

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.08.2020

DELIVERED ON : 16.09.2020

CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH
and
THE HON'BLE MRS.JUSTICE R.HEMALATHA

WA.No.2104 of 2018
and
CMP.No.16496 of 2018

M/s.Hyundai Motor India Ltd.,
Plot No.H-1, SIPCOT Industrial Park,
Irungattukottai, Sriperumbudur Taluk,
Kanchipuram - 602 117.

.... Appellant

Vs.

1. The Deputy Commissioner of Income Tax,
Transfer Pricing Officer - 2 (1),
Room No.506, 5th Floor, Tower - I,
BSNL Building, No.16, Greams Road,
Chennai - 600 006.

2. The Deputy Commissioner of Income Tax (LTU),
7th Floor, Income Tax Main Building (Aayakar Bhawan),
121 Mahatma Gandhi Road, Nungambakkam,
Chennai - 600 034.

... Respondents

Prayer: Writ Appeal filed under Clause 15 of Letters Patent
praying to set aside the order in WP.No.22508 of 2017 dated
16.07.2018 and allow the above writ appeal.

WP.No. 22508/2017:

Filed under Article 226 of the Constitution of India
praying to issue a writ of Certiorarified Mandamus to quash the
giving effect order F.No.H-201 / TPO - 2/ A.Y.2008-09 dated
27.03.2017 issued by the 1st respondent and to issue directions
to the 1st respondent to give proper and specific effect to the
order of the ITAT in Miscellaneous Petition No.93 / Mds / 2016
in ITA No.2353 /Mds / 2012 dated 06.09.2016

For Appellant : Mr.R.V.Easwar, Senior counsel
for Mr.SP.Chidamvaram & Mr.Rubal Bansal

For Respondents: M/s.Hema Muralikrishnan

ORDER

(Order of the Court was made by R.HEMALATHA, J.)

This appeal is against the final order passed in WP.No.22508 of 2017 dated 16.07.2018.

2. The facts of the case briefly are summarized below. The appellant company is engaged in the business of manufacturing, selling and servicing passenger vehicles and related spare parts / CKD parts in the domestic as well as overseas markets. The assessee / appellant company (M/s.Hyundai Motors India Ltd) has exclusive rights of the Holding company (M/s.HMC Korea) abroad to produce cars in this country. The brand name and logo are the Holding Company's property while the end product is made in India. The matter of dispute is in the e-return filed for the assessment year 2008-2009 in which the first respondent as the Transfer Pricing Officer (TPO) found the royalty paid by the assessee / appellant company to the Holding Company was higher (3.47%) than the average royalty rates of four comparable companies (2.54%) thus concluding that the Arm's length price of the royalty paid was in excess and therefore Rs.106.67 crores was disallowed i.e., in other words added to the taxable income. The Draft Assessment Officer passed the order under Section 143/3 of IT Act read with Section 92 CA. The assessee / appellant company filed its objections in form 35 A before the Dispute Resolution Panel (DRP), Chennai which rejected the objections. A rectification petition was filed before the DRP disputing the inconsistency in arriving at the royalty expenses. However, the final assessment order was passed on 29.10.2012 without considering the objections of the assessee / appellant company. An appeal in form 36 B was filed by the assessee / appellant company with the Income Tax Appellate Tribunal (ITAT). The Dispute Resolution Panel (DRP) issued revised order stating that certain mistake had crept in while calculating the adjustment and consequently the disallowance was scaled down from Rs.106.67 crores to Rs.86.88 crores. ITAT upheld this revised adjustment order of the DRP. Subsequently, a Miscellaneous Petition was filed by the appellant company before ITAT on 12.05.2016 which prompted the ITAT to correct and modify its earlier order and direct the TPO to verify whether the petitioner's rate of royalty payment is lesser than the rate prevailing in the industry. The TPO which revisited the royalty payment part opined that the assessee / appellant company relied on Wikipedia and not any authentic source to substantiate its

contentions regarding the average royalty rate in the Industry and therefore, reiterated the decision on the disallowance of Rs.86.88 crores, on account of royalty paid. Irked by this order of the TPO, a Writ Petition No.22508 of 2017 was filed by the assessee / appellant company in which Single Judge of this Court dismissed the petition by stating that it was premature and the assessee / appellant company had not exhausted all the available remedies before approaching this Court. Hence, this appeal against the order of the Single Judge of this Court.

3. The learned senior counsel for the assessee / appellant Mr.Rubal Bansal for Mr.S.P.Chidambaram, learned counsel would contend that the Single Judge of this Court had failed to appreciate the fact that the first respondent TPO had two different yardsticks for two different assessment years to arrive at the average royalty paid in the Industry. It was further argued by the learned counsel that while for the assessment year 2007-08, it was accepted by the TPO that royalty rates called out from the Wikipedia is valid and based on which the ITAT had decided in allowing the entire royalty paid as allowance, a different yardstick was adopted this year (2008-09) not allowing the same. This speaks volumes of the arbitrary and illogical reasoning by the TPO. His further contention that the Single Judge had dismissed the Writ Petition merely because he felt that the remedies available to the assessee / appellant company as IT assessee were not exhausted, is also erroneous. It was also contended that the entire process of appeal in all the possible forms was undergone only to be referred back to the TPO on the aspect of verifying the actual industrial average royalty paid in the automobile sector and whether it is higher than the royalty paid by the appellant company. The TPO went much beyond the ITAT order thus exposing the lack of any proper scientific approach in determining this all important aspect of Arm length price as regards the royalty paid. Further, the denial of natural justice by the TPO by not issuing a show cause notice aggravated the matter, it was contended.

4. The first respondent represented by the learned counsel Mrs.Hema Muralikrishnan contended that the former was right in determining whether the transactions pertaining to the royalty paid were within Arm's length or not. It was contended that the royalty paid to sales ratio cannot be constant every year and it was imperative to make a comparative study with other comparable companies. Further contention of the learned counsel was that the ITAT had never considered the royalty rates of the Industry from the Wikipedia. It was argued that in 2007-08, the TPO herself had mentioned the average royalty of the Industry as 4.7 which was higher than the 4.22 of the appellant company. But, the assessee were not able to satisfactorily substantiate that the same average rates continued this year also. It was argued

that therefore relying on Wikipedia rates to get the average of the royalty paid in the Industry is wrong and without any reasoning.

5. It is found that in 2007-08, the ITAT had observed that the "TPO herself observed that in respect of royalty payment in automotive sector from the study of 35 licences, the average works out to 4.7% which is higher than the royalty payment of 4.22% of the assessee company". In the same year, the TPO had initially made comparisons like in 2008-09 and concluded that the average royalty paid by the 4 comparable companies is 2.36% while the appellant company had paid 4.22% and hence in excess of the Arm's length price by 1.86% of the sales ie., 165.05 crores which was restricted to Rs.104.27 crores by the DRP stating two of the comparable companies were not qualifying for the comparison. In this context, it was mentioned by the DRP that "the related party transactions were more than 25%" and therefore removed two of the four comparable companies to arrive at the average. Subsequently, the ITAT allowed the entire Rs.104.27 crores based on the observation of the TPO that the royalty payment by the assessee / appellant was 4.22% which was lesser than the Industry average of 4.70%.

6. It is the specific contention of the learned senior counsel that it can be prima facie seen that the first respondent does not have a standard procedure to assess the Arm's length price. The entire concept of the ALP is to keep a check on the companies which have their parent company abroad from overstating the royalty expenses in order to claim allowance. Thus, the need to make the comparisons more scientific to arrive at the average royalty rates is imperative. In the instant case, it is clear that companies which have been compared for getting the royalty percentage to sale are not comparable if the decision by the DRP for 2007-08 is any indication. Thus, the choice of comparable companies becomes crucial and if companies which cannot be compared are included, the Industry average varies to a great extent.

7. It is also pertinent to mention that in 2007-08, objections were raised by the assessee / appellant not to compare similar companies, as the royalty payment for one company was only for the 'technology' component like in Maruti Suzuki India Ltd., while the royalty payment was for 'technology and the use of brand' as in assessee / appellant company. Such inherent deficiencies were pointed out thereby making the entire system faulty and fraught with loopholes.

8. Now, it is revealed, during the course of the arguments that the TPO's order was accepted by the Assessing Officer and the final order of assessment was passed in November 2019. It

is not clear whether the assessee / appellant approached the DRT with objections against the draft assessment order. The assessee / appellant ought to have approached the ITAT against this final order of assessment. In such circumstances, this Court opines that the remedies are available in the system and the assessee / appellant ought to have approached the ITAT before approaching this Court, but instead challenged the TPO's order in this Court. We may note, even in the first instance the assessee did the same thing by approaching the Tribunal against the final assessment made. Certainly, as done by it earlier, all the issues can be agitated before the Tribunal.

9. In the WP.No.22508 of 2017, in the final order, the Single Judge had also observed that "this Court is of an undoubted opinion that the writ petitioner has not made out any case for the purpose of waiving the efficacious alternate remedy available to the writ petitioner under the provisions of the Act and therefore, this Court is not inclined to entertain the writ petition on merits and adjudicate the issues involved in respect of fixing of average rate of royalty payment".

10. We would like to reiterate the legal position involving invocation of the extraordinary jurisdiction of this Court by placing reliance upon the judgment of a Division Bench of this Court in the Joint Commissioner of Income Tax, Media Range and others Vs. Kalanithi Maran and another (2014 (3) Law Weekly 846) in which one of us is a party (MMSJ) wherein law laid down by the Apex Court in Commissioner of Income Tax and others Vs. Chhabil Dass Agarwal, ((2014) 1 SCC 603), has been noted of. The following paragraphs would be apposite.

"12. While holding so, we are quite aware that the jurisdiction vested with High Court under Article 226 of the Constitution of India can be exercised in a given case. In other words, the restriction is self-imposed and nothing else. There may be a case, where an assessment is sought to be reopened by an Officer, who is not competent to do so. Similarly, there may be cases, where on the face of it would appear that the reopening is barred by limitation or lacks inherent jurisdiction. To put it differently, in a case, where no adjudication is required on facts, then certainly jurisdiction of this Court under Article 226 of the Constitution of India can very well be invoked. Therefore, to such a limited extent, we are inclined to hold that the jurisdiction of this Court under Article 226 of the Constitution of India can be exercised.

13. Considering the said principle, the Supreme Court in Commissioner of Income Tax and others Vs. Chhabil Dass Agarwal, ((2014) 1 SCC

603), was pleased to hold as under:

"15. Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, (AIR 1964 SC 1419), Titagarh Paper Mills case ((1983) 2 SCC 433) and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

We do not find any of the circumstances as laid down by the Supreme Court available before us.

14. Ratio laid down in Commissioner of Income Tax and others Vs. Chhabil Dass Agarwal, ((2014) 1 SCC 603):-

The entire issues framed, in our considered view, are covered by the recent judgment of the Supreme Court referred above. Considering the jurisdiction of this Court under Article 226 of the Constitution of India, it has been held therein in the following manner:

"10. In the instant case, the only question which arises for our consideration and decision is whether the High Court was justified in interfering with the order passed by the assessing authority under Section 148 of the Act in exercise of its jurisdiction under Article 226 when an equally efficacious alternate remedy was available to the assessee under the Act."

15. The Supreme Court, while considering the said issue, has also taken into consideration the decision rendered in G.K.N.Driveshafts (India) Limited Vs. Income-tax Officer, ((2003) 1 SCC 72 = 259 ITR 19(SC)). In this connection, it is apposite to refer paragraph No.12 of the said decision,

which reads as follows:-

"12. The Constitution Benches of this Court in K.S. Rashid and Sons vs. Income Tax Investigation Commission, (AIR 1954 SC 207); Sangram Singh vs. Election Tribunal, Kotah, (AIR 1955 SC 425); Union of India vs. T.R. Varma, (AIR 1957 SC 882); State of U.P. vs. Mohd. Nooh, (AIR 1958 SC 86) and K.S. Venkataraman and Co. (P) Ltd. vs. State of Madras, (AIR 1966 SC 1089) have held that though Article 226 confers a very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or the procedure required for decision has not been adopted."

16. Statutory remedy:-

When in a fiscal statute, hierarchy of remedy of appeals are provided, the party has to exhaust them instead of seeking relief by invoking the jurisdiction of this Court under Article 226 of the Constitution of India and as held in Commissioner of Income Tax and others Vs. Chhabil Dass Agarwal, ((2014) 1 SCC 603), the Court will have to take into consideration of the legislative intent enunciated in the enactment in such cases. It is not as if the alternative remedy is neither efficacious nor effective. In the above said judgment, the Supreme Court held as under:

"13. In Nivedita Sharma vs. Cellular Operators Assn. of India, (2011) 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows

"12. In Thansingh Nathmal v. Supdt. of Taxes, (AIR 1964 SC 1419), this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed:

"7. ... The High Court does not therefore act

as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

13. In *Titaghur Paper Mills Co. Ltd. v. State of Orissa*, (1983) 2 SCC 433 this Court observed: (SCC pp. 440-41, para 11)

"11. ... It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in *Wolverhampton New Waterworks Co. v. Hawkesford*, 141 ER 486 in the following passage:

'... There are three classes of cases in which a liability may be established founded upon a statute. ... But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.'

The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspapers Ltd.*, 1919 AC 368 and has been reaffirmed by the Supreme Court Today With All High Courts Page 4 of 6 Privy Council in *Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd.*, 1935 AC 532 (PC) and *Secy. of State v. Mask and Co.*, AIR 1940 PC 105 It has also been held to be equally applicable

to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

14. In *Mafatlal Industries Ltd. v. Union of India*, (1997) 5 SCC 536 B.P.Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed:

"77. ... So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."

14. In *Union of India vs. Guwahati Carbon Ltd.*, (2012) 11 SCC 651, the Apex Court has reiterated the aforesaid principle and observed:

"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in *Munshi Ram v. Municipal Committee, Chheharta*, (1979) 3 SCC 83. In the said decision, this Court was pleased to observe that:

"23. ... when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded."

11. Therefore, this writ appeal is disposed of with the above observations with liberty to the assessee / appellant to approach the Tribunal within four weeks from the date of receipt of a copy of this order. We leave all the issues open to be

agitated before the Tribunal. Consequently, the connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar

// True Copy//

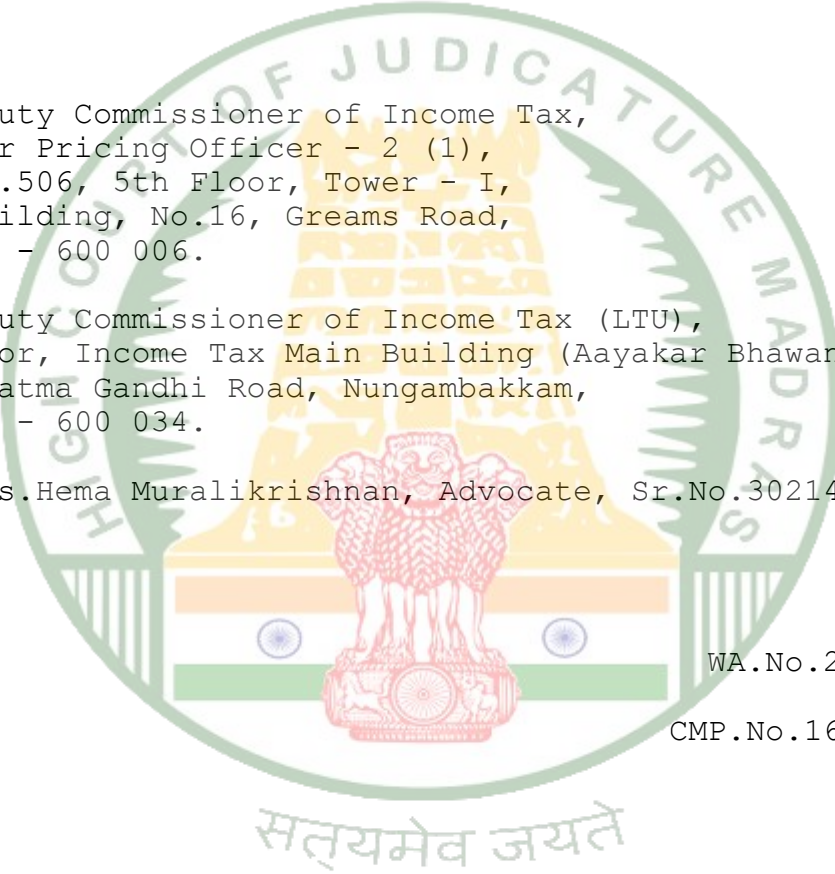
Sub Assistant Registrar

mbi

To

1. The Deputy Commissioner of Income Tax,
Transfer Pricing Officer - 2 (1),
Room No.506, 5th Floor, Tower - I,
BSNL Building, No.16, Greams Road,
Chennai - 600 006.
2. The Deputy Commissioner of Income Tax (LTU),
7th Floor, Income Tax Main Building (Aayakar Bhawan),
121 Mahatma Gandhi Road, Nungambakkam,
Chennai - 600 034.

+1cc to M/s.Hema Muralikrishnan, Advocate, Sr.No.30214



WA.No.2104 of 2018
and
CMP.No.16496 of 2018

EV (CO)
GS (20/10/2020)

WEB COPY