IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.09.2018

CORAM

THE HON'BLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.No.27334 of 2017
and
W.M.P.No.29226 of 2017

M/s.Regen Powertech Private Limited
represented by its Managing Director
Mr.Madhusudan Khemka
No.2, KRM Plaza, 8th Floor,
Harrington Road, Chepet,
Chennai - 600 031. ... Petitioner

vs.

1.The Dispute Resolution Panel-2,
Bangalore, 7th Floor,
Income Tax Office, BMTC Building,
80 Feet Road, Koramangala,
Bangalore - 560 095.

2.Deputy Commissioner of Income Tax,
Corporate Circle 5(1) Chennai,
Aayakar Bhawan, MG Road,
Nungambakkam,
Chennai - 600 034. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus to call for the records on the file of the First respondent and quash the impugned order under Rule 13 of the IT (DRP) Rule, 2009 read with section 144C of the Act in PAN No.AAADC5531M dated 12.10.2017 for the Assessment year 2013-14 and consequently direct the first respondent to consider the submissions of the petitioner and pass a fresh order following the principles laid down by the Income Tax Appellate Tribunal in the petitioner's own case for the preceding assessment year 2011-12.

For Petitioner : Mr.R.Sivaraman

For Respondent : Mrs.Hema Muralikrishnan
Senior Standing Counsel(Income Tax)

O R D E R

The petitioner is aggrieved against the order of the first respondent dated 12.10.2017 passed in respect of the assessment year 2013-2014. Consequently, the petitioner seeks for a direction to the first respondent to consider the submissions of the petitioner and pass a fresh order following the principles laid down by the Income Tax Appellate Tribunal in the petitioner's own case for the preceding assessment year 2011-2012.

2. The case of the petitioner in short is as follows:

(i) The petitioner is engaged in the business of manufacturing and supply of wind turbine generators. In respect of the assessment year 2013-2014, they filed the return of income. The case was subsequently taken up for scrutiny by the second respondent and notice under section 143(2) of the Income Tax Act was issued to the petitioner on 02.09.2014. Due to the presence of international transactions, the second respondent made a reference under section 92CA to the Transfer Pricing Officer to consider the issue relating to royalty payment by the petitioner to Regen, Cyprus. The Transfer Pricing Officer, without considering the terms of the agreement between the petitioner and the other company, passed an order on 31.10.2016. Based on the said order, the second respondent passed a draft assessment order on 30.12.2016 and proposed to make a downward adjustment on royalty payment to the tune of Rs.6,10,91,950/-. Being aggrieved against the said draft assessment order, the petitioner filed their objection before the first respondent under section 144(C) of the said Act. The primary objections raised by the petitioner before the first respondent are as follows:

> Ground 1: The Learned AO and TPO erred in making a downward adjustment on royalty payment to Regen Renewable Energy generation Global Ltd, Cyprus without appreciating the fact that the royalty expenditure is at arm's length.
>
> Ground 2: The Learned AO and TPO ought to have appreciated that no profits have effectively been retained by Regen Cyprus and therefore such transfer pricing adjustment is not warranted tin the first place.
>
> Ground 3: The Learned AO and TPO have erred in treating the royalty payable by Regen Cyprus to Vensys AG at arm's length price which is not in accordance with the principles of res-judicata.

(ii) The first respondent passed an order on 25.09.2017 rejecting the objection raised by the petitioner on the reason that identical issue was considered by the first respondent for the assessment year 2011-2012 and 2012-2013 and that there was no reason to differ with such decision for the immediate preceding year.

iii) However, with regard to the assessment year 2011-12 on the same set of facts and circumstances, an appeal was filed before the Income Tax Appellate Tribunal, which in turn, by its order dated 17.08.2016 held that the issue to be re-looked as the percentage computed by the Transfer Pricing Officer is 1.14% in comparison with the Arm's Length Price margin being 4.60%. Thus, the Tribunal remitted the issue back for recalculation, to the file of the Transfer Pricing Officer, to consider the royalty payments on brought out component based on technical specification. Pursuant to the said order of the Tribunal, the Transfer Pricing Officer through the order dated 28.03.2017 had given effect to the order of the Tribunal re-calculating the royalty payment and revising downward adjustment at Rs.42,00,000/-. Consequently, the second respondent passed their final assessment order under section 143(3) on 30.03.2017, thereby accepting the claim of the petitioner with regard to the downward adjustment of royalty payment. Subsequently, the Transfer Pricing Officer through an order dated 12.09.2017 further reduced the downward adjustment of royalty paid to Rs.3,20,576/- for the assessment year 2011-2012.

iv) Therefore, for the impugned assessment year 2013-14 also, the first respondent ought to have followed the order of the Tribunal dated 17.08.2016 as the factual matrix was identical. On the other hand, the first respondent suo motu filed application under Rule 13 of the Income Tax (Dispute Resolution Panel) Rules, 2009 to rectify the earlier order dated 25.09.2017. According to the first respondent, the facts for the earlier years namely assessment years 2011-2012 and 2012-2013 are different and therefore, the order passed on 25.09.2017 has to be rectified. The petitioner also filed an application under Rule 13 of the said Rules on 09.10.2017 to rectify the direction passed by the first respondent on 25.09.2017. The petitioner contended in the said application that in view of the order passed by the Appellate Tribunal dated 17.08.2016 in respect of the assessment year 2011-2012 arising out of the same issue, the present order dated 25.09.2017 has to be rectified accordingly.

v) However, the first respondent without disposing the application filed by the petitioner under Rule 13 has passed the impugned order on 12.10.2017 merely by adjudicating upon its own suo motu rectification application. Hence, the present writ petition.

3. A counter affidavit is filed by the respondents, wherein it is stated as follows:

The first respondent has passed the impugned order after following the principles of natural justice. If the petitioner is aggrieved against the same, they have to file only an appeal and not a writ petition. The question whether the addition made by the respondent is justifiable or not is an issue to be agitated on merits after letting in evidence. Hence, the above writ petition is not maintainable. An error which had crept in the order dated 25.09.2017 was sought to be rectified suo motu by the first respondent. The facts and circumstances existing in the year 2013-2014 were different from those existing in the years 2011-2012 and 2012-2013. The petitioner's objection to the suo motu rectification notice was considered by the first respondent and thereafter, the impugned order was passed. Therefore, the petitioner cannot contend that the factual matrix was not considered. The rectification proposed by the first respondent and the rectification application filed by the assessee are not identical. The petitioner cannot be heard to say that the rectification petition filed by him on 11.10.2017 ought to have been considered along with the suo motu application filed by the first respondent.

4. Heard both sides.

5. The facts and circumstances which warranted the filing of the present writ petition has been referred to in detail supra. Therefore, I am not reiterating the same once again hereunder.

6. The main grievance of the petitioner before this Court is that the first respondent has chosen to pass the present impugned order only by considering its own suo motu rectification application without considering the rectification application filed by the petitioner also under Rule 13 of the said Rules and passing an order on such application as well. It is seen that the dispute between the parties is with regard to the royalty payment made by the petitioner to their foreign contracting party, namely Regen at Cyprus. It is seen that the Assessing Officer referred the matter to the Transfer Pricing Officer to consider the issue relating to royalty payment, who in turn, seems to have passed some adverse order against the petitioner. Thereafter, the Assessing Officer, based on such order of the Transfer Pricing Officer, passed a draft assessment order. The petitioner filed their objection against the said draft assessment order before the first respondent by raising several objections, out of which, three primary objections, as stated supra, were highlighted for the consideration of the first respondent. It is seen that in respect of assessment years 2011-2012 and 2012-2013, the very same objections were raised by the petitioner before the first respondent, which in turn, rejected those objections. Therefore, the first respondent originally by order dated 25.09.2017, rejected the objection with regard to the present assessment year 2013-2014 also on the reason that on the similar factual matrix, the panel has rejected the contentions raised by the petitioner in respect of the assessment year 2011-2012 and 2012-2013. However, the fact remains that in respect of the assessment year 2011-2012, the matter went on Appeal before the Income Tax Appellate Tribunal,

which in turn, by order dated 17.08.2016 remanded the matter back to the Transfer Pricing Officer to consider the issue regarding royalty payments. Consequently, the Transfer Pricing Officer, passed an order followed by the final order of assessment passed by the 2nd respondent, accepting the claim of the petitioner with regard to the downward adjustment of royalty payment. It is seen that, while the fact stood thus, the first respondent suo motu sought to rectify its order dated 25.09.2017 by filing an application under Rule 13 of the said Rules.

7. The crux of the reasons for such rectification sought to be made by the first respondent was that the facts in the earlier orders, namely, the assessment years 2011-2012 and 2012-2013 are not similar to the facts in the present assessment year 2013-2014. Therefore, the first respondent sought to rectify the order already passed. On the other hand, the petitioner also filed an application under Rule 13 seeking for rectification of the very same order on 25.09.2017 by placing reliance on the order passed by the Income Tax Appellate Tribunal dated 17.08.2016. Thus, according to the petitioner, as per the said order of the Appellate Tribunal, the first respondent has to pass an order in respect of the present assessment year as well in favour of the petitioner.

8. There is no dispute to the fact that the said application filed by the petitioner under Rule 13 is pending and not yet disposed of. It is also not in dispute that before passing the present impugned order, the petitioner has already filed such application on 09.10.2017. When such application was already filed by the petitioner and the same was taken on record, in all fairness, the first respondent ought to have considered the petitioner's application also along with its own suo motu application for rectification. In this case, it has not been done so. Needless to state that whether the facts and circumstances of the assessment years 2011-2012 and 2012-2013 on the one hand, and of the assessment year 2013-2014 on the other hand, are similar or not is the question which has to be necessarily considered and decided by the first respondent by hearing both the applications. Equally, it is also for the first respondent to consider as to whether the order passed by the Income Tax Appellate Tribunal dated 17.08.2010 in respect of assessment year 2011-2012 is applicable to the present assessment year as well, by considering the facts and circumstances of both assessment years. All these things can be done only by hearing the suo motu application and the petitioner's application dated 09.10.2017, both filed under Rule 13 of the said Rules, together.

9. Learned counsel for the respondents admitted to the position that the application filed by the petitioner has not

been disposed of so far. Needless to state that when the parties have filed the rectification petition to rectify the same order, it is not proper to pass an order on the application filed by one party alone leaving the other application either unheard or not disposed of. Therefore, without expressing any view on the merits of the contentions raised by both parties, this Court is of the view that the present impugned order has to be set aside only for the purpose of remitting the matter back to the first respondent for considering both the applications filed under Rule 13 and pass a fresh order on merits and in accordance with law.

10. Accordingly, the writ petition is allowed and the impugned order is set aside. Consequently, the matter is remitted back to the first respondent to hear afresh the suo motu application under Section 13 by the first respondent along with the application filed by the petitioner for rectification dated 11.10.2017 and pass orders on both the applications on merits and in accordance with law. Such exercise shall be done by the first respondent within a period of eight weeks form the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

vsi

To

1.The Dispute Resolution Panel-2,
Bangalore, 7th Floor,
Income Tax Office, BMTC Building,
80 Feet Road, Koramangala,
Bangalore - 560 095.

2.Deputy Commissioner of Income Tax,
Corporate Circle 5(1) Chennai,
Aayakar Bhawan, MG Road,
Nungambakkam,
Chennai - 600 034.

+1cc to Mr.R.Sivaraman, Advocate, S.R.No.65783

W.P.No.27334 of 2017

RK(CO)

rrs 04/10/2018