

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.07.2018

CORAM :

THE HON'BLE MS.INDIRA BANERJEE, CHIEF JUSTICE
AND
THE HON'BLE MS.JUSTICE P.T.ASHA

W.A.No.1001 of 2018

Inno Estates Private Limited,
rep. by its Chief Finance Officer,
C.V.Lakshmanan,
No.5, Giri Road,
T.Nagar,
Chennai - 600 017. Appellant

vs.

- 1.Dispute Resolution Panel-2,
Office of the Dispute Resolution Panel,
7th Floor, Income Tax Office,
BMTC 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

PRAYER: Appeal filed under Clause 15 of the Letters Patent against the order dated 14.6.2017 passed in W.P.No.1787 of 2017 on the file of this Court.

WP.No.1787/2017: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. AAC11592A for the Asst. Year 2012- 13 dated 18.11.2016 quash the same.

For Appellant : Mr.R.Sivaraman
For Respondents: Mrs.Hema Muralikrishnan
Standing Counsel

JUDGMENT

Ms.INDIRA BANERJEE, CHIEF JUSTICE

This appeal is against a judgment and order dated 14.6.2017 of the learned Single Bench dismissing the writ petition, being W.P.No.1787 of 2017, filed by the appellant writ petitioner, with liberty to challenge the impugned order of assessment dated 18.11.2016 passed by the Income Tax Officer, Corporate Ward 2(4), being the second respondent, before the First Appellate Authority under Section 246(1)(a) of the Income Tax Act, 1961, hereinafter referred to as "the 1961 Act", within a period of four weeks from the date of receipt of a copy of the said judgment and order.

2. The appellant, a private limited company engaged in the business of real estate development, filed its Income Tax Returns electronically for the assessment year 2012-2013 on 29.9.2012, declaring 'Nil' income.

3. The case of the appellant was selected for scrutiny and notice dated 8.8.2013 was issued to the appellant under Section 143(2) of the 1961 Act. In the course of scrutiny proceedings, it was found that the appellant had entered into an international transaction within the meaning of Section 92B of the 1961 Act for Compulsory Convertible Debentures (CCD) of the value of Rs.4,60,32,949/- at book interest of 15% per annum in the assessment year in question, in that it had received loan/advance in US Dollars from IIROF 4 Artemis Ltd., Cyprus, an associated enterprise of the appellant abroad, within the meaning of Section 92A of the 1961 Act.

4. Section 92(1) of the 1961 Act provides that any income arising from an international transaction within the meaning of Section 92B is to be computed having regard to the arm's length price (ALP).

5. Section 92C of the 1961 Act provides that the ALP in relation to an international transaction is to be determined by one of the following methods, being the most appropriate method, having regard to the nature or class of transaction:

- (i) comparable uncontrolled price method;
- (ii) resale price method;
- (iii) costs plus method;
- (iv) profit split method;
- (v) transactional net margin method,

or any other method as may be prescribed by the Board. The most appropriate method is to be applied for determination

of ALP, in any manner as may be prescribed. The proviso makes an exception, where the variation between the ALP determined and the price at which the international transaction has actually been undertaken does not exceed 3%. In such a case, the latter, i.e., price at which the international transaction has actually been undertaken, might be notified.

6. Section 92CA of the 1961 Act provides for reference to the Transfer Pricing Officer for computation of the ALP in relation to the international transaction with previous approval of the Principal Commissioner or Commissioner. Sub-section 3 to Section 92CA requires the Transfer Pricing Officer to determine the ALP by an order in writing. Such order in writing has to be made within the prescribed period of limitation. Under sub-section 4 to Section 92CA, on receipt of an order of the Transfer Pricing Officer, the Assessing Officer is to proceed to compute the total income of the assessee under sub-section 4 of Section 92C in conformity with the ALP so determined by the Transfer Pricing Officer.

7. The case of the appellant was referred to the Transfer Pricing Officer for determining the ALP with reference to all transactions reported in Form No.3 CEB filed by the appellant. The Fully and Compulsorily Convertible Debentures (FCCD) carried an inherent option to convert, which was not the case in a typical loan transaction. Accordingly, the Transfer Pricing Officer issued a show cause notice dated 14.12.2015 to the appellant directing the appellant to show cause as to why interest payment on FCCD should not be taken as per comparables for the purpose of ALP calculation, to which the appellant filed a detailed reply.

8. The Transfer Pricing Officer observed that the Compulsory Convertible Debentures (CCD) was an instrument mandatorily and automatically convertible into equity within a specified time and hence, could not be called debt, as debt implied an obligation to pay.

9. The Transfer Pricing Officer was, thus, of the view that the interest rate on Compulsory Convertible Debentures in transfer pricing could not be determined only by adopting the Prime Lending Rate (PLR) of the Indian Banks. Comparables from external database should have to be adopted for benchmarking.

10. Taking note of evidence of allotment of Compulsory Convertible Debentures in foreign currency, Transfer Pricing Officer adopted the relevant LIBOR rates with risk

premium of 2% relevant to the year under consideration to benchmark interest transaction.

11. The Transfer Pricing Officer issued a draft order under Section 92C(1) and (2) of the 1961 Act and ordered adjustment in the income of the appellant amounting to Rs.3,67,55,978/- towards excess interest paid on Compulsory Convertible Debentures (CCD).

12. Adopting the said draft order passed by the Transfer Pricing Officer, the second respondent issued a draft assessment order under Section 144C(1) of the 1961 Act on 29.3.2016. The draft assessment order was served on the authorized representative of the appellant on 29.3.2016.

13. Section 144C of the 1961 Act provides:

"Section 144C. Reference to dispute resolution panel.-

(1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.

(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,-

(a) file his acceptance of the variations to the Assessing Officer; or

(b) file his objections, if any, to such variation with,-

(i) the Dispute Resolution Panel; and

(ii) the Assessing Officer.

(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if

(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or

(b) no objections are received within the period specified in sub-section (2).

(4) The Assessing Officer shall, notwithstanding anything contained in section 153 or section 153B, pass the assessment order under sub-section (3) within one month from the end of the month in which,—

(a) the acceptance is received; or

(b) the period of filing of objections under sub-section (2) expires.

(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.

(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:—

(a) draft order;

(b) objections filed by the assessee;

(c) evidence furnished by the assessee;

(d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;

(e) records relating to the draft order;

(f) evidence collected by, or caused to be collected by, it; and

(g) result of any enquiry made by, or caused to be made by, it.

(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),—

(a) make such further enquiry, as it thinks fit; or

(b) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.

(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.

(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 or section 153B, the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

(14) The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.

(14A) The provisions of this section shall not apply to any assessment or re-assessment order passed by the Assessing Officer with the prior approval of the Principal Commissioner or Commissioner as provided in sub-section (12) of section 144BA.

(15) For the purposes of this section, -

(a) "Dispute Resolution Panel" means a collegium comprising of three Principal Commissioners or Commissioners of Income-tax constituted by the Board for this purpose;

(b) "eligible assessee" means, -

(i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and

(ii) any foreign company."

14. Section 144C of the 1961 Act contemplates that a draft order may be accepted by the assessee or objected to. The objection might be filed with the Dispute Resolution Panel and the Assessing Officer. If the assessee accepts the variation or if no objections are received within thirty days of receipt by the assessee of the draft order, the Assessing Officer is to complete the assessment on the basis of the draft order. The Assessing Officer is to pass an assessment order within one month from the end of the month in which the acceptance is received or the period of filing objections under Sub-section (2) to Section 144C expires.

15. The appellant objected to the draft assessment order by filing objection before the Dispute Resolution Panel under Section 144C(2)(b) of the 1961 Act on 29.4.2016. The objection was apparently filed one day after expiry of the thirty days time limit.

16. The Dispute Resolution Panel issued a hearing notice and in course of hearing, the members of the Dispute Resolution Panel informed the appellant that the draft assessment order had been served on the appellant on 29.3.2016 and the objection had been filed beyond the period of thirty days. The Dispute Resolution Panel, by order dated 10.11.2016, refused to condone the delay of one day in filing the objections holding that the provisions of the 1961 Act did not empower the Dispute Resolution Panel to condone the delay in filing objections by an assessee. The objection was, thus, rejected.

17. Significantly, the Dispute Resolution Panel only rejected the objection on the ground of limitation. The Dispute Resolution Panel. They did not issue any directions to the Assessing Officer as contemplated under Section 144C(5) of the 1961 Act. After the rejection of the objection by the order dated 10.11.2016, the Assessing Officer, namely the second respondent, passed a final assessment order making adjustments as proposed by the Transfer Pricing Officer and adding Rs.3,67,55,978/- to the total income of the assessee. Since the income originally returned was 'Nil', the assessed income was Rs.3,67,55,978/-, on which tax payable along with education cess and surcharge and interest was assessed at Rs.1,76,13,094/-. After adding recoverable interest of Rs.19,669/-, there was a tax demand of Rs.1,76,32,760/- which has been challenged in this Court by filing the aforesaid writ petition.

18. The Revenue took an objection to the writ petition on the ground of existence of an alternative remedy of appeal. The learned Single Bench, as observed above, has dismissed the writ petition and remitted the appellant to its alternative remedy of appeal before the learned First Appellate Authority, being the Commissioner of Appeals.

19. It is well settled that this Court exercising jurisdiction under Article 226 of the Constitution of India does not adjudicate the correctness of an order of assessment. Though the order of the learned Single Judge dismissing the writ petition has been challenged in entirety, the learned counsel appearing on behalf of the appellant contends that an appeal would not lie to the First Appellate Authority under Section 246(1)(a) of the 1961 Act, but to the Income Tax Appellate Tribunal under the provisions of Section 253(1)(d) of the 1961 Act.

20. Section 253(1)(d) of the 1961 Act is set out herein below:

"Section 253.Appeals to the Appellate Tribunal.-

(1) Any assessee aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order-

.....

(d) an order passed by an Assessing Officer under sub-section (3), of section 143 or section 147 or section 153A or section 153C in pursuance of the directions of the Dispute Resolution Panel or an order passed under section 154 in respect of such order."

21. An appeal from an assessment order under Section 143(2) of the 1961 Act lies before Appellate Commissioner of Income Tax, whereas an appeal from an order passed by an Assessing Officer under Section 143(3) or Section 147 or Section 153A or Section 153C in pursuance of the directions of the Dispute Resolution Panel lies before the Income Tax Appellate Tribunal.

22. The question before us is whether the order of assessment impugned is an order in pursuance of directions of the Dispute Resolution Panel.

23. In a case where objection is received, the Dispute Resolution Panel might issue such directions as it might think for the guidance of the Assessing Officer to enable him to complete the assessment [Section 144C(5)]. The directions referred to in Section 144C(5) of the 1961 Act are to be issued after considering (i) the draft order; (ii) objections filed by the assessee; (iii) evidence furnished by the assessee; (iv) report of the Transfer Pricing Officer or any other authority; (v) records relating to the draft order; (vi) evidence collected by or caused to be collected by the Dispute Resolution Panel; (vii) result of any enquiry made by or caused to be made by the Dispute Resolution Panel.

24. The Dispute Resolution Panel may also make such further enquiry as it thinks fit or cause any further enquiry to be made by any Income Tax Authority and report the result of it to the Dispute Resolution Panel before issuing any directions, referred to in Section 144C(5) of the 1961 Act.

25. After considering the aforesaid materials, the Dispute Resolution Panel might confirm, reduce or enhance the variations proposed in the draft order.

26. Section 144C(10) of the 1961 Act mandates that every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer. The direction is obviously a direction under Section 144C(5) which is given after taking into consideration of the materials stipulated in Section 144C(6) and going through the exercise contemplated, inter alia, under Section 144C(7) of the 1961 Act.

27. As found by the Dispute Resolution Panel, an objection is to be filed by an aggrieved assessee within thirty days from the date of receipt of the draft assessment order. Dispute Resolution Panel has no power and/or authority and/or jurisdiction to condone the delay in filing the objection.

28. When an objection is filed before the Dispute Resolution Panel beyond the stipulated time of thirty days from the date of receipt of the order, there is no objection before the Dispute Resolution Panel in the eye of law.

29. An order of rejection of an objection on the ground of the same being barred by limitation is not a direction under sub-section 5 read with sub-section 6 to Section 144C of the 1961 Act. Though the impugned order dated 10.11.2016 rejecting the objection on the ground of the bar of limitation is captioned as a direction under Section 144C(5) of the 1961 Act, it is not in fact a direction under Section 144C(5). The quoting of a wrong provision in an order is a mistake apparent on the face of the record and, therefore, inconsequential. The impugned assessment order though stated as an order under Section 143(3) read with Section 144C(13) of the 1961 Act, is not an order in pursuance of the directions of the Dispute Resolution Panel, but an order of assessment simplicitor under Section 143(3) of the 1961 Act from which an appeal would lie to the Commissioner (Appeals). The learned Single Judge rightly dismissed the writ petition and remitted the appellant to his remedy of appeal before the first appellate authority.

30. However, the time granted to the appellant by the learned Single Bench to file an appeal before the First Appellate Authority as against the impugned order passed by the second respondent is extended for a further period of four weeks from date. Needless to mention that it will be open to the appellant assessee to agitate all questions before the First Appellate Authority.

The appeal is, accordingly, dismissed. No costs.
Consequently, C.M.P.No.8499 of 2018 is closed.

Sd/-
Assistant Registrar(CS VII)

// True Copy//

Sub Assistant Registrar

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To:

1.Dispute Resolution Panel-2,
Office of the Dispute Resolution Panel,
7th Floor, Income Tax Office,
BMTC 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.Siva Raman, Advocate Sr.No.51448

+1cc to Mrs.Hema Murali Krishnan, Advocate Sr.No.50499

PA(CO)
sm:6.8.2018

W.A.No.1001 of 2018

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