

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 07.06.2017

Delivered on 14.06.2017

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Writ Petition No.1787 of 2017

and

W.M.P.No.1772 of 2017

M/s.Inno Estates Private Limited

PAN: AACCI1592A

A Private limited Company,

Represented by tis

Chief Finance Officer

C.V.Lakshmanan,

No.5, Giri Road, T.Nagar,

Chennai - 600 017

.. Petitioner

Vs.

1. Dispute Resolution Panel - 2,
Office of the Dispute Resolution Panel,
7th Floor, Income Tax Office,
BMT Building, 80 Feet Road,
Koramangala,
Bengaluru - 560 095.

2. The Income Tax Officer,
Corporate Ward 2(4),
Corporate Range -2,
5th Floor, 121, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 600 034.

.. Respondents

Writ petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records of the 1st respondent in F.No.138/DRP-2-BNG/2016-17 dated 10.11.2016 and consequential order of the 2nd respondent in PAN No.AACCI1592A for the Assessment Year 2012-13 dated 18.11.2016 and quash the same.

For Petitioner : Mr.R.Sivaraman

For Respondents : Mrs.Hema Muralikrishnan

O R D E R

This writ petition is filed challenging the order of the 1st respondent dated 10.11.2016 and consequential order of the 2nd respondent dated 18.11.2016.

2.The case of the petitioner is as follows:

(i) The petitioner is a Private Limited Company engaged in the business of Real Estate Development of Residential Plots. It is an assessee before the 2nd respondent. On 29.09.2012, the petitioner filed its return of Income electronically for the assessment year 2012-13 declaring 'Nil' income. The case was selected for scrutiny and a notice under Section 143(2) of the Income Tax Act dated 08.08.2013 was served on the petitioner. During the course of scrutiny proceedings, it was noted that the petitioner Company had entered into an international transaction with its Associated Enterprises abroad and the value of the same exceeded Rs.15 crores. Hence, the case was referred to the Transfer Pricing Officer for determining the Arms Length Price with reference to all transactions reported in Form No.3 CEB. The Transfer Pricing Officer issued a show cause notice dated 14.12.2015. The petitioner Company filed a detailed reply on 18.12.2015. The Transfer Pricing Officer, by order dated 27.01.2016, calculated the Arms Length Price as per the provisions of Section 92C (1) & (2) of the said Act and ordered adjustment in the income of the assessee amounting to Rs.3,67,55,978 towards excess interest paid on Compulsory Convertible Debentures.

(ii) Adopting the said order passed by the Transfer Pricing Officer, the 2nd respondent issued a draft assessment order under Section 144C (1) of the said Act on 29.03.2016. The draft assessment order was served on the authorised representative of the petitioner on 29.03.2016.

(iii) As per the provisions contained under Section 144C of the said Act, the petitioner has to file their objections before the Dispute Resolution Panel, namely, the 1st respondent herein, if the petitioner is intended to object to the draft assessment order. Accordingly, the petitioner filed their objections before the 1st respondent on 29.04.2016 as per Section 144C (2)(b) of the said Act. The 2nd respondent is aware of the fact that such objections were filed before the 1st respondent on 29.04.2016 i.e., after 30 days time limit. The 1st respondent issued a hearing notice and during the course of hearing, the members of the 1st respondent panel informed the petitioner that the draft assessment order was served on 29.03.2016 and the objection was filed beyond the period of 30 days. Since there was one day delay in filing the objections, the 1st respondent, by order dated 10.11.2016, refused to condone the delay and thus, rejected the objections. The 1st respondent had not issued any directions to the 2nd respondent as contemplated under Section

144C (5) of the said Act. Pursuant to the above said order passed by the 1st respondent, a final assessment order under Section 144(3) r/w Section 144(C)(13) of the said Act was passed by the 2nd respondent on 18.11.2016 by making the adjustment as proposed by the Transfer Pricing Officer. Thus, consequently a demand of Rs.1,76,32,760/- was made. As against the impugned proceedings, the petitioner has no other alternative remedy. Hence, this Writ petition is filed seeking for the relief as stated supra.

3. The respondents filed counter affidavit, wherein it is stated as follows:

(i) This writ petition is not maintainable, since the petitioner has statutory right of appeal before the appellate forum. Without prejudice to the above preliminary objections, it is stated that the assessee Company had entered into transaction with persons located in notified territory as specified under Section 94A of the Income Tax Act during the finance year 2011-12 and therefore, the case of the petitioner was referred to Transfer Pricing Officer in order to examine the transactions as reported in Form 3 CEB.

(ii) The draft assessment order was passed on 29.03.2016 under Section 143(3) r/w section 144C(1) of the said Act and was served on the assessee on 29.03.2016 itself. Subsequently, on 28.04.2016, the petitioner Company, in their letter dated 27.04.2016, intimated about the filing of objections before the 1st respondent and requested that the tax demand be kept in abeyance till the disposal of the appeal. The petitioner had filed the objection before the 1st respondent only on 29.04.2016. However, the petitioner served a letter on the 2nd respondent dated 27.04.2016, as if the objections were filed before the 1st respondent on the said day itself. The petitioner had thus, misled the 2nd respondent with regard to the date of filing of the objections before the 1st respondent. In fact, the petitioner has claimed before the 1st respondent that the draft assessment order was served only on 31.03.2016, which is a false statement. Since the petitioner company has intimated the filing of objections through letter dated 27.04.2016 and preempted the 2nd respondent from completing the assessment, the final assessment order was not passed. However, after the disposal of the objections by the 1st respondent, the final assessment order was passed by the 2nd respondent on 18.11.2016 by raising a demand of Rs.1,76,32,760/- on the petitioner Company.

4. Mr.R.Sivaraman, learned counsel for the petitioner submitted as follows:

The draft assessment order was made on 29.03.2016 and served on the petitioner on the same day. The objections were filed before the 1st respondent on 29.04.2016, admittedly, with one day delay. Therefore, the 2nd respondent ought to have passed the final order on or before 31.05.2016 as contemplated under

Section 144C(4) of the said Act since the objection was not filed within time. However, in this case, the final order was passed on 18.11.2016 and thus, it is barred by limitation. The 2nd respondent cannot take the order passed by the 1st respondent dated 10.11.2016 as a direction issued to the 2nd respondent. In the absence of any specific direction issued by the 1st respondent and when the objection were rejected only on the ground of delay, the 2nd respondent cannot take shelter under Section 144C(13) to bring the final order dated 18.11.2016 as the one passed within the period of limitation. The 1st respondent has not passed the order as contemplated under Section 144C(5) & (6) of the said Act and therefore, the order passed by the 2nd respondent, pursuant to the order passed by the 1st respondent, cannot be challenged by way of statutory Appeal before the appellate authority. Alternatively, in case, if this Court is of the view that the 1st respondent is empowered to condone the delay, the matter may be remitted back to the 1st respondent to decide the same on merits or if the Court comes to the conclusion that the order passed by the 1st respondent, virtually, amounts to a direction issued to the 2nd respondent, the petitioner may be given an option to file an appeal before the appellate forum challenging the order of the 2nd respondent.

5. Per contra, learned counsel Mrs.Hema Muralikrishnan, appearing for the respondent submitted as follows:

The petitioner has not come to this Court with clean hands. They have misled the 1st and 2nd respondents with regard to the date of receipt of the draft assessment order and filing of the objections before the 1st respondent, respectively. In the letter dated 27.04.2016 addressed to the 2nd respondent, the petitioner clearly stated that their objections were filed before the 1st respondent, while in fact, such objection was filed subsequently only on 29.04.2016. The 1st respondent has no power to condone the delay. Therefore, such panel has rightly rejected the objections as barred by limitation. In view of the letter dated 27.04.2016 issued by the petitioner, the 2nd respondent had to wait till the 1st respondent dispose the objections. However, after the disposal of such objections, the final order of assessment came to be passed within 8 days and therefore, there is no delay in passing the final order. The petitioner can file appeal before the Appellate Authority challenging the final order of assessment.

6. Heard both sides.

7. The petitioner is an assessee before the 2nd respondent. In respect of the assessment year 2012-13, the petitioner's case was referred to the Transfer Pricing Officer for determining the Arms Length Price with reference to all transactions reported in Form No.3 CEB, since the petitioner had entered into International transactions with its Associate Enterprises. The

Transfer Pricing Officer, after issuing notice to the petitioner and considering their reply, passed an order under Section 92CA (3) of the said Act on 27.01.2016. Consequently, by adopting the said Transfer Pricing Officer's order, the 2nd respondent issued a draft assessment order under Section 92CA(4) of the said Act on 29.03.2016 and forwarded the same as required under Section 144C of the said Act to the assessee on the very same day. The core contention of the dispute between the parties arises only from this stage.

8. On receipt of the draft assessment order, the petitioner filed their objections before the Dispute Resolution Panel, namely, the 1st respondent, on 29.04.2016. Admittedly, the said filing was with one day delay, since Section 144C(2) of the said Act mandates filing of such objection within 30 days of the receipt of the draft order. The 1st respondent, by order dated 10.11.2016 rejected the objections only on the reason that the assessee has filed the same beyond the specified period of 30 days. Accordingly, the 1st respondent communicated such decision to the petitioner as well as the 2nd respondent as per the provisions under Section 144C(5) of the said Act. Thereafter, the final assessment order was passed by the 2nd respondent on 18.11.2016 under section 143(3) r/w section 144C(13) of the said Act.

9. It is not in dispute that the petitioner has filed their objection before the 1st respondent only on 29.04.2016 by specifically indicating as though the draft order of assessment was served on them only on 31.03.2016. Thus, it is evident that the petitioner made the 1st respondent to believe that the objections were filed in time. However, when it was pointed out by the 2nd respondent to the 1st respondent, through communication dated 25.07.2016, that the draft assessment order was served on the assessee on 29.03.2016 itself, the petitioner filed an affidavit before the 1st respondent on 07.11.2016 reiterating that they received the draft assessment order only on 31.03.2016 and even otherwise, the delay is only one day, if the date of service of draft assessment order is taken as 29.04.2016. After taking such stand before the 1st respondent, the petitioner before this Court, in the affidavit filed in support of this writ petition, has admitted the date of service of the draft assessment order as 29.03.2016. Learned counsel for the petitioner also admitted that the draft assessment order was served on the petitioner on 29.03.2016. Thus, it is evident that the petitioner, having received the draft assessment order on 29.03.2016, has deliberately and intentionally misled the 1st respondent as though it was served on them only on 31.03.2016, so as to bring the filing of the objections within the period of limitation.

10. Therefore, it is not in dispute that the petitioner has filed the objection before the 1st respondent only on 29.04.2017. When such being the admitted factual position, the letter dated 27.04.2016 issued by the petitioner to the 2nd respondent would show that the petitioner has deliberately made the 2nd respondent to believe as if the appeal/objection has either been already filed or filed on 27.04.2016 before the 1st respondent. For better appreciation, the above letter dated 27.04.2016 is extracted hereunder:

27.04.2016

To
Income Tax Officer
Corporate Ward 2(4)
Chennai-24
Madam,
Sub: Appeal for IT Assessment order for
Assessment year 2012-13
Ref: Your order dated 29-03-2016 PAN-
AACC11592A (Inno estates Private Limited)

Please find attached the entire set of documents filed before the Dispute Redressal Panel. We request you to keep the demand in abeyance till the disposal of the appeal.
Thanking you,
For Inno Estates Private Limited
Director.

11. In the above said letter, apart from making the 2nd respondent to believe as though the objection was filed in time, the petitioner has also requested him to keep the demand in abeyance till the disposal of such objection. Therefore, the 2nd respondent is statutorily prevented from passing the final assessment order, as contemplated under Section 144C(3) of the said Act. A perusal of Section 144C(2) of the said Act would show that the assessee, on receipt of the draft order, shall file his objections within 30 days of the receipt of the draft order with Dispute resolution Panel and the Assessing officer. Only when no objections are received within the period specified under Sub- Section 2, the Assessing Officer shall complete the assessment on the basis of the draft order, as contemplated under Section 144(C)(3) of the said Act. In this case, by communication dated 27.04.2016, the petitioner, by attaching the entire set of documents filed before the 1st respondent, asserted and made the Assessing Officer to believe that the objection was filed in time. Therefore, the 2nd respondent is justified in deferring the matter till an order is passed by the 1st respondent. At this juncture, it is to be noted that what is contemplated under Section 144C(2) is the filing of the objections by the assessee with the Dispute Resolution Panel, if he is not accepting the draft assessment order. Of course, the said provision also contemplates filing of such objection

before the Assessing Officer as well. If such objection is filed in time, then the Dispute Resolution Panel alone shall proceed to decide the matter as provided under Section 144C(5) & (6) of the said Act. Therefore, the Assessing Officer cannot proceed to pass the final order till the Dispute Resolution Panel passes an order as stated supra. Once the objection is filed within the period of limitation, consideration of the same is vested only with the Dispute Resolution Panel as provided under Section 144C(5), (6), (7) & (8) of the said Act and as such the Assessing Officer cannot decide such objection. Therefore, filing of such objection before the Assessing Officer within time itself will not get over the period of limitation, if such filing before the Dispute Resolution Panel was after such period.

12. The next contention raised by the petitioner is that the order passed by the 1st respondent does not contain any directions to the 2nd respondent and therefore, the final order passed by the 2nd respondent on 18.11.2016 cannot be treated as the one passed in accordance with Section 144C(13) of the said Act. I do not think the learned counsel for the petitioner is justified in making such contention in view of sub-section 8 of Section 144C which reads as follows:

(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order

(Explanation - For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee)

13. A perusal of the above said provision of law would undoubtedly make it clear that the Dispute Resolution Panel may confirm, reduce or enhance the variation proposed in the draft order. It is not in dispute that the 1st respondent rejected the objection filed by the petitioner on 10.11.2016, of course, on the ground that it is barred by limitation. Still it is an order rejecting the objections. Once, the 1st respondent has chosen to reject the objections either on merits or on the ground of delay, it goes without saying that resultant position of such rejection is nothing but confirmation of the draft order passed by the 2nd respondent, as contemplated under Section 144C(8) of the said Act. Consequently, the final order passed by the 2nd

respondent on 18.11.2016 is certainly an order passed under Section 144C(13) of the said Act, more particularly, when the 1st respondent in its order dated 10.11.2016 clearly stated that the directions are communication to the assessee and the departmental authorities as per the provision of Section 144C (5) of the said Act.

14. No doubt, the learned counsel for the petitioner emphasized that there is no specific direction, whatsoever in the said order dated 10.11.2016. In my considered view, the dismissal or rejection of the objections filed by the petitioner, on whatever the ground may be, itself is a direction to the Assessing Officer to complete the assessment in accordance with draft order as contemplated under Section 144C (5) which reads as follows:

(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

15. Hence, the dismissal or rejection of the objection and communication of the same has to be treated and construed as a direction given to the Assessing Officer to complete the assessment as per draft order. Only when the panel chooses to reduce or enhance the variation proposed, it can give any specific directions. Therefore, I do not think that the petitioner is justified in contending that the final order is not an order passed under Section 144C(13) of the said Act.

16. The next question that would arise for consideration is as to what is the remedy available to the petitioner as against the order passed under Section 144C(13) of the said Act. I have already found that the final order passed by the 2nd respondent dated 18.11.2016 is the one passed under Section 144C(13) of the said Act. I have also found that the said order was passed well within the period of limitation. In such a situation, the petitioner is entitled to file an appeal before the Appellate Authority as contemplated under Section 246(1)(a) of the said Act, which covers an order passed against the assessee under Section 144 of the said Act as well. When such statutory appellate remedy is available to the petitioner, this Court is not inclined to entertain this writ petition by going into the contentions raised on the merits of the matter by either parties. It is well settled that when a statutory appellate remedy is available, more particularly in fiscal matters, parties should not be permitted to resort to the remedy under Article 226 of the Constitution of India. The reliance placed on by the learned counsel for the petitioner in the decisions reported in 2016(75) taxmann.com (Rain Cements Ltd. v. Deputy

Commissioner of Income Tax, Circle 3(1), Hyderabad) and 2013(31) taxmann.com 396 (Intimate fashions (India) (P,) Ltd. vs. Assistant commissioner of Income-tax, Company CircleII(3), Chennai) is not helping the petitioner in any manner as the facts and circumstances involved in those cases are totally different and distinguishable.

17. Accordingly, this writ petition is dismissed with liberty to the petitioner to challenge the impugned order of the 2nd respondent by way of filing an appeal before the 1st Appellate Authority under Section 246(1)(a) of the Income Tax Act within a period of four weeks from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Asst.Registrar (CS V)

/true copy/

Sub Asst. Registrar

vsi

To

1. Dispute Resolution Panel - 2,
Office of the Dispute Resolution Panel,
7th Floor, Income Tax Office,
BMT Building, 80 Feet Road,
Koramangala,
Bengaluru - 560 095.
2. The Income tax Officer,
Corporate Ward 2(4),
Corporate Range -2,
5th Floor, 121, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 600 034.

+1cc to Mr.R.Sivaraman, Advocate in sr.no.42331

+1cc to M/s.Hema Muralikrishnan, Advocate in sr.no.41887

W.P.No.1787 of 2017

LRS (CO)
NR 29/06/2017