

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	05/04/2019
Delivered on	25/06/2019

CORAM:

THE HONOURABLE MR. JUSTICE K.KALYANASUNDARAM
W.P.Nos. 7354 of 2018 &
W.M.P.No.9135 2018

Cognizant Technology Solutions
India Pvt. Ltd.,
No.165, Eternity Building,
6th Floor, St. Mary's Road,
Chennai - 600 018. ... Petitioner

Vs.

The Deputy Commissioner of Income Tax,
Larger Taxpayer Unit-1,
7th Floor, Wanaparthi Block,
Aayakar Bhawan,
Nungambakkam, Chennai - 600 034. .. Respondent

PRAYER: Writ Petition filed under Article 226 of the
Constitution of India praying for issuance of a Writ of
Certiorari to call for records pertaining to F No.
Recovery / DCIT (LTU) - 1 / 2017-18, dated 22.03.2018 on the
file of the respondent herein and quash the same.

For Petitioner : Mr.Gopal Subramaniam
Senior Advocate
For Mr.Srinath Sridevan

For Respondent : Mr.G.Rajagopalan
Additional Solicitor General
Assisted by Mr.Karthik Ranganathan
Senior Standing Counsel
for Income Tax Department

* * *

O R D E R

Assailing the order of the respondent dated 22.03.2018,
whereby the petitioner was directed to remit tax at 15% of the
total payment of Rs.19415,62,77,269/- along with interest under
Section 115P of the Income Tax Act (in short "Act"), the present

Writ Petition has been filed.

2. According to the petitioner, it is a Company incorporated under the Companies Act and is engaged in the business of development of computer software and related services and export. In the year 2013, the petitioner bought back its own shares under Section 77A of the Companies Act. Thereafter, during the year 2016 under the Scheme of Arrangement and Compromise, the petitioner planned to purchase its own shares under Sections 391 to 393 of the Companies Act for the following reasons:-

(i) to increase earnings per share and return on equity over a period of time and enhance long-term value creation;

(ii) to streamline ownership structure by purchasing its own shares from minority shareholders holding less than 25% of the issued, subscribed and paid up share capital;

(iii) to serve the shareholders more efficiently and optimize the overall capital structure; and

(iv) to reduce foreign currency fluctuation risk in respect of rupee funds in India.

3. The petitioner filed C.P.No.102 of 2016 before this Court for approval of the Scheme to buy back a maximum of 94,00,534 equity shares from its shareholders for a total consideration of Rs.19,080.26 Crores and the Scheme got approved by an order dated 18.04.2016. It is a case of the petitioner that the consideration for such buy-back was paid to the shareholders in May 2016. The gain arising to the shareholders in the course of buy-back was offered to taxation as capital gain subject to applicability of treaty relief and a total of Rs.898.01 Crores was paid as capital gain to the respondent-Department by the petitioner.

4. The petitioner would allege that during the year 2017, the I.T. Department attempted to tax the 2013 buy-back as an income from other sources in the hands of the petitioner's shareholders and the Assessing Officer overruling the findings of the Transfer Pricing Officer, proceeded to pass a Draft Assessment Orders against its shareholders and the orders are under challenge in W.P.Nos.1244 & 1245 of 2018. In view of the stand taken by the Department in the 2013 buy-back, the petitioner approached the Authority for Advance Rulings and filed an application under Section 245Q of the Act in relation to the buy-back of shares in the year 2016.

5. The petitioner would claim that when the application filed under 245Q of the Act is pending and when there is an express bar contained in 245RR of the Act, the impugned order shall not stand. Further, it came to be passed in violation of principles of natural justice. According to the petitioner, the shares bought back in pursuance to the order of this Court under Sections 391 and 393 of the Companies Act is covered under Section 46A of the Act and it would not come under the definition of dividend as per Section 2(22) of the Act.

6. In the counter filed by the respondent, it has been stated that the petitioner remitted about Rs.19,415 Crores to its non-resident shareholders in May 2016, without paying Dividend Distribution Tax (DDT) under Section 115 O of the Act. The issue of non-payment of DDT was identified and a notice dated 21.11.2017 was issued to the assessee calling for details of the tax paid on those remittances. Thereafter, a series of meetings were held with Tax Team of CTS between November 2017 and March 2018 in the Chamber of Commissioner of Income Tax (LTU), where apart from CIT (LTU), Joint Commissioner of Income Tax (LTU) and the Deputy Commissioner of Income Tax (LTU-I) were present. On two occasions Shri. R.Chandrasekharan, Executive Vice Chairman / MD of the Company appeared before the Department along with the Competent Tax Team and they were explained about the liability of its remittances to tax under Section 115O of the Act. On two more occasions, Shri.Gym, Head, Global Taxation (CTS) was also present along with Tax Team. They assured that they will look into the scheme once again and tax liability, if any will be paid, for which, they sought time. Since no proper response was forthcoming from the Company, the final show-cause notice dated 22.03.2018 was issued. It is stated that the Department has clearly explained and communicated to the assessee regarding the tax liability under Section 115 O of the Act, provided ample opportunity, and proceeded with necessary action, by observing requisite formalities.

7. It is further stated in the counter that a letter dated 21.11.2017 was issued to the assessee calling for various details regarding remittances made to the shareholders of the petitioner Company during FY 2015-16 and 2016-17 and their tax payment. It is a case of the respondent that by virtue of first proviso to Section 245R (2) of the Act, the Authority for Advance Rulings shall not take cognizance on the application filed under Section 245Q of the Act as the issue raised in the application is already pending before the Income Tax Authority and the application was filed only to circumvent the proceedings.

8. The respondent has further stated that the buy-back of share under Section 391 of the Indian Companies Act is nothing but the distribution of accumulated profit and it has to be treated as dividend under Section 2(22)(d) of the Act and Dividend Distribution Tax at 15% is required to be paid by the petitioner under Section 115O of the Act. Though the petitioner deposited a sum of Rs.898,01,63,318/- byway of withholding tax, it has not deposited the remaining tax to the extent of 2500 Crores.

9. It is further stated that unlike the Regular Assessment Proceedings under Section 143 (3) of the Act, etc., the provisions of Section 115O of the Act do not prescribe any specific order to be passed as it is equivalent to self declaration and under Section 115O of the Act, the tax payer is required to remit the taxes within a period of 14 days from the date of distribution of dividends and any failure in remitting the taxes within the time will automatically makes the taxpayer, "assessee deemed to be in default" and the Department can proceed with all recovery measures.

10. A rejoinder affidavit has been filed by the petitioner contending that the notice dated 21.11.2017 does not refer to any provision / Section of the Act and there is no mention about the Distribution Dividend Tax in the letter dated 21.11.2017. The letter was duly replied on 04.12.2017 and 06.12.2017. In paragraph No.9, the meeting and discussions held by the respondent has not been specifically denied, however it is stated that the informal discussions cannot be a substitute to a proper show-cause notice with a chance of reply and an opportunity of hearing.

11. Mr.Gopal Subramaniam, learned Senior Counsel appearing on behalf of the petitioner would urge that Chapter XII DA was inserted by an amendment to Finance Act, 2013 with effect from 01.06.2013. Prior to the insertion of the said Sections, the Companies are entitled to the benefits under Double Taxation Avoidance Agreement in respect of buy-back of shares under Section 77A of the Companies Act. Before 2013 Amendment, the petitioner purchased its shares under Section 77A of the Companies Act and filed the Income Tax Returns. It is the submission of the learned Senior Counsel that in view of Double Taxation Avoidance Agreement between the Indian Government and Mauritius Government, the Cognizant (Mauritius) Limited is entitled to exemption of payment of income tax and the Cognizant Technology Solutions Corporation, United States remitted the tax liability of about Rs.898 Crores and after receipt of the huge sum, the present demand cannot be made. The explanation to Section 115QA of the Act was amended with effect from 01.06.2016. Post amendment, the Companies, which purchase their

own share are liable to pay the additional income tax at the rate of 20% on the distributed income. It is urged by the learned Senior Counsel that prior to the amendment, the petitioner bought back its own shares under the Scheme of Arrangement and Compromise under Sections 391 to 393 of the Companies Act. As per Section 46A of the Act, the buy-back of shares shall be deemed to be capital gain and the shares purchased by the petitioner would not come under Distribution of Dividend under Section 2(22) of the Act. Hence, the demand of tax under Section 115QA of the Act retrospectively is not permissible in law.

12. It is next contended that admittedly the petitioner filed an application under Section 245Q of the Act before the Authority for Advance Rulings for quantitative judicial pronouncement and during the pendency of the application, the respondent is barred from issuing the impugned notice in view of Section 245 RR of the Act. It is further contended that the impugned order was passed without any notice and enquiry and in gross violation of principles of natural justice.

13. per contra Mr.G.Rajagopalan, learned Additional Solicitor General appearing on behalf of the Revenue raised a preliminary objection to the maintainability of the Writ Petition contending that the petitioner is having an effective alternative remedy; He adds that as per explanation 2(22) (d) / 2(22)(a) of the Act, any reduction of share would amount to distribution of dividend and under Section 115 O of the Act, the domestic company is liable to deduct the tax at source and remit the amount to the Government within 14 days and that if the amount is not deposited within the stipulated time, the company shall be deemed to be an "assessee in default". It is the submission of the learned Additional Solicitor General, this is a special provision, where there is no requirement to issue notice, conducting enquiry before passing orders.

14. The learned Additional Solicitor General further submitted that the Assessing Officer having entertained doubt over the remittance of huge amount of about Rs.19,415 Crores, issued a notice to the petitioner, dated 21.11.2017 calling for informations with regard to the dates and amount of remittance made to the non-residents during FY 2015-16 and 2016-2017 and the nature and purpose of the said remittance. Even though no provisions of law is mentioned, but a perusal of the notice shows that the respondent had called for particulars from the petitioner to ascertain the tax liability. Since the enquiry was pending, the bar referred in Section 245 RR would not apply in view of Section 245 Q of the Act. It is further submitted that even though no enquiry is necessitated, the petitioner was put

on notice and only after enquiry, the impugned order came to be passed and hence, there is no breach of principles of natural justice.

15. It is further contended that when the Scheme was sanctioned by this Court, taking note of the objection raised by the Regional Director, it has been observed in the order that the said order will not be construed as an order granting exemption from payment of statutory dues. So, the order of the Company Court would not help the petitioner. Reference is made in this regard to the decision of the Bombay High Court in the case of Casby CFS (P.) Ltd [(2015) 56 taxmann.com 262 (Bombay)].

16. Heard both and perused the materials placed on record.

17. In view of the above said rival contentions, the following points arise for consideration:-

(i) Whether Section 115-O of the Act mandates issuance of show-cause notice, enquiry before passing a final order?

(ii) Whether there is any breach of principles of natural justice?

(iii) Whether the Assessing Officer is prohibited from issuing the impugned order in the light of the bar prescribed in Section 245 RR of the Act?

(iv) Whether the Writ Petition is maintainable?

Point No.(i)

18. This is purely a question of law and for better appreciation, the relevant provisions are extracted hereunder:-

Section 115-O - Tax on distributed profits of domestic companies.

"[(1) Notwithstanding anything contained in any other provision of this Act and subject to the provisions of this section, in addition to the income-tax chargeable in respect of the total income of a domestic company for any assessment year, any amount declared, distributed or paid by such company by way of dividends (whether interim or otherwise) on or after the 1st day of April, 2003, whether out of current or accumulated profits shall be charged to additional income-tax (hereafter referred to as tax on distributed profits) at the rate of [fifteen] per cent.]

[Provided that in respect of dividend referred to in sub-clause (e) of clause (22) of Section 2, this sub-section shall have effect as if for the words "fifteen per cent", the words "thirty per cent" had been substituted]

[(1A) The amount referred to in sub-section (1) shall be reduced by,—

[(i) the amount of dividend, if any, received by the domestic company during the financial year, if such dividend is received from its subsidiary and,—

(a) where such subsidiary is a domestic company, the subsidiary has paid the tax which is payable under this section on such dividend; or

(b) where such subsidiary is a foreign company, the tax is payable by the domestic company under section 115BBD on such dividend: or

Provided that the same amount of dividend shall not be taken into account for reduction more than once;]

(ii) the amount of dividend, if any, paid to any person for, or on behalf of, the New Pension System Trust referred to in clause (44) of section 10.

(2) Notwithstanding that no income-tax is payable by a domestic company on its total income computed in accordance with the provisions of this Act, the tax on distributed profits under sub-section (1) shall be payable by such company.

(3) The principal officer of the domestic company and the company shall be liable to pay the tax on distributed profits to the credit of the Central Government within fourteen days from the date of—

(a) declaration of any dividend; or

(b) distribution of any dividend; or

(c) payment of any dividend,

whichever is earliest.

....."

Section 115 P - Interest payable for non-payment of tax by domestic companies.

" Where the principal officer of a domestic company and the company fails to pay the whole or any part of the tax on distributed profits referred to in sub-section (1) of section 115-O, within the time

allowed under sub-section (3) of that section, he or it shall be liable to pay simple interest at the rate of [one] per cent for every month or part thereof on the amount of such tax for the period beginning on the date immediately after the last date on which such tax was payable and ending with the date on which the tax is actually paid."

Section 115 Q - When company is deemed to be in default.

" If any principal officer of a domestic company and the company does not pay tax on distributed profits in accordance with the provisions of section 115-O, then, he or it shall be deemed to be an assessee in default in respect of the amount of tax payable by him or it and all the provisions of this Act for the collection and recovery of income-tax shall apply."

Section 115QA - Tax on distributed income to shareholders:-

"(1) Notwithstanding anything contained in any other provision of this Act, in addition to the income-tax chargeable in respect of the total income of a domestic company for any assessment year, any amount of distributed income by the company on buy-back of shares (not being shares listed on a recognised stock exchange) from a shareholder shall be charged to tax and such company shall be liable to pay additional income-tax at the rate of twenty per cent on the distributed income.

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19. From a plain reading of the above provisions, it is seen that Section 115 O is a charging section on its own. These Sections are self contained codes in themselves and they do not demand for issuing any show-cause notice and then passing any order. Chapter XIV of the Act prescribes procedure for assessment. Section 139 deals with filing of returns of income. Section 142 describes procedure for conducting enquiry before assessment and under Section 143, the Assessment Order can be passed, based on the Returns filed under Section 139, or in response to a notice under Section 142 (1) of the Act. Section 148 deals with issue of notice where income has escaped

assessment and a notice of demand issued under Section 156.

20. The only difference between the regular assessment and Special Provisions is that under the regular assessment, the Authorities are required to verify the Returns submitted by the assessee and the materials to ascertain the income escaped from assessment. However, under the Special Provisions, there is no dispute with regard to quantum of distribution of profit made by the Company. Hence, in my opinion there is no need for issuance of notice before making a demand under Section 115 O of the Act. It is to be noted that unless the law requires, the Assessing Officer need not issue notice before making a demand under Section 115 O of the Act. The parliament in its wisdom brought amendments to the Finance Act and inserted Section 115 O to 115 Q with effect from 01.06.1997 (Special Provisions) to achieve an object. If any other view is taken, then the Special Provisions under Chapter XIV would become redundant and it would be opening a pandoras box.

21. Regarding point No.(ii), this Court while answering first point held that the law does not require issuance of notice to make a demand under Section 115 O of the Act. Despite the same, admittedly, a notice dated 21.11.2017 was issued to the petitioner calling for details and meetings were convened, in which, indisputably, the officials of the petitioner Company participated and a detailed note explaining the various provisions of the Act have been given to them. It is pertinent to note that the object and purpose of issuing show cause notice is to put on notice to the proposed action to be initiated by the Officials and nothing else. But, a curious stand is taken by the petitioner that the letter dated 21.11.2017 cannot be construed as a show-cause notice and the informal discussion cannot be substituted for a proper show-cause notice with a chance of reply and an opportunity of hearing, hence, I find no substance in the said submission.

Point No.(iii)

22. It is not disputed that the respondent by the letter dated 21.11.2017 sought for furnishing informations with regard to remittance made to the shareholders of the petitioner-Company during the financial year 2015-16 and 2016-2017. It is an admitted fact that no provision of law has been quoted in the letter particularly Section 2(22) of the Act, but a cursory perusal of the letter would show that the respondent had sought for payment details to ascertain the tax liability of the petitioner.

23. It is equally not disputed that the petitioner approached the Authority for Advance Rulings only on 20.03.2018,

when the issue was pending before the Assessing Officer. It can be reasonably presumed that the multinational company like the petitioner is not expected to plead ignorance in regard to the purpose of the notice dated 21.11.2017. Otherwise, there was no necessity for the top officials of the petitioner to attend the meetings conducted by the respondent. Section 245R of the Act makes it clear that if the enquiry is already pending before the Assessing Officer, the Authority for Advance Rulings has no jurisdiction to entertain the application. Hence, I find no force in the argument of the learned Senior Counsel for the petitioner that the impugned order does not stand in view of the bar under Section 245 RR of the Act.

Point No.(iv)

24. The impugned order is questioned in this Writ Petition on the ground that gain on buy-back of shares cannot be categorized as a dividend and it is a capital gain as per Section 46 A of the Act. It is a case of the respondent that there was no dispute and necessity to file the petition under Sections 391 to 393 of the Companies Act and it was filed only to avoid payment of Dividend Distribution Tax. It is relevant to note that in the Company Petition in C.P.No.102 of 2016, in Clauses 6.6 and 6.7, it is stated that the provisions of Section 2(22) or Section 115 O or Section 115QA of the Act are not applicable to the purchase of Equity Shares by the Company from its shareholders and the Scheme of Arrangement and Compromise shall not be treated or considered as a "capital reduction" under the provisions of Section 100 of the Companies Act, or a "buy-back" under the provisions of Section 68 of the Companies Act. However, while approving the Scheme, as observed above, the Company Court has categorically held that "this order will not be construed as an order granting exemption from payment of stamp duty or, taxes or, any other charges, if any, payable, as per the relevant provisions of law".

25. Whenever a Company distributes its profits to its shareholders, the profit so disbursed, will amount to dividend. Clause (d) to Section 2 (22) of the Act, demonstrates that if any distribution to his shareholders by a Company on the reduction of his capital, would be a dividend. Clause (a) and (d) to Section 2(22) of the Act is extracted below for ready reference:-

" 2 (22) dividend" includes-

(a) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company;

(d) any distribution to its shareholders by

a company on the reduction of its capital, to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not;"

26. In Casby CFS (P.) Ltd (supra) the company sought sanction of the proposed Scheme of amalgamation. A notice was issued to the Regional Director under Section 394 and he objected approval of the Scheme contending that the Scheme would circumvent the provisions of Income Tax Act. The High Court of Bombay held that the Regional Director is entitled to object approval of the Scheme and it was his duty to do so. After considering the objections, the Scheme was approved. Relevant paras have been extracted hereunder:-

"7. As more particularly set out hereinafter, since it was argued on behalf of the Regional Director that the idea of the petitioners behind propounding the above scheme is inter alia to obtain sanction of this Court to the Scheme with the appointed date of 1st April, 2008, and thereafter to file revised Income Tax Returns in violation of Section 139(5) of the Income Tax Act and the whole purpose of fixing a retrospective appointed date is to defeat the income tax demands and assessment proceedings either in progress or completed and the retrospective appointed date is nothing but a device to defeat the provisions of the Income Tax Act, particularly Section 139 (5), and the scheme therefore needs to be rejected, this Court directed the Regional Director to contact the Income Tax Department and to seek their views on the objections of the Regional Director. The Income Tax Department by its letters dated 03.12.2014 addressed to the Regional Director informed the Regional Director that they were supporting the views / stand taken by the Regional Director. The said letters received from the Income Tax Department were placed before this Court by the Regional Director along with another further affidavit dated 04.12.2014 ("third affidavit"). This affidavit was filed after the hearing had commenced. The petitioners did not file an affidavit in reply to the third affidavit."

"57. In the circumstances, I pass the following order:-

(i)	The Scheme of amalgamation as proposed is sanctioned subject to the following conditions:-
(a)	Clause 6.2.1 of the Scheme shall stand deleted;
(b)	the issue regarding the liability, if any, of the petitioners and their shareholders towards payment of capital gains tax as well as income tax that may arise pursuant to the sanction of the Scheme, are left open to the Income Tax Department to decide in accordance with law at the appropriate stage without being influenced by the observations made herein;
(c)	in the event of the petitioners filing revised income tax returns, the validity and permissibility thereof will be decided by the Income Tax Department, and while doing so, the Income Tax Department will not be bound by the appointed date of 1st April 2008 fixed by the Scheme;
(d)	the Income Tax Department shall not be bound by the appointed date fixed under the Scheme while carrying out pending and/or future assessments of the Transferor and Transferee companies whether on the basis of the income tax returns already filed or revised returns, if any, that may be filed, or otherwise, and shall carry out such assessments without being influenced by the observations made herein.
(ii)	The petitioners will pay the Regional Director costs quantified at Rs.25,000/- each.
(iii)	The petitioners will pay further amounts of Rs.25,000/- each as and by way of costs. However, these amounts be paid to the High Court Legal Services Committee.

"

27. In SEBI vs. Sterlite Industries (India) Ltd., [(2003) 45 SC1 475 (Bombay)], the Division Bench of Bombay High Court had an occasion to consider the object and purpose to introduce Section 77A of the Companies Act through an amendment in the year 1999 and the power of the Company Court to sanction a Scheme under Section 391 of the Companies Act. It has been categorically held that reduction in the capital can be effected under Sections 77 r/w Sections 100 to 104 and 391 of the Companies Act, even in case of buy-back of shares, which would run thus:-

"16. Before we take up this question we would briefly refer to the relevant provisions of the Companies Act Section 77 puts restriction on purchase of its own shares by a company. The section reads as follows :-

'Restrictions on purchase by company, or loans by company for purchase, of its own or its holding company's shares.

(1) No Company limited by shares, and no company limited by guarantee and having a share capital, shall have power to buy its own shares, unless the consequent reduction of capital is effected and sanctioned in pursuance of Section 110 to 104 or Section 402.

.....
5) Nothing in this section shall affect the right of a company to redeem any shares issued under Section 80 or under any corresponding provision in any previous companies law."

17. The reason for the restriction on purchase of its own shares by a company is that such purchase either amounts to "trafficking" in its own shares, thereby enabling the company, in an unhealthy manner to influence the price of its own shares on the market or it operates as a reduction of capital which can only be effected with the sanction of the Court, and in the manner laid down by sections 100 to 104 Prior to introduction of Section 77A the only exceptions to the general principle that the company cannot buy its own shares were (i) purchase resulting in reduction of capital with the sanction of the court under Sections 100-104: (ii) redemption of redeemable preference shares under Section 80 : (iii) purchase under an order of court in a scheme of arrangement or amalgamation under Sections 391-394, subject to compliance with Sections 100-104 and (iv) purchase under an order of Company Law Board to purchase shares of minority shareholders under Section 402(b) (See Companies Act by A Ramaiya (15th Edn) at page 962-963).

18. Thus the company could purchase its shares prior to introduction of Section 77A provided the scheme or arrangement therefore had been sanctioned under Sections 100 to 104. Section 100 does not prescribe the manner in which the reduction of capital is to be effected. Nor is there any limitation or the

power of court to confirm the reduction except that it must be first satisfied that all the creditors entitled to object to the reduction have consented or have been paid or secured. Reference in that behalf may be made to Punjab Distilling Industries Ltd. v. Commissioner of Income Tax, Punjab, (1965) Com Cas 641 Hindustan Commercial Bank Limited v. Hindustan General Electrical Corporation (1960) 30 Comp Cas 367 .

.....

24. It is not disputed before us that reduction in the capital can be effected under Sections 77 read with Sections 100-104 and 391 even in the case of buy-back of shares. However, it is contended that the optional sale by the Shareholders would not amount to arrangement or reorganisation of the capital and would not therefore cover Section 391 read with Section 100 of the Companies Act. We are unable to accede to this contention as even in cases where capital is reduced by optional sale reduction results after the option is exercised to the extent of the shares cancelled. This is as equally a reduction of capital as in the case of compulsory cancellation of shares. We do not see any distinction between the two on the aspect of the reduction. The word arrangement is of wide import and is not restricted to a compulsory purchase or acquisition of shares. There is no reason as to why a cancellation of shares and the consequent reduction of capital cannot be covered by Section 391 read with section 100 merely because a shareholder is given an option to cancel or to retain his shares. In view of the foregoing discussions, the objection of the appellants based on Section 77A must be rejected."

28. In the light of the decisions referred supra and the order passed by this Court in C.P.No.102 of 2016, and also the reasons stated for purchasing the shares under the Scheme of Arrangement under Sections 391 to 393 of the Companies Act, prima-facie I find no merit in the contention of the learned Senior Counsel for the petitioner that the shares purchased pursuant to the order of the Company Court would be a capital gain and not to be treated as dividend.

29. Placing the reliance on the following decisions as extracted hereunder, it is argued by the learned Additional Solicitor General that any assessee, who denies his liability, is entitled to file an appeal under Section 246 of the Act:-

(i) Central Provinces Manganese Ore Co. Ltd.
Vs. Commissioner of Income Tax [(1986) 27 Taxman 275]

(SC)]

" 8. Now the question is whether orders levying interest under Sub-section (8) of Section 139 and under Section 215 are appealable under Section 246 of the Income-tax Act. Clause (c) of Section 246 provides an appeal against an order where the assessee denies his liability to be assessed under the Act or against any assessment order under Sub-section (3) of Section 143 or Section 144, where the assessee objects to the amount of income assessed or to the amount of tax determined or to the amount of loss computed or to the status under which he is assessed. Inasmuch as the levy of interest is a part of the process of assessment, it is open to an assessee to dispute the levy in appeal provided he limits himself to the ground that he is not liable to the levy at all. In this connection we may usefully refer to the decision of the Karnataka High Court where in a judgment in *National Products v. Commissioner of Income-tax, Mysore* [1977]108ITR935(KAR) . Govind Bhat, C.J., explained the position in regard to the levy of interest under Section 139 and under Section 215. After referring to the earlier cases on the point he observed:-

"All decided cases except one have uniformly taken the view that levy of interest under Section 18A(6) or Section 18A(8) of the 1922 Act or levy of interest under Section 215 of the Act is not appealable but in the appeal against a regular assessment, it is open to the assessee to take every contention which, if accepted, must result in the Income-tax Officer holding that there was no liability to pay advance tax and, therefore, there was no liability to pay penal interest. In other words, it is open to an assessee to contend in the appeal against an order of assessment that he is not liable to pay any advance tax at all or the amount of advance tax determined as payable by the Income-tax Officer is not correct; but if the assessee does not dispute the amount of advance tax determined as payable by the Income-tax Officer, he merely cannot object to the levy of penal interest or question its quantum.

The levy of penal interest under Section 139 or Section 215 is made in the regular assessment order; the demand issued pursuant

to the assessment order is for the total amount of liability imposed inclusive of tax and interest. While levy of penal interest under Section 18A of the 1922 Act up to 1st April 1952, was automatic as was noticed by Chagla, C.J. in Ramnath's case : [1955] 27ITR192(Bom) , under the Act such levy is not automatic; discretion is vested in the Income-tax Officer to waive or reduce penal interest in the cases and circumstances mentioned in Rule 117A and Rule 40 of the Income-tax Rules, 1962. If the case of the assessee falls within the scope of the said Rules, the Income-tax Officer is bound in law to consider whether the assessee was entitled to waiver or reduction of interest. It is, therefore, clear that levy of penal interest under Sections 139 and 215 is part of assessment. When such penal interest is levied the assessee is "assessed", meaning thereby, he is subjected to the procedure for ascertaining and imposing liability on him. If the assessee denies his liability to be assessed under the Act, he has a right of appeal to the Appellate Assistant Commissioner against the order of assessment. Where penal interest is levied under Section 215 by the order of assessment, the assessee may altogether deny his liability to pay such interest on the ground that he was not liable to pay advance tax at all or that the amount of advance tax determined by the Income-tax Officer as payable ought to be reduced. In either case he denies his liability, wholly or partially, to be assessed. Similarly, where interest is levied under Section 139 of the Act, the assessee may deny his liability to pay such interest on the ground that the return was not belated or that the penal provision was not attracted at all to his case. In such a case also he denies his liability to be assessed to interest."

9. The decision was noted with approval by the Gujarat High Court in Bhikhoobhai N. Shah v. Commissioner of Income-tax, Gujarat-V [1978]114ITR197 (Guj) . The only dissent expressed in the matter by the Gujarat High Court arose on the question whether the assessee could challenge in appeal his partial liability to be assessed to interest. In this area of dissent we need not enter. But we have no hesitation

in endorsing the legal position which has commonly found favour with the two High Courts. We hold that the question whether a case is made out for waiver or reduction of the interest levied under Sub-section (8) of Section 139 or under Section 215 cannot be the subject of an appeal under Clause (c) of Section 246 of the Income-tax Act.

..... "

(ii) Commissioner of Income Tax Vs. Angadi Bros. [(1985) 22 Taxman 578 (Karnataka)]

" 24. Section 30 of the Indian Income Tax Act, 1922, contained a similar expression such as "denying his liability to be assessed under the Act" and the section also provided that such an assessee may appeal to the Appellate Assistant Commissioner against the order of assessment. The Supreme Court, while examining the scope of the expression "denial of liability", observed (at p. 229) :

"Under section 30, an assessee objecting to the amount of income assessed under section 23 or the amount of tax determined under the said section or denying his liability to be assessed under the Act can prefer an appeal against the order of the Income Tax Officer to the Appellate Assistant Commissioner. It is said that an order made by the Income Tax Officer rejecting the plea of an association of persons that the members thereof shall be assessed individually does not fall under one or other of the three heads mentioned above. What is the substance of the objection of the assessee ? The assessee denies his liability to be assessed under the Act in the circumstances of the case and pleads that the members of the association shall be assessed only individually. The expression 'denial of liability' is comprehensive enough to take in not only the total denial of liability but also the liability to tax under particular circumstances. In either case, the denial is a denial of liability to be assessed under the provision of the Act. In one case, the assessee says that he is not liable to be assessed to tax under the Act and in the other case, the assessee denies his liability to tax under provisions of the Act if the option given to the appropriate officer under the

provisions of the Act is judicially exercised. We, therefore, hold that such an assessee has a right of appeal under section 30 of the Act against the order of the Income Tax Officer assessing the association of members instead of the members thereof individually."

25. It will be seen from the above observation that the expression "denial of liability" is comprehensive enough to take in not only the total denial of liability but also the liability to tax under particular circumstances. In either case, the denial is a denial of liability to be assessed under the provisions of the Act. On this view, the Supreme Court that the order of the Income Tax Officer assessing the association of members instead of the members thereof individually was appealable under section 30 of the Indian Income Tax Act, 1922.

26. The assessee in this case denies its liability to be assessed as an unregistered firm and pleads that it should be assessed only as a registered firm. The expression "denial of liability", as per the said decision of the Supreme Court, is comprehensive enough to take in not only the total denial of liability to be assessed under the Act but also the liability to tax under particular circumstances. The total denial of liability to be assessed appears to mean that where the assessee contends that it is not at all liable to be assessed under the Act which in other words means that the assessee wants to get out of the clutches of the entire Act. Whereas, the denial of liability to tax under particular circumstances may mean, if we may say so, the assessee denies its liability to tax not wholly, but partially. We, therefore, hold that having regard to the contention of the assessee in this case, the assessee must be held to have a right to appeal against the order of the Income Tax Officer."

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(iii) Commissioner of Income Tax Vs. Daimler Benz, A.G.
[(1977) 108 ITR 961 (Bom.) (FB)]

26. Having regard to the aforesaid discussion of the decided cases it appears to us clear that the correct position would be that the assessee will have no right of appeal to the Appellate Assistant

Commissioner merely against the quantum of penal interest charged, that is to say, merely for the purpose of raising a contention that interest charged is excessive or should be reduced or should have been waived altogether but an appeal would lie to the Appellate Assistant Commissioner if he were to deny altogether his liability to pay such interest on the ground that he is not liable to pay advance tax at all or that the amount of advance tax determined as payable by the Income Tax Officer is not correct. In the instant case before us there is no doubt that the assessee had preferred an appeal to the Appellate Assistant Commissioner in which the principal ground of attack against the charge of penal interest levied against it was that the assessee-company being a non-resident company was not liable to be assessed to advance tax at all inasmuch as its income was under one or the other head falling under section 18 of the Act and was outside the purview of section 18A of the Act. In other words, it was a clear case of an assessee "denying its liability to be assessed under this Act" and as such the appeal to the Appellate Assistant Commissioner was competent under section 30 (1) of the 1922 Act. The Tribunal's view was, therefore, correct.

27. Having regard to the above discussion, the first question referred to us is answered in the affirmative and in favour of the assessee. Revenue will pay the costs of the reference to the assessee."

(iv) Commissioner of Income Tax Vs. Hindusthan Steel Ltd.,
[(1989) 45 Taxman 273 (Calcutta)]

" 9. In this case, ultimately, the amount of tax will be paid by Hindusthan Steel Ltd. Hindusthan Steel Ltd. is also the person against whom a proceeding has been taken for assessment of the income of Mr. Nemethy. Although the liability to pay the assessed tax is of the assessee and Hindusthan Steel Ltd. has no liability under the Income Tax Act, the facts of the case are as such that it is Hindusthan Steel Ltd. who will have to pay the tax. In our opinion, under Section 246, any person who really is aggrieved by the assessment order and on whom the burden of tax will fall will be entitled to prefer an appeal, so that the tax burden can be entirely reduced or lessened. A person who will not have to bear the burden of the tax will never appeal."

(v) Commissioner of Income Tax vs. Kanpur Coal Syndicate

11. The next question is whether the said option is given only to the Income-tax Officer and is denied to the Appellate Assistant Commissioner and the Appellate Tribunal. Under the Act the Income-tax Officer, after following the procedure prescribed, makes the assessment under s. 23 of the Act. Doubtless in making the assessment at the first instance he has to exercise the option whether he should assess the association of persons or the members thereof individually. It is not because that any section of the Act confers an exclusive power on him to do so, but because it is part of the process of assessment; that is to say, he has to ascertain who is the person liable to be assessed for the tax. If he seeks to assess an association of persons as an assessable entity, the said entity can object to the assessment, inter alia, on the ground that in the circumstances of the case the assessment should be made on the members of the association individually. The Income-tax Officer may reject its contention and may assess the total income of the association as such and impose the tax on it. Under s. 30 an assessee objecting to the amount of income assessed under s. 23 or the amount of tax determined under the said section or denying his liability to be assessed under the Act can prefer an appeal against the order of the Income-tax Officer to the Appellate Assistant Commissioner.

..... "

30. In the above referred decisions, the Hon'ble Supreme Court and various High Courts have held that the assessee has an appeal remedy under Section 246 of the Act. In this case, an unsuccessful attempt has been made by the petitioner to bypass the appeal remedy, but, I find no valid ground to entertain the Writ Petition. In that view, the Writ Petition is dismissed as not maintainable at this stage.

31. It is also contended by the learned Senior Counsel for the petitioner that India needs Foreign Direct Investment for developmental activities and investments have been made by the foreign companies, based on the invitation made by the Government of India and the State Governments. While so, if they are harassed by the Officials by making unreasonable demand, it would seriously affect the Foreign Direct Investment. Such situation does not arise here and I find no such harassment in the matter on hand.

32. For the foregoing reasons, the Writ Petition fails and the same is dismissed. However, liberty is given to the petitioner to prefer an appeal within a period of four weeks from today. If such an appeal is filed within the stipulated time, the Appellate Authority shall dispose of the same on merits, after providing sufficient opportunity of hearing to the petitioner. It is needless to mention that the above observations have been made only to reach a prima facie conclusion.

33. It is to be noted that the petitioner in compliance of the order of this Court, dated 03.04.2018, in W.M.P.No.9135 of 2018 in W.P.No.7354 of 2018, deposited Rs.495 Crores. Since this Writ Petition is dismissed, directing the petitioner to avail the appeal remedy, the Appellate Authority shall take into account the amount deposited in pursuance of the order referred supra, while entertaining the appeal. With regard to Fixed Deposits, the respondent shall maintain status-quo as on date for a period of two weeks. There is no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To

The Deputy Commissioner of Income Tax,
Larger Taxpayer Unit-1, सतयमेव जयते
7th Floor, Wanaparthi Block,
Aayakar Bhawan,
Nungambakkam, Chennai - 600 034.

+1cc to Mr.Karthik Ranganathan, Advocate sr.52033
+1cc to Mr.Srinath Sridevan, Advocate sr.53008

W.P.Nos. 7354 of 2018 &
W.M.P.No.9135 2018

nr 27/06/2019