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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 5577/2018 and CM APPL. 21731/2018 (stay)**

GE ENERGY PARTS INC Petitioner
Through Mr. Sachit Jolly & Mr. Aarush
Bhatia, Advocates

Versus

THE DEPUTY COMMISSIONER OF INCOME-TAX
& ANR. Respondents
Through Mr. Ruchir Bhatia, Senior standing
counsel for Revenue

+ **W.P.(C) 5580/2018 and CM APPL. 21735/2018 (stay)**

M/s. NUOVO PIGNONE Petitioner
Through Mr. Sachit Jolly & Mr. Aarush
Bhatia, Advocates

Versus

THE DEPUTY COMMISSIONER OF INCOME-TAX
& ANR. Respondents
Through Mr. Sagar Suri, Standing counsel &
Ms. Lakshmi Gurung, Senior standing
counsel for Income Tax Department

+ **W.P.(C) 5603/2018 and CM APPL. 21868/2018 (stay)**

M/s. GE JAPAN LTD. Petitioner
Through Mr. Sachit Jolly & Mr. Aarush
Bhatia, Advocates

Versus

THE COMMISSIONER OF INCOME
TAX-1 & ANR.

..... Respondents

Through Mr. Sagar Suri, Standing counsel &
Ms. Lakshmi Gurung, Senior standing
counsel for Income Tax Department

+ **W.P.(C) 5633/2018 and CM APPL. 21995/2018 (stay)**

M/s. GE ENGINE SERVICES DISTRIBUTION LLC Petitioner

Through Mr. Sachit Jolly & Mr. Aarush
Bhatia, Advocates

Versus

THE DEPUTY COMMISSIONER OF INCOME-TAX
& ANR.

..... Respondents

Through Mr. Ruchir Bhatia, Senior Standing
counsel for Revenue

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE TALWANT SINGH

ORDER
20.08.2019

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Dr. S. Muralidhar, J.:

1. These are four petitions arising out of a common set of facts and they raise similar issues. They are accordingly being disposed of by this common judgment.

2. In all these petitions challenge is laid to penalty orders dated 26th April, 2018 passed by the Deputy Commissioner of Income Tax, Circle 1 (3) (1), International Taxation, New Delhi (Respondent No.1) under Section 271(1)

(c) of the Income Tax Act, 1961 (Act) levying penalty at 100% of the tax sought to be evaded.

3. For the sake of convenience the facts in WP(C) No. 5577/2018 are discussed in detail. The Petitioner M/s GE Energy Parts Inc. (GEPI) is a company incorporated in United States of America (USA). It is also a tax resident of USA. GEPI is engaged in the business of manufacture and offshore sale of highly sophisticated equipment such as gas turbine parts and sub-assemblies. GEPI states that it sells its products offshore on a principal to principal basis to customers all over the world, including those in India. It is stated that the title to the goods sold to Indian customers passes from GEPI outside India.

4. On 2nd March, 2007 a survey under Section 133 A of the Act was conducted at the Liaison Office of General Electric International Operations Company Inc. ('GEIOC') at New Delhi. Based on the above survey, by an order dated 27th March, 2018 the Assessing Officer (AO) initiated re-assessment proceedings of GEPI for Assessment Years (AYs) 2002-03 to 2006-07 by issuing notices under Section 148 of the Act. Subsequently by an order dated 30th December, 2008 the AO completed the assessment proceedings under Section 147 read with 143 (3) of the Act holding that GEPI had a fixed place of Permanent Establishment (PE) and dependent agent PE ("DAPE") in India. The AO deemed 10% of the value of supplies made to the clients in India as the profits arising out from such supplies and attributed 35% of such profit to GEPI's PE in India. In essence, the AO attributed 3.5% of the total value of supplies made by GEPI to customers in

India, as the income of the GEPI. Simultaneously the AO also initiated penalty proceedings against GEPI under Section 271(1) (c) of the Act for the aforementioned AYs.

5. Aggrieved by the above assessment order dated 30th December 2018, GEPI filed separate appeals before the Commissioner of Income Tax (Appeals) [CIT (A)]. By an order dated 30th September, 2010 the CIT (A) upheld the order of the AO in so far initiation of proceedings under Section 147/148 of the Act, existence of PE and attribution of income were concerned. However, the appeal was allowed on the issue of levy of interest under Section 234 B of the Act.

6. For AY 2007-2008 the return of GEPI was selected for scrutiny. The AO passed a draft order which was challenged before the Dispute Resolution Panel (DRP). The draft assessment order was upheld by the DRP and subsequently, the final assessment order for AY 2007-2008 was passed by the AO on 13th October, 2010. The AO initiated penalty proceedings under Section 271(1) (c) for the said AY as well.

7. Aggrieved by the orders of the CIT (A) and the DRP, GEPI preferred appeals before the ITAT. By the order dated 27th January, 2017 following its decision of even date in the case of GE Energy Parts (GEEP) for AY 2001-2002, the ITAT disposed of the appeals filed by the GEPI upholding the order of the AO and CIT (A) except lowering the rate of attribution of profit from 35% to 26%.

8. Pursuant to the above order of the ITAT passed on 27th January, 2017 Respondent No.1 issued a penalty Show Cause Notice ('SCN') dated 16th February, 2017 requesting GEPI to appear before him on 27th February, 2017 and to show cause as to why penalty should not be levied for subject AYs under Section 271(1) (c) of the Act. In response to the said SCN, GEPI filed a reply dated 27th February, 2017 *inter-alia* raising an objection that the said notice was barred by limitation in terms of Section 275 (1) (a) of the Act. In other words it was contended by GEPI that since the order levying penalty was not passed within six months of receipt by the Revenue of the order of the ITAT, the penalty SCN was time barred.

9. Meanwhile, aggrieved by the order dated 27th January, 2017 of the ITAT, GEPI filed separate appeals for the said AYs in this Court under Section 260-A of the Act on 11th August, 2017. These appeals being ITA Nos. 674/2017, 675/2017, 677/2017, 629/2017, 628/2017 & 671/2017 were for AYs 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007 & 2007-2008 respectively. The said appeals are stated to be pending.

10. Respondent No.1 on 22nd May, 2017 passed separate orders under Section 254/143(3) of the Act for the aforementioned AYs giving appeal effect to the order dated 27th January, 2017 of the ITAT.

11. On 19th September, 2017 Respondent No.1 issued a separate penalty SCN to GEPI for AY 2001-2002 requesting them to appear before him on 26th September, 2017 to show cause as to why penalty should not be levied under Section 271(1) (c) of the Act.

12. Pursuant to the above SCN, Respondent No.1 on 19th September, 2017 passed a penalty order stating that the order dated 27th January, 2017 passed by the ITAT in the quantum appeal was received by Respondent No.1 on 18th April, 2017.

13. Thereafter, Respondent No.1 again issued another penalty SCN dated 16th November, 2017 seeking to levy penalty on GEPI under Section 271(1) (c) of the Act for AYs 2002-2003 to 2006-2007.

14. In response to the aforementioned SCNs GEPI filed two letters dated 15th February, 2018 and 28th February, 2018 again submitting that the penalty proceedings were barred by limitation.

15. Thereafter, Respondent No.1 passed impugned penalty orders dated 26th April, 2018 for the aforementioned AYs. In the said orders Respondent No.1 observed that the order dated 27th January, 2017 passed by the ITAT had been received in his office only on 1st November, 2017.

16. GEPI filed an application under the Right to Information Act, 2005 (RTI) before the Central Public Information Officer (CPIO) of the ITAT seeking to know when a copy of the order dated 27th January, 2017 was in fact served upon the Revenue. In response to the said application, GEPI received a reply dated 17th May, 2018 from the CPIO of the ITAT confirming that the order dated 27th January, 2017 of the ITAT was served on the Commissioner of Income Tax (Judicial), [CIT (J)] on 17th April, 2017.

17. Based on the above fact, GEPI filed the present petition seeking the aforementioned reliefs.

18. The facts in the companion writ petitions by the other group entities/ sister concerns of GEPI are more or less similar. They are WP(C) No. 5580/2018 (*M/s. Nuovo Pignone v. The Deputy Commissioner of Income Tax & Anr.*), WP(C) No. 5603/2018 (*M/s. GE Japan Limited v. The Commissioner of Income Tax-1 and Anr.*) and WP(C) No. 5633/2018 (*M/s. GE Engine Services Distribution LLC v. The Deputy Commissioner of Income Tax & Anr.*) Each of them seeks similar reliefs challenging the respective penalty orders dated 26th April, 2018 passed by the Respondent No.1 in their cases under Section 271(1) (c) of the Act, at the maximum rate of 100% of the tax sought to be collected.

19. These petitions were first listed for hearing in this Court on 23rd May, 2018 when the following order was passed:

“Issue notice, returnable on 1.8.2018. Notice is accepted on behalf of the respondents.

Counter-affidavit would be filed within four weeks. Rejoinder affidavit, if any, would be filed within four weeks, after service of the counter-affidavit.

Learned counsel for the respondents has stated that judgment of the Full Bench of this Court in *Commissioner of Income Tax v. Odeon Builders (P) Ltd*, [2017] 393 ITR 27(Del)(FB) has been challenged, but stay order has not been passed. The petitioner has referred to several decisions of the Delhi High Court in which the writ' courts have interfered and set aside assessment

orders as barred by limitation, notwithstanding the alternative statutory remedy.

Till the next date of hearing, no coercive steps for recovery would be taken on account of additions made.

Without prejudice to the rights and contentions of the petitioner, the petitioner would file appeals before the Commissioner of Income Tax (Appeals). This observation/direction is being made, as learned counsel for the petitioner has stated that statutory appeals have not been preferred. However, appeals would not be taken up for hearing till the next date of hearing.

Dasti.”

20. The aforementioned interim orders continue till date.

21. In response to the notice issued in the petitions, a counter affidavit has been filed in each of the petitions by the Respondents. In the counter affidavit filed in WP(C) No. 5577/2018, it is contended *inter alia* that an efficacious statutory remedy is available to each of the Petitioners against the impugned penalty orders. Reference is made to the decision in ***CIT v. Chhabil Dass Agarwal (2014) 1 SCC 603.***

22. As regards the plea that the penalty orders are beyond the period of six months from the end of the month in which the order was received by the CIT (A) in terms of Section 275 (1) (a) of the Act, it is contended that the limitation expired only on 30th May, 2018 since according to the Respondents, the order of the ITAT was received by the ‘jurisdictional’ CIT

i.e. CIT International Taxation-1 only on 1st November, 2017.

23. It is pointed out by the Respondents that reliance by the Petitioners on the decision of the Full Bench of this Court in ***Commissioner of Income Tax v. Odeon Builders Private Limited*** (*supra*) is misplaced since that decision was in the context of limitation for filing an appeal under Section 260A (2) (a) of the Act i.e. filing an appeal in this Court against the order of the ITAT. However, in the present case the dispute regarding limitation was referable to Section 275 of the Act and was in a different context viz., levy of penalty. It is submitted that a penalty order can be passed by the jurisdictional AO which in this case is the CIT, International Taxation [CIT (IT)]. Therefore, it is contended that such till time the CIT (IT) receives the copy of the order of the ITAT, the period of limitation for initiating penalty proceedings does not commence. More or less the same plea has been taken by the Respondents in each of the other petitions.

24. This Court has heard the submissions of Mr. Sachit Jolly, learned counsel for the Petitioners, Mr. Sagar Suri, learned standing counsel for Income Tax Department and Ms. Laxmi Gurung, learned senior standing counsel for the Revenue.

25. A consideration of the above submissions has to begin with an examination of Section 275(1) of the Act which reads as under:

“Bar of limitation for imposing penalties.

275. (1) No order imposing a penalty under this Chapter shall be passed—

(a) in a case where the relevant assessment or other order is the subject-matter of an appeal to the Commissioner (Appeals) under section 246 or section 246A or an appeal to the Appellate Tribunal under section 253, after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which the order of the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, whichever period expires later :

Provided that in a case where the relevant assessment or other order is the subject-matter of an appeal to the Commissioner (Appeals) under section 246 or section 246A, and the Commissioner (Appeals) passes the order on or after the 1st day of June, 2003 disposing of such appeal, an order imposing penalty shall be passed before the expiry of the financial year in which the proceedings, in the course of which action for imposition of penalty has been initiated, are completed, or within one year from the end of the financial year in which the order of the Commissioner (Appeals) is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, whichever is later;

(b) in a case where the relevant assessment or other order is the subject-matter of revision under section 263 or section 264, after the expiry of six months from the end of the month in which such order of revision is passed;

(c) in any other case, after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which action for imposition of penalty is initiated, whichever period expires later.”

26. It is seen that more or less the same expression “Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner” as used in Section 260A of the Act finds place in Section 275(1) (a). The limitation begins to run on the expiry of six months from the end of the month in which the order of the ITAT is received by any of the above officers.

27. There are two periods of limitation within which the penalty proceedings have to be completed. One is the expiry of the financial year in which the proceedings in the course of which the action for imposition of penalty has been initiated are completed. The second is the expiry of six months from the end of the month in which the order of the ITAT is received by the above officers. Whichever period expires later becomes the limitation period for issuing an order of penalty. The title of Section 275 reads: “limitation for imposing penalties”. Section 275 (1) opens with the line: “no order imposing penalty under this chapter shall be passed” thus, indicating the mandatory nature of the provision.

28. It is in the above context that it becomes crucial to determine when exactly the order of the ITAT in the present case was received by the CIT. In ***Commissioner of Income Tax v. Odeon Builders Private Limited (FB)*** (*supra*), this Court specifically addressed the issue of the ‘jurisdictional Commissioner’ having to receive the order of the ITAT for the period of limitation to commence. This Court disagreed with the Revenue’s contention in that regard. It was specifically held in Para 50 as under:

“It is, therefore, not possible to accept the submission that till a

particular jurisdictional Commissioner of Income-tax or Principal Commissioner of Income-tax has not received the order of the Income-tax Appellate Tribunal, the period of limitation for filing an appeal against that order does not commence.”

29. The answers to the following questions by the Full Bench are relevant in the present context as well:

“51.

Q: (i) What is the correct interpretation to be placed on the expression "received by the Assessee or the Principal Chief Commissioner or the Chief Commissioner or Principal Commissioner" in Section 260A (2) (a) of the Act? Does it mean 'received' by any of the named officers including the Commissioner of Income-tax (Judicial)?

Ans: The word “received” occurring in Section 260A (2) (a) would mean received by any of the named officers of the Department, including Commissioner of Income-tax (Judicial). The provision at present names four particular officers i.e. the Principal Commissioner, Commissioner, Principal Chief Commissioner, and the Chief Commissioner of Income Tax. These are the only designations of the officers who could receive a copy of the order. In the absence of a qualifying prefix “concerned”, the receipt of a copy of the order of the ITAT by any of those officers in the Department including the Commissioner of Income-tax (Judicial) will trigger the period of limitation.

Q: (ii) Does limitation begin to run for the purposes of Section 260A (2) (a) only when a certified copy of the order of the ITAT is received by the 'concerned' Commissioner of Income-tax within whose jurisdiction the case of the Assessee falls notwithstanding that it may have been received by any other Commissioner of Income-tax, including the Commissioner of Income-tax (Judicial) prior thereto? Is it open to the Court to read the word 'concerned' into Section 260A (2) (a) of the Act

as a prefix to any of the officers of the Department named therein?

Ans: In Section 260A (2) of the Act, the words Commissioner of Income-tax, Pr Commissioner of Income-tax or Chief Commissioner of Income-tax are not prefixed or qualified by the word 'concerned'. There is no warrant for the Court to read into the provision such a qualifying word. The Court rejects the contention of the Revenue that limitation for the purposes of Section 260A (2) (a) begins to run only when a certified copy of the order of the ITAT is received by the 'concerned' Commissioner of Income-tax within whose jurisdiction the case of the assessee falls notwithstanding that it may have been received by any other Commissioner of Income-tax, including the Commissioner of Income-tax (Judicial) prior thereto.”

30. It is seen in the present case that an SCN was issued to the Assessee on 16th February, 2017 itself by the AO under Section 271 (1) (c) of the Act and this could not have happened if the AO was not already aware of the order of the ITAT. The appeal effect order passed on 22nd May, 2017 could not have been issued without a copy of the order of the ITAT. Therefore, in any event, the six-month period of limitation in terms of Section 275 (1) (a) of the Act would begin to run from 22nd May, 2017.

31. On the other hand, it is sought to be contended by the Revenue that the jurisdictional CIT i.e. the CIT (IT) received the copy of the order only on 1st November, 2017 and therefore, the period of limitation for the purposes of Section 275 (1) (a) of the Act did not begin till then. In support of this submission, reference is made to a communication dated 1st November, 2017 addressed by the ITO, Judicial-II, to the CIT (IT) simply enclosing a copy of the order of the ITAT dated 27th January, 2017. The letter states that

the ITO Judicial II received the order only on 31st October 2017. It bears the date stamp of 1st November, 2017 of the office of the CIT (IT) to show that it was received by the CIT (IT) on that date.

32. The claim that the ITO, Judicial-II received the copy of the order dated 27th January 2017 of the ITAT only on 31st October, 2017 contradicts the fact that an appeal effect was given to the ITAT order by an order dated 22nd May, 2017 itself which clearly meant that the ITAT order was already available on that date. Further in the replies received by the Petitioner in response to the application filed by it under the RTI, the CPIO has clearly stated that “the said order of Hon’ble ITAT was dispatched by the Registry of the ITAT on 11th April, 2017 and received by the office of the CIT (Judicial) on 17th April, 2017.” The proof of service has also been enclosed to that letter. These facts have not been denied by the Respondents. This Court is, therefore, unable to accept the plea of the ITO, Judicial-II that copy of the order of the ITAT was received only on 31st October, 2017 and could, therefore, be sent to the CIT (IT) only on 1st November, 2017.

33. If an officer of the Department is allowed to choose a date on which a copy of the order which has to be given effect to or acted upon is sent to the officer concerned, it will defeat the very purpose for which the legislature has stipulated definite time limits in various provisions of the Act for the authorities to perform their statutory tasks in a time bound manner. In other words, the mandatory period of limitation under Section 275 (1) (a) of the Act cannot be sought to be defeated by delaying the dispatch of the relevant order of the ITAT to the concerned ‘jurisdictional’ CIT. What is relevant is

when the CIT (Judicial) representing the Department before the ITAT received the order, which in any event is generally made available in the public domain soon after the order is pronounced. This is purport of the decision of the Full Bench of this Court in ***Commissioner of Income Tax v. Odeon Builders Private Limited (FB)*** (*supra*), the ratio decidendi of which will apply to the case on hand as well since the language of Section 260 A (1) and Section 275 (1) (a) of the Act is identical.

34. The result of the above discussion is that the impugned orders of penalty dated 26th April 2018 were issued far beyond the six-month period of limitation in terms of Section 275 (1) (a) of the Act and were, therefore, invalid. On the date that the said orders were issued, i.e. 26th April, 2018 they were without jurisdiction.

35. Consequently, this Court negatives the objection of the Respondents to the maintainability of the present writ petitions. In ***Commissioner of Income Tax v. Chhabil Das Agrawal*** (*supra*), the Supreme Court took note of the fact that normally the existence of an alternative remedy should discourage writ petitions under Article 226 of the Constitution being entertained. However, as explained by the Supreme Court in ***Whirlpool Corporation v. Registrar of Trademarks (1998) 8 SCC 1*** there are exceptions to this rule one of which is that the order under challenge is itself without jurisdiction. In the present case the impugned orders are, for the reasons explained, clearly without jurisdiction.

36. For the aforementioned reasons, the writ petitions are allowed and

impugned orders dated 26th April, 2018 are hereby set aside. The pending applications are disposed of.

S. MURALIDHAR, J.

TALWANT SINGH, J.

AUGUST 20, 2019

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