IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 25.04.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.10319 and 10320 of 2018

& W.M.P.No.12253 of 2018

M/s.International Seaport Dredging
Private Limited
Represented by its Manager
Mr.Amedeo Peyron .. Petitioner in both W.Ps'

Versus

Deputy Commissioner of Income-tax
International Taxation Circle 1 (2)
4th Floor, BSNL Building
16 Greams Road
Chennai - 600 006. .. Respondent in both W.Ps'

W.P.No.10319 of 2018 is filed under Article 226 of the Constitution of India, seeking to issue a Writ of Certiorari, calling for records pertaining to PAN/TAN: AABCI2286E dated 31.03.2018 under Section 201(1)/(1A) of the Income Tax Act for the assessment year 2011-12 on the file of the respondent herein and quash the same.

W.P.No.10320 of 2018 is filed under Article 226 of the Constitution of India, seeking to issue a Writ of Certiorari, calling for records pertaining to TDS Remittance/FY-2010-11 dated 01.03.2018 culminating into the show cause notice in PAN:AABCI2286E/DCIT-1(1)/2017-18 dated 27.03.2018 on the file of the respondent herein, and quash the same.

For Petitioner (In both W.Ps') : Mr.N.V.Balaji
For Respondent (In both W.Ps') : Mrs.Hema Muralikrishnan, Senior Standing Counsel

COMMON ORDER

Heard Mr.N.V.Balaji, learned counsel for the petitioner and Mrs.Hema Muralikrishnan, learned Senior Standing Counsel for the respondent.

2. With the consent on either side, these writ petitions are taken up for disposal.

3. The petitioner is a private limited company, engaged in the business of dredging and marine engineering services involving designing, construction, developing, modernizing, extending and maintaining ports and harbours. In these writ petitions, the petitioner challenges the order passed by the respondent under Section 201(1)(1A) of the Income Tax Act 1961.

4. After elaborately hearing the learned counsel for the parties and carefully perusing the materials placed on record, I am of the considered view that the matter requires re-examination and re-consideration by the respondent, for which purpose, the matter has to be remanded to the respondent. This conclusion is supported by the following reasons:

(i) The first and foremost reason for this Court to be convinced that the matter has to be sent back to the respondent for fresh consideration is the manner in which the order has been passed. In spite of exercising great care to understand the manner in which the respondent has passed the order, this Court is unable to clearly decipher as to which is the finding rendered by the respondent vis-a-vis the petitioner's contentions and which are details and materials pertaining to the party whom the petitioner has effected payments. Therefore, on this short ground, the matter ought to be sent back to the respondent for fresh consideration.

(ii) The second reason, which has convinced this Court to remand the matter, is on account of the fact that materials which have been disclosed or mentioned in the impugned order were never disclosed to the assessee. When the notice dated 23.12.2017 was issued, there was no inclination that the respondent proposes to direct the petitioner to pay tax and interest by referring to the orders which were passed in the case of M/s.Baggerwerken Decloedt en Zoon nv, Belgium. In fact, the respondent has verbatim extracted the order rather, scanned the order and pasted it in the impugned order. This is why, this Court made an observation in the preceding paragraph that it is difficult to decipher as to which are the observations and findings with regard to the petitioner and which are those pertaining to the Belgium Company against whom the order dated 23.12.2017 was passed .

5. At the very fist instance, viz., when the respondent issued notice dated 01.03.2018, calling for details, there was no whisper as to the basis for calling for the details. Strictly speaking, this may not be required at that stage, but, however, upon perusal of the details furnished by the petitioner, if the respondent proposes to make the petitioner liable for payment of interest based upon the materials, which are available with the respondent pertaining to the other assessee viz., Belgium Company or for that matter the French Company, such details ought to have been disclosed in the notice dated 27.03.2018.

6. Mr.N.V.Balaji, emphatically states, even during the course of discussion with the respondent pursuant to the reply given by the petitioner dated 29.03.2018, the petitioner was not made known that the respondent proposes to refer to the order passed in respect of the Belgium Company or such other matters nor there was a stray reference that the respondent proposes to rely upon the materials, which have been collected behind the back of the assessee. These are sufficient to hold that there has been gross violation of principles of natural justice. Further from the reply dated 29.03.2018, I find that the petitioner has not only placed on record the type of the business activities and the facts relatable to the same, but has also discussed about the judicial precedents, which they seek to rely upon. The petitioner placed reliance on the decision of this Court in the case of CIT V Van Oord ACZ Equipment BV reported in (2015) 373 ITR 133 (Mad) in the context of India Netherlands DTAA and distinguished the decision in the case of Poompuhar Shipping Corporation Ltd., reported in [2014] 360 ITR 257 (Mad). However, the respondent has not even referred to those decisions, much less distinguished the stand taken by the petitioner in their reply dated 29.03.2018. This is one more reason to hold that the impugned order is in violation of principles of natural justice and could be termed as a non-speaking order.

7. On facts, Mr.N.V.Balaji, learned counsel appearing for the petitioner pointed out that total payment remitted to Baggerwerken Decloedt En Zoon being Rs.142,15,98,070/- does not pertain to the relevant year, but, pertains to the earlier years and the respondent has mechanically adopted the said figure and worked out 25% of the receipts as Rs.35,53,99,518/- and calculated TDS at 40% under Section 201(1) at Rs.14,21,59,807/- and also interest at 1%. Though such a stand has been taken by the learned counsel, I find that such a specific plea was not taken by the assessee in the reply dated 29.03.2018. Further the learned counsel pointed out that when the petitioner's Assessing Officer was in the process of completing the

assessment for the assessment year 2011-12, queries were raised by the Assessing Officer, which were replied by the petitioner, wherein, they have specifically mentioned as to why tax need not be deducted at source in respect of the floating equipments and more particularly, the amount paid to Baggerwerken Decloedt & Zoon Nv, on the ground that TDS is not applicable as per India-Belgium treaty. Further with regard to the payments made to the French Company viz., Societe De Draggage International SA, to the tune of Rs.13,98,17,692/- the learned counsel for the petitioner, placed reliance on the assessee's own case for the assessment year 2010-11 in ITA No.418/Mds/2015 on the file of the Income tax Appellate Tribunal, 'D' Bench, Chennai, wherein the first question, which pertain to non-deduction of tax at source under Section 195 of the Act and the Tribunal referring to India-Sweden treaty, which did not provide for taxation of right to use equipment, held that it would be applicable to India-France treaty as well and accepted the case of the assessee. However, the revenue is on an appeal before this Court, but there is no order of stay. Therefore, it is submitted that there is absolutely no basis for the respondent to pass the impugned order, that too in the manner done.

8. Mr.N.V.Balaji, contended that the impugned proceedings is wholly barred by limitation, as the proceedings have been initiated beyond the period of six years and therefore, it is void ab initio.

9. Mrs.Hema Muralikrishnan, learned Senior Standing Counsel for the respondent strenuously contended that the impugned order is an appealable order and if the petitioner is aggrieved, he has to file an appeal and without exhausting the appeal remedy, the petitioner should not be permitted to approach this Court under Article 226 of the Constitution of India.

10. Further, the learned Senior Standing Counsel submitted that the question of limitation was not specifically raised by the petitioner at any earlier point of time and it is raised by the petitioner for the first time before this Court. In any event, the question of limitation being a question of law especially in the present case, whether the issues revolve around the amendment brought about to Section 201(3). It is pointed out that the amendment extending the period of limitation to 7 years was only prospective, whereas the earlier amendment was retrospective and this distinction is very important in the case on hand. Thus the question of limitation being a question of law, though there may be facts, which may be required to be looked into, but the contention raised by the petitioner in the instant case, appears to be a pure question of law. Therefore, the petitioner cannot be shutout from raising

such an issue though not raised by them, while submitting their reply dated 29.03.2018. One other aspect, which has to be pointed out, is that if the respondent had proposed to place reliance on materials or orders which were passed in respect of Belgium Company or French Company or for that matter proposed to rely on and refer to statements recorded from the petitioner's employees, the assessee was entitled to put on notice about such course of action. This having not been done, this Court is fully convinced that there are several grounds to hold that the impugned order is in violation of principle of nature justice. Having held so, the necessary consequence that has to follow is to set aside the impugned order and remand the matter to the respondent for fresh consideration. However, in the instant case, I propose to take a slightly different approach. The respondent having referred to several materials and information not pertaining to the petitioner/assessee in the impugned order and arriving at a conclusion against the petitioner largely based on such information, the impunged proceedings can be directed to be treated as a show cause notice.

11. The learned counsel for the petitioner would submit that the petitioner should be furnished with all information that the respondent has referred to and relied on or might have collected behind the back of the petitioner. Though the learned counsel may be partly right in making such a request, I am of the view that such request of the petitioner has to be considered by the respondent though not immediately but a little later, as the Court proposes to direct.

12. In the result, these writ petitions are disposed of directing the petitioner to treat the impugned order as a show cause notice and submit their preliminary objection to the impugned order. In the preliminarily objection, the petitioner is entitled to raise the plea of limitation. Apart from that, if the petitioner requires any documents, records, statement etc., then they shall clearly indicate, which are documents required by them and the relevancy of the documents to their case. On such request being made, the respondent shall bear in mind the principle of natural justice and furnish copies of the records sought for by the petitioner and give the petitioner sufficient time to submit their objections. After objections are submitted, the respondent shall afford an opportunity of personal hearing which should not be an empty formality and should be an effective personal hearing, where all issues are to be clarified and necessary documents obtained from the petitioner and clear record of the personal hearing be maintained. After conclusion of such personal hearing, the respondent is directed to pass fresh orders on merits and in accordance with law. Till such exercise is completed, no coercive action shall be initiated against the petitioner

pursuant to the impugned order. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

vsm

To
Deputy Commissioner of Income-tax
International Taxation Circle 1 (2)
4th Floor, BSNL Building
16 Greams Road
Chennai - 600 006.

+1cc to Mr.N.V.Balaji, Advocate Sr.31450
+1cc to Mr.Hema Muralikrishnan, Senior Standing Counsel Sr.30965

W.P.Nos.10319 and 10320 of 2018

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srg 18/05/2018