IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.09.2019

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

Writ Petition No.5384 of 2005
and
W.M.P. Nos.5952 of 2005

M/s.Dar Consultants (India) Private Limited,
represented by E.Kumaran,
No.50, Beach Road, Kalakshetra Colony,
Besant Nagar, Chennai - 600 090 .... Petitioner

vs

1.The Union of India, Ministry of Finance,
Department of Revenue,
Government of India through Secretary,
North Block, New Delhi - 110 011.

2.The Commissioner of Income Tax,
Chennai -I, Chennai - 600 034.

3.The Assistant Commissioner of Income Tax,
Company Circle I (4),
Chennai - 600 034. .... Respondents

PETITION under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorarified Mandamus, calling for the records of the third respondent in the Notice dated 30.03.2004 vide PAN AAACD22464/Dx-4-306 and quash the same and direct the respondents from taking any action in furtherance or in pursuance of or in implementation of the impugned notice dated 30th March, 2004 and permanently prohibiting and restraining the second and third respondents from reassessing the petitioner for the Assessment Year 1997-98.

For Petitioner : Mr.R.Sankara Narayanan,
Senior Counsel
for Mr.G.S.Shivekumar

For Respondents : Mrs.Hema Muralikrishnan
Senior Standing Counsel

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

O R D E R

The petitioner challenges proceedings for re-assessment in respect of Assessment Year 1997-98 in terms of the Income Tax Act, 1961 (in short 'Act'). A return of income had been filed and an intimation issued in terms of Section 143(1)(a) of the Act. Thereafter, the assessment was taken up for scrutiny by issue of notice under Section 143(2) of the Act. Various hearings were conducted and written submissions filed before the Assessing Officer. The order of assessment came to be passed thereafter on 09.03.2000, disallowing withholding tax on royalty payments that had remained unpaid under Section 43B of the Act.

2. Thereafter, on 30.03.2004, a notice under Section 148 of the Act, was issued seeking to re-open the scrutinised assessment and calling upon the petitioner to file a return of income. Pursuant thereto, the petitioner complied with the notice and sought the reasons on the basis of which, the re-assessment had been initiated. Reasons were supplied on 24.08.2004 as follows:

> 'I have gone through the contents of the letter referred to above wherein it is contended that there is no failure on the part of the assessee to disclose the facts fully. I am of the view that there is a failure on the part of your company to disclose fully and truly all material facts necessary for the assessment. In this connection, kind reference is invited to the audit report and the comments furnished by your Chartered Accountant in Form No.3CD against column No.7 and 11 which is reproduced below for the sake of convenience.
>
> 7. Any tax, duty or other sum-
>
> (i) debited to the profit and loss account : Cess Rs.11,63,360/-
>
> but not paid during the previous year, or Paid on 01.10.97.
>
> (ii) paid during the previous year but : Nil
>
> Allowed as a deduction in any earlier
>
> Year - Section 43B
>
> 11.Whether the assessee has deducted tax
>
> at source and paid the amount so deducted
>
> to the credit of the Central Government in
>
> accordance with the provisions of Chapter
>
> XVII-B? If not, give details : Nil

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Your are aware that during the course of assessment proceedings for A.Y.1998-99 and 1999-2000, it has been noticed that the tax deducted at source has not been paid to the account of the Government. Thus, the remarks given by the Chartered Accountants is factually incorrect and it obviously is a failure on your company's part to disclose the facts fully. Therefore, your are requested to call the comments of the Chartered Accountant on this issue so that the same can be incorporated in the assessment order likely to be passed in your company's case.'

3. In the course of assessment proceedings the books of accounts of the assessee were specifically called for, for verification. The Assessing Authority was also furnished with a copy of a Collaboration Agreement entered into between the petitioner and one Dar Al-Handasah Consultants (Shair & Partners) EC dated 16.06.1994 and the approval of Ministry of Finance for such collaboration, in terms of which the petitioner was required to remit Royalty to the consultant for technical services provided by it. The aforesaid particulars had been filed before the Assessing Officer, along with detailed written submissions dated 07.12.1998. Subsequent submissions dated 12.03.1999, 20.09.1999, 22.09.1999 and 29.09.1999 are also available on record, revealing that submissions have been specifically made on the question of Royalty paid, and tax withheld among various other issues.

5. In submission dated 07.12.1998, the petitioner has brought to the notice of the Officer that Royalty at 5% of the turnover was being paid to the consultants on which tax has been withheld at 30%. Annexure V to the written submission sets out the details of outstanding liabilities wherein, the petitioner has disclosed that a portion of the tax withheld was remitted only in September 1997. A perusal of the original order of assessment dated 09.03.2000 reflects specific application of mind to the issue of tax deduction itself as a disallowance has been made on that very account. Thus, the issue of payment of royalty and tax deduction thereupon has specifically caught the attention of the Assessing Authority even at the original instance.

6. The provisions of Section 147 of the Act, set out a time limit of four years within which time income stated to have escaped assessment would be brought to tax. A further period of two years is granted in those cases where the escapement has been occasioned by virtue of non-filing of return of income by the petitioner, or by its failure to make a full and true disclosure at the original instance. In the present case, the year in question is 1997-98 and the regular limitation provided expires on 31.03.2002. The impugned notice under Section 148 of

https://hcservices.ecourts.gov.in/hcservices/

the Act has been issued on 30.03.2004 invoking the extended period of limitation. However, the only reason for re-assessment relates to shortfall in deduction of tax at source, that has been duly disclosed in the financial statements, discussed in the proceedings for assessment and specifically noticed and addressed by the Assessing Officer in the order of assessment. There is thus no question that the escapement, if at all, cannot be attributed to the petitioner, since a full and true disclosure has been made by it at all stages. The petitioner relies on an judgment of the Supreme Court in the case of Income Tax Officer, Ward No.16(2) Vs. Techspan India Private Limited and another [(2018) 6 SCC 685] and the decision of the Madras High Court in the case of MBI Kits International Vs. Income Tax Officer, Non-Corporate Ward-1(3), Chennai [(2018) 98 taxmann.com 473(Madras)]. The respondent relies on the judgment of the Supreme court in the case of Girilal & Co. Vs. Income Tax Officer, Mumbai [(2016) 75 taxmann.com 172(SC)].

7. In Girilal (Supra), learned Standing Counsel specifically relies on Paragraph No.4 that reads as follows:

> '4. It is clear from the above that this information was supplies as there was some query about the value of the land. Obviously, while going to this document the Assessing Officer would examine the value of the land. However, the reason for issuing notice under Section 148 of the Income Tax Act was that the appellant had not correctly disclosed the actual assets of the plot and hence, it was not entitled for deduction under Section 80(1B) (10) of the Act. The Income Tax Authority itself has mentioned in the notice under Section 148 of the Act that such information was available only in the valuation report. Giving the information in this manner shall be of no help to the appellant as the Assessing Officer was not expected to go through the said information available in the valuation report for the purpose of ascertaining the actual construction of the plot.'

8. This case is clearly distinguishable from the facts before me now. In Girilal, the assessee firm was engaged in the business of construction and development of real estate. The assessee had contended that in reply to a query from the Assessing Officer, information in regard to the valuation of certain land was supplied, seeking to rely on this to show that the issue had been looked into at the original instance and could not be agitated again. This contention was rejected by the Court stating that mere furnishing of information that was indirectly connected to the business of real estate development

https://hcservices.ecourts.gov.in/hcservices/

would be of no assistance to the Assessing Authority and nor would it stand in the way of re-assessment where the very entitlement of the assessee to deduction under Section 80 (1B)(10) of the Act was in question.

9. Thus, in Girilal, the nexus that was sought to be drawn by an assessee between the reasons and the material already furnished to the Officer, was held to be too farfetched and indirect. However in the present case, the material furnished by the petitioner at the original instance is directly on the point of Royalty and tax deduction thereupon and not merely proximate. In Techspan India Private Limited (supra) followed by this Court in MBI Kits International (supra), the Bench has categorically held, quoting an earlier judgment in the case of Commissioner of Income Tax Vs. Kelvinator of India Limited [320 ITR 561], that a re-assessment is impermissible where it is based only on a change of opinion. Additionally, it is also relevant to note that the re-assessment in the case of Techspan (supra) was within a period of four years whereas the re-assessment before me is beyond the period of four years and is hence also barred by limitation, in the light of the proviso to Section 147 of the Act.

10. The impugned order is set aside and this Writ Petition is allowed. Connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

rkp

To

1.The Secretary, Union of India,
Ministry of Finance,
Department of Revenue,
Government of India,
North Block, New Delhi - 110 011.

2.The Commissioner of Income Tax,
Chennai -I, Chennai - 600 034.

3.The Assistant Commissioner of Income Tax,
Company Circle I (4),
Chennai - 600 034.

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

+1cc to Mr.Hema Muralikrishnan, Advocate SR.80423

+1cc to Mr.G.S.Shiva kumar, Advocate SR.81320

Writ Petition No.5384 of 2005
and
W.M.P. Nos.5952 of 2005

RSV(CO)
CB(30/01/2020)

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/