

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.12.2020

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P.Nos.919, 922, 1068 and 1070 of 2020
and WMP Nos.1102, 1104, 1273 and 1274 of 2020

M/s.Roca Bathroom Products Private Limited
Rep. by its Managing Director,
Mr.K.E.Ranganahan

... Petitioner in all WPs.

Vs

1. The Dispute Resolution Panel-2,
Kendriya sadan, 4th Floor, Koramangala,
Bangalore 560034.

... 1st Respondent in W.P. Nos.919 & 922 of 2020

2.Commissioner of Income Tax,
The Dispute Resolution Panel -2,
BMTc Building, 80 Feet Rd, 6th Blflock,
Near KHB Games Village, Koramangala,
Bengaluru, Karnataka - 560 095.

... 1st Respondents in W.P. No.1068 & 1070 of 2020

3. The Deputy Commissioner of Income tax
Large Taxpayer Unit -1,
Nungambakkam, Chennai 600 034.

... 2nd Respondent in All WPs

Prayer in W.P. No.919 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of Certiorarified Mandamus to call for the records in DIN and Lettner No.ITBA / DRP / F/17 /2019 -20/1023642401 (1) dated 06/01/2020 for the Assessment year 2010 -11 on the file of the 1st respondent and quash the same and consequently direct the 2nd respondent to issue the refund of the tax amount along with interest in accordance with section 244A of the Income tax Act 1961.

Prayer in W.P. No.922 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of Prohibition for a direction or order in the nature of writ to restraint the respondents or any other Authority under the Income Tax Act to proceed further in relation to the Assessment Year 2010 -11.

Prayer in W.P. No.1068 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of Certiorarified Mandamus to call for the records in DIN and Letter No. ITBA / DRP/F/17/ 2019-20/ 1023641 753(1) dated 06.01.2020 for the Assessment Year 2009-10 on the file of the 1st Respondent and quash the same and consequently direct the 2nd Respondent to issue the refund of the tax amount along with interest in accordance with section 244A of the Income tax Act 1961.

Prayer in W.P. No.1070 of 2020: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of Prohibition to Prohibit the Respondents or any other Authority under the Income-tax Act to proceed further in relation to the Assessment Year 2009-10.

In all W.Ps.

For Petitioner : Mr.R.V.Eshwar,
Senior Counsel for
Mr.Sandeep Bagmar

For Respondents : Mrs.Hema Muralikrishnan,
Senior Standing Counsel

C O M M O N O R D E R

The petitioner is an assessee on the file of the Deputy Commissioner of Income Tax, (R2) in terms of the provisions of the Income Tax Act, 1961 (Act). The Dispute Resolution Panel (DRP) is arrayed as the first respondent (R1). In W.P.No.919 of 2020, notice dated 06.01.2020 relating to assessment year (AY) 2010-11 issued by R1 is challenged as being bereft of jurisdiction and barred by limitation. In W.P.No.922 of 2020, the petitioner seeks a writ of prohibition restraining the respondents from continuing with proceedings for assessment for AY 2010-11. In W.P.No.1068 of 2020, the petitioner seeks a Certiorarified Mandamus calling for and quashing communication dated 06.01.2020 in respect of AY 2009-10 and a direction to R2 to refund the tax paid by the petitioner along with interest in accordance with Section 244A of the Act. In WP.No.1070 of 2020, the petitioner seeks a writ of prohibition restraining the respondents from continuing with or proceeding further in relation to AY 2009-10.

2. W.P. Nos.1068 and 1070 of 2020 are taken up first. The Petitioner filed a return of income that was selected for scrutiny and referred to the Transfer Pricing Officer (TPO). A Transfer Pricing order was passed on 23.01.2020 and a draft

assessment order by R2 on 30.03.2013 making various adjustments to the income returned as well as incorporating the adjustments proposed in the Transfer Pricing Order. The petitioner filed objections to the draft assessment before R1 that were confirmed by R1 in terms of Section 144C of the Act. R2 thereafter passed a final assessment order on 16.01.2014, aggrieved with which the petitioner filed an appeal before the Income Tax Appellate Tribunal (ITAT/Tribunal). The Tribunal, vide order dated 18.12.2015, remanded the matter to R1 for fresh examination and the operative portion of the order is as follows:

'13.... In view of the misunderstanding of the facts by the Transfer Pricing Officer and Dispute Resolution Panel, this Tribunal is of the considered opinion that the matter needs to be reconsidered by the Dispute Resolution Panel once again on the basis of the agreement entered into between the assessee and Roca Sanitaria S.A. Spain. In other words, the Dispute Resolution Panel shall re-examine the issue afresh on the basis of the agreement entered into between the parties and determine the actual function performed by the assessee. The Dispute Resolution Panel has to find out whether the assessee functions only as an independent distributor or as agent of Roca Sanitaria S.A. Spain. Since these facts were not considered by the Transfer Pricing Officer or Dispute Resolution Panel, this Tribunal is of the considered opinion that the matter needs to be re-examined. Accordingly, the orders of the Assessing Officer are set aside and the Assessing Officer shall refer the matter again to the Dispute Resolution Panel. The Dispute Resolution Panel shall examine the agreement between the parties and other transactions between the assessee and Roca Sanitaria S.A. Spain and thereafter determine the actual function performed by the assessee apart from the assets employed in the transaction, including the risks assumed by the assessee, and thereafter decide the matter in accordance with law. The Dispute Resolution Panel shall give sufficient opportunity to the assessee before giving direction to the Assessing Officer under Section 144C of the Income-tax Act, 1961 (in short 'the Act').'

3. As far as AY 2010-11 is concerned, the sequence of events remains largely similar as that for AY 2009-10 except that pursuant to the Tribunal's order, the petitioner filed a Miscellaneous Petition (MP) seeking adjudication of certain

grounds of appeal that had not been considered by the Tribunal in disposing the appeal. The MP was allowed, the appeal reopened and the grounds omitted to be adjudicated originally were disposed vide order of the Tribunal dated 23.09.2016. The operative portion of order dated 23.09.2016 is extracted below:

'4.... Accordingly, the orders of the authorities below are set aside and the issue with regard to determination of arm's length interest rate for compulsory convertible debentures as well as disallowance under Section 14A of the Income-tax Act, 1961 (in short 'the Act') read with Rule 8D is also remitted back to the file of the Assessing Officer. The Assessing officer shall re-examine the issue afresh and thereafter decide the same in accordance with law after giving a reasonable opportunity to the assessee.'

4. No further proceedings were initiated by R1 pursuant to the order of the Tribunal and on 21.08.2019, the petitioner wrote to R2 seeking refund of the tax paid for both assessment years, i.e., AYs 2009-10 and 2010-11. The aforesaid letter triggered notices dated 06.01.2020 from R1 calling upon the petitioner to appear for a hearing, that are challenged in these writ petitions as being barred by limitation.

5. The Petitioner submits that, as per the provisions of Section 153(2A) (unamended)/153(3) (post amendment), an order of fresh assessment in pursuance of an order under Section 254 setting aside or cancelling an assessment is to be made at any time before the expiry of one year/nine months respectively from the end of the financial year in which the order under Section 254 was received by the Principal Chief Commissioner/Commissioner.

6. The provisions of Section 153 stood amended by Finance Act, 2016 and the present proceedings would be governed by unamended section 153(2A) (A Y 2009-10)/amended Section 153(3) (A Y 2010-11) respectively that read as follows:

153. Time limit for completion of assessments and reassessments

...

(2A) Notwithstanding anything contained in sub-sections (1A), (1B) and (2), in relation to the assessment year commencing on the 1st day of April, 1971, and any subsequent assessment year, an order of fresh assessment in pursuance of an order under section 250 or section 254, section 263 or section 264, setting aside

or cancelling an assessment, may be made at any time before the expiry of one years from the end of the financial year in which the order under section 250 or Section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner.

153. Time limit for completion of assessment, reassessment and recomputation

.....

(3) Notwithstanding anything contained in sub-sections (1) and (2), an order of fresh assessment in pursuance of an order under section 254 or section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of nine months from the end of the financial year in which the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Commissioner or Commissioner:

Provided that where the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Commissioner or Commissioner on or after the 1st day of April, 2019, the provisions of this sub-section shall have effect, as if for the words "nine months", the words "twelve months" had been substituted.

7. As far as AY 2009-10 is concerned, order of the Tribunal dated 18.12.2015 was received by the concerned officer in Financial Year 2015-16 and as such, the time for completion of assessment in terms of Section 153(2A) expired on 31.03.2017. As far as AY 2010-11 is concerned, the order of the Tribunal had been received by the Department in Financial Year 2016-17 and the time for completion of assessment in terms of Section 153(3) expired on 31.12.2017. The impugned notices are dated 06.01.2020, barred by limitation.

8. This submission of the revenue is that Section 144C is a complete code by itself, not governed by the time lines set out in Section 153. Learned Senior Standing Counsel for the revenue would take me to the scheme of Section 144C stressing on the

opening phrase which states that the Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, forward a draft of the proposed order of assessment to the assessee. Thus, according to her Section 144C is a standalone provision and contemplates a unique procedure un-impacted by any of the other provisions in the Act, unless specifically stated so.

9. Moreover, she points out that Section 144C(13) requires the Assessing Officer to complete the final assessment 'notwithstanding anything to the contrary contained in Section 153 or Section 153B' and without providing any further opportunity of hearing to the assessee, within one month from the end of the month when the direction from the DRP is received. This, according to her, should be taken to indicate the absolute exclusion of the operation of Section 153 from Section 144C. Learned standing counsel however, concedes to the position that there is no specific limitation prescribed for the disposal of objections by the DRP. This, according to her, is a lacunae that can be remedied only by way of amendment.

10. There is no dispute as regards the dates or sequence of events involved. The question to be decided is as to whether the proceedings before the DRP are circumscribed by the limits of time imposed by Section 153. According to the petitioner, they are, whereas, according to the revenue, proceedings before the DRP are unfettered by time.

11. There is no doubt in my mind that the orders of the Tribunal have not been given effect to in a proper manner by the Assessing Authority. The Tribunal, in the order for AY 2009-10, has set aside the order of assessment directing the DRP to re-examine the issue afresh on the basis of available documentation and after affording an opportunity to the assessee. The direction is to the DRP though the DRP was not a party to the proceedings and only the Joint Commissioner of Income Tax, was arrayed as appellant/respondent in the appeals. The order of the Tribunal has also not been marked to the DRP, as copies are marked routinely only to the appellant/respondent/CIT(A)/CIT/DR/GF. This is perhaps the reason for the inaction of the DRP even though the direction of the Tribunal is specifically addressed to it. 12. As far as AY 2010-11 is concerned, the Tribunal set aside the order of assessment and remanded the matter to the file of the Assessing Officer, who, though being a party to the proceedings did nothing to give effect to the same. In my view, the proper course of action would have been for the Assessing Authority to have given effect to the order of the Tribunal by way of a consequential order and thereafter taken proceedings up in accordance with the procedure prescribed in Section 144C. However, it was only after receipt of the petitioner's communication seeking a refund that the Department

has woken up, with the DRP issuing notices to the petitioner for both years, though for AY 2010-11, the matter was remanded to the file of the Assessing Officer.

13. Under the scheme of assessment in Section 144C(1), the Assessing Officer, notwithstanding anything to the contrary contained in the Act, is to forward a draft of the proposed order of assessment to the assessee in question, if he is of the view that a variation is called for in the income or loss returned by that assessee which would be prejudicial to its interests. The assessee in response, under sub-section (2), has 30 days to either file its acceptance of the proposed variation or objections to the variations with the DRP and the Assessing Officer. The Assessing Officer is to thereafter, under sub-section (3), complete the assessment on the basis of the draft order if the assessee has intimated its acceptance of the order or has not filed objections to the same within the time stipulated. In terms of sub-section (4), the Assessing Authority is to pass an order of assessment within one month from the end of the month in which the acceptance of the assessee is received or the period for filing of objections expires.

14. Sub-section (5) to (12) set out the procedure for receipt, adjudication and disposal of objections by the DRP. Sub-section (5) states that the DRP shall issue such directions as it may think fit to guide the Assessing Officer is completing the assessment. In issuing the guidelines, as per sub-Section (6) the DRP shall take into account the draft order, objections, evidences, reports of authorities and records as per sub-section (6). Sub-section (7) empowers the DRP to make further enquiry, if thought necessary and sub-section (8) confines the power of confirmation, rejection or enhancement of the variations proposed in the draft order. Sub-sections (9) and (10) state that the opinion of the majority of the members shall prevail and that the directions of the DRP bind the Assessing Officer. Sub-section (11) provides for an opportunity of hearing to the assessee prior to issuance of the directions. Sub-section (12) sets out a limitation of nine (9) months from the end of the month in which the draft order is forwarded to the assessee for disposal of the objections received. In passing a final assessment order, sub-section (13) specifically excludes the provisions of Section 153 stating that the Assessing Officer shall pass a final order of assessment even without hearing the assessee, in conformity with the directions issued by the DRP, within one month from the end of the month when such directions were received by him. However, in my view, the exclusion of Section 153/153B is specific to, and kicks in only at the stage of passing of final assessment order after directions are received from the DRP, and not at any other stage of the

proceedings under Section 144C. Sub-sections (14) and (15) are not relevant for the purpose of these Writ Petitions.

15. No doubt, Section 144C is a self contained code of assessment and time limits are inbuilt each stage of the procedure contemplated. Section 144C envisions a special assessment, one which includes the determination of Arms Length Price (ALP) of international transactions engaged in by the assessee. The DRP was constituted bearing in mind the necessity for an expert body to look into intricate matters concerning valuation and transfer pricing and it is for this reason that specific timelines have been drawn within the framework of Section 144C to ensure prompt and expeditious finalisation of this special assessment.

16. The purpose is to fast-track a specific type of assessment. This does not however lead to the conclusion that overall time limits have been eschewed in the process. In fact, the argument to the effect that proceedings before the DRP are unfettered by limitation would run counter to the avowed object of setting up of the DRP a high powered and specialised body set up for dealing with matters of transfer pricing. Having set time limits every step of the way, it does not stand to reason that proceedings on remand to the DRP may be done at leisure sans the imposition of any time limit at all.

17. Sub-section (13) to Section 144C, in my view, imposes a restriction on the Assessing Officer and denies him the benefit of the more expansive time limit available under Section 153 to pass a final order of assessment as he has to do so within one month from the end of the month when the directions of the DRP are received by him, even without hearing the assessee concerned.

18. Barring this, I find nothing in the language of Section 144C or 153 to lead me to the conclusion that the latter is operated from the operation of the former. The specific exclusion of Section 153 from Section 144C(13) can be read only in the context of that specific sub-section and once again, reiterates the urgency that sets the tone for the interpretation of Section 144C itself.

19. The Bombay High Court, in PCIT V. Lion Bridge Technologies Pvt. Ltd. (260 Taxmann 273) was dealing with a challenge to a final order of assessment. It was held that such a final assessment could be made only if the draft assessment had been forwarded by the Assessing Officer to the assessee within the time limit prescribed under Section 153(2A) of the Act.

20. In Lion Bridge (supra) the Income Tax Appellate Tribunal had set aside the order of assessment and remanded the

matter to the file of the Assessing Officer directing him to pass orders de novo. In appeals filed by the revenue under Section 260A, the substantial question raised was "Whether on the facts and in the circumstance of the case and in law, the Tribunal is correct in entertaining the objection that the assessment order is without jurisdiction null and void and unenforceable?" While dismissing the appeals, the Division Bench proceeds on the basis that the draft assessment order ought to have been passed within the time frame stipulated under Section 153(2A) of the Act, also supporting the conclusion arrived at by me.

21. In Nokia India Private Ltd. V. DCIT (298 CTR 334) a Division Bench of the Delhi High Court held that where the matter had been remanded to be re-done, it would hardly make a difference as to whether the remand had been to the TPO or the DRP, thus indicating that the provisions of Section 144C were also governed by the limitation of time set out in Section 153 of the Act.

22. The issue before the Delhi High Court concerned the effect of Section 153(2A) in a matter where the Tribunal had remanded the assessment in respect of five out of seven issues to the Assessing Officer. Upon receipt of the order of the Tribunal, the Assessing Officer referred the transfer pricing issues to the TPO. The assessee took a stand that the TPO would be bound by the limitation prescribed under Section 153(2A) and requested the TPO to take the provision into consideration in the proceedings before him. The time limits under Section 153 (2A) were however violated by the Department leading to Writ Petitions being filed by Nokia. In that context, the Court, while accepting the stand of the assessee that the time limits specified in Section 153(2A) would apply, states as follows:

25. In the present case, of the seven issues, the assessment in respect of five was set aside and the issues remanded for a fresh determination. Whether the remand was to the TPO or the DRP would not make a difference as long as what results from the remand is a fresh assessment of the issue. Clearly, therefore, the time limit for completing that exercise was governed by Section 153 (2A) of the Act.

23. It is brought to my notice that the above order has not been accepted by the revenue and has been challenged before the Supreme Court. Delay in filing the SLP has been condoned and leave granted Civil Appeal in C.A.No.6755 of 2018 is pending though without any order of stay.

24. In the light of the aforesaid discussion, I am of the view that the impugned notices issued by the DRP after a period of four years from the date of order of the Tribunal would be barred by limitation by application of the provisions of Section 153(2A) of the Act. These Writ Petitions are allowed. No costs. Connected Miscellaneous Petitions are closed

Sd/-

Assistant Registrar (CS-II)

//True Copy//

Sub Assistant Registrar

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To

1. The Dispute Resolution Panel-2,
Kendriya sadan, 4th Floor, Koramangala,
Bangalore 560034.

2. Commissioner of Income Tax,
The Dispute Resolution Panel -2,
BMT Building, 80 Feet Rd, 6th Blflock,
Near KHB Games Village, Koramangala,
Bengaluru, Karnataka - 560 095.

3. The Deputy Commissioner of Income tax
Large Taxpayer Unit -1,
Nungambakkam, Chennai 600 034.

+2cc to M/s.Sandeep Bagmar, Advocate SR.43114

+1cc to M/s.Hema Murali Krishnan, Advocate SR.43121

W.P.Nos.919, 922, 1068 and 1070 of 2020
and WMP Nos.1102, 1104, 1273 and 1274 of 2020

KV (CO)

CB(29/03/2021)

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