121, Uthamar Salai, Nungambakkam,
Chennai - 600 034.

2 ccs to M/s.Rajnish Pathiyil, Advocate, sr.40290, 40289
1 cc to Mr.T.Pramodkumar Chopda, Advocate, sr.40095

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and

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