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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	11.03.2021
Pronounced On	11.06.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P. No. 22901 of 2010
and
M.P. No. 2 of 2010

M/s.Virtusa Consulting Services Private Limited,
No.34, IT Highway,
Navallur, Chennai - 600 130.

(Cause Title amended vide order of this Court
dated 11.01.2021 made in W.M.P.No.16418 of 2020
in W.P.No.22901 of 2010)

... Petitioner

Vs

1. The Dispute Resolution Panel (DRP),
Income-Tax Department,
Room No.217, II Floor, Aayakar Bhawan,
No.121, Nungambakkam High Road,
Nungambakkam, Chennai - 600 034.

2. The Joint Commissioner of Income Tax,
Transfer Pricing Officer-II,
Room No.420, IV Floor, Aayakar Bhawan,
No.121, Nungambakkam High Road,
Nungambakkam, Chennai - 600 034.

3. The Additional Commissioner of Income Tax,
Office of the Additional Commissioner of Income Tax,
Company Range-V, No.121, Nungambakkam High Road,
Nungambakkam, Chennai - 600 034.

... Respondents

Prayer:

Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records comprised in the Draft Assessment Order in PAN No.AAACP4341E for the Assessment Year 2006-07 dated 31.12.2009 on the file of the third respondent and consequential order in F.No.DRP/Chennai/Sectt./026/2010-11, dated 24.09.2010 on the file of the first respondent and quash the same as barred by limitation.



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For Petitioner : Mr.Kamal Sawhney with
Mr.Prashanth Meharchandani
Mr.Arun singh Bhadauria
for Mr.Arun Karthik Mohan

For Respondents : Mr.Prabhu Mukunth Arun Kumar
Standing Counsel

ORDER

The present writ petition has been filed against the impugned order dated 24.09.2010 passed by the 1st respondent/Dispute Resolution Panel for the assessment year 2006-2007 under Section 144C (5) read with Section 144C (8) of the Income Tax Act, 1961.

2. The relevant portion of the impugned order dealing with limitation reads as under:-

"2.3. Before us the assessing officer has presented the case records, the assessment folder and made written submission on this issue vide letter dated 25/08/2010. Briefly, the A.O's submission is that the A.O during the course of assessment proceedings found that the value of International transactions in this case for the relevant assessment year exceeded Rs.15 crore, he therefore, vide a letter dated 11/11/2008 addressed to the CIT u/s. 92 CA requested the CIT for approval as required before making a reference to the TPO. The CIT after considering the subject mater accorded his approval vide letter dated 18/11/2008 to the A.O., therefore, the process for Transfer Pricing Audit u/s. 92CA had commenced. The A.O therefore, submitted that the communication dated 17/02/2009 by the A.O to the TPO is merely a formality and is not a fatal defect in the procedure, hence, the assessment is not barred by limitation of time.

2.4 We have carefully considered the facts of the case, written submissions of both the parties and we have also examined the case records, more particularly the A.O's letter dated 11/11/2008 addressed to the CIT for seeking the previous approval as required u/s. 92CA and the CIT's letter dated 18/11/2008 addressed to the A.O conveying the necessary approval for initiating the TP Audit in this case by the TPO. On appreciating these facts we have come to this conclusion that once the CIT accorded on 18/11/2008 his approval after proper



6. The learned counsel for the petitioner placed heavy reliance on the decision of the Hon'ble Supreme Court in State of Punjab and others Vs Shreyans Industries Limited and others, (2016) 4 SCC 769. The learned counsel for the petitioner drew the comparison between Section 153 of the Income Tax Act, 1961 and Section 11 of the Punjab General Sales Tax Act, 1948 and submitted that in absence of a provision giving powers to extend the period of limitation under Section 153 of the Income Tax Act, 1961, as in Section 11(10) of the Punjab General Sales Tax Act, 1948, the impugned order passed by the 1st respondent/Dispute Resolution Panel was liable to be interfered with.

7. The learned counsel for the petitioner further submitted that, in taxing matters, the provisions have to be read in the manner in which they appear. Therefore it was not open for the respondents to proceed with the assessment beyond the period of limitation merely because an approval was obtained on 18.11.2008.

8. It is submitted that the reference made on 17.02.2009 was clearly time barred as the time for making the assessment/completing the assessment under Section 153 of the Income Tax Act, 1961 had already expired on 31.12.2008.

9. In support of the present writ petition, learned counsel for the petitioner has relied on the following decisions of the Court/Tribunal:-

- (i) Dongfang Electric Corporation Vs DCIT, Kolkata, I.T.A. No.572/Kol/2014.
- (ii) CCE, Bangalore Vs M/s.Bal Pharma, 2010-TIOL-74-SC-CX
- (iii) CCE, Kanpur Vs Flock India Ltd., (2000) 6 SCC 650
- (iv) Ashok Leyland Ltd., Vs ACIT, [2005] 277 ITR 22 (Madras DB)
- (v) CST, UP Vs Modi Sugar Mills Ltd., AIR 1961 SC 1047
- (vi) CIT Vs SAP Lab, [2014] 271 CTR 612 (Karnataka)
- (vii) CIT Vs XL Finance, (ITA 713/2015) (Delhi HC).
- (viii) CIT Vs Bajrang Textiles, [2007] 294 ITR 561 (RAJ.)
- (ix) State of Punjab Vs Shreyans Industries, (2016) 4 SCC 769
- (x) JCIT Vs Kalanithi Maran, [2014] 366 ITR 453 (Madras DB)



(xi) Durga Enterprises (P.) Ltd., & Anr. Vs P.S., Govt of UP & Ors, (2004) 13 SCC 665

(xii) Bal Krishna Vs State of UP, Civil Appeal No.607 of 1995

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(xiii) Thanthi Trust Vs CBDT [1995] 213 ITR 639 (Madras DB)

(xiv) Kamalam Rajendran Vs Inspecting Assistant Commissioner of Income-tax (Assessment), [1999] 237 ITR 299 (MAD.)

(xv) Supdt of Taxes, Dhubri & Ors. Vs Onkarmal Nathmal Trust Etc., AIR 1975 SC 2065.

(xvi) State of Punjab & Ors Vs Bhatinda District Cooperative Milk Producers, (2007) 11 SCC 363

(xvii) Bihar Police Building Construction Corporation (P) Ltd Vs PCIT, [2019] 108 taxmann.com 48 (Patna)

(xviii) DCIT Vs Mahi Valley, [2006] 287 ITR 360 (Gujarat)

(xix) Jagmitter Singh Vs DHS, Haryana & Ors, (2013) 10 SCC 136.

(xx) Zuari Estate Vs Regional Director, ESIC, (2015) 7 SCC 690

(xxi) Pandurang Chogule Vs Maruti Hari Jadhav, (1966) 1 SCR 102

(xxii) Kalyankumar Ray Vs CIT, Calcutta, AIR 1992 SC 15

(xxiii) Auto & Metal Engineers and Ors., Vs Union of India and Ors., 1998 229 ITR 399 SC

(xxiv) Bansilal Sons Vs ACIT, Nashik, [2019] 101 taxmann.com 20/260 Taxman 281 (Bom.)

(xxv) CIT Vs Ramesh D.Patil, [362 ITR 492 (Guj)]

(xxvi) Rajesh Kumar Vs CIT, [2006] 157 Taxman 168 (SC)

(xxvii) PCIT Vs Shreelekha Damani, (2019) 307 CTR (Bom).

(xxviii) K.P.Varghese Vs Income-tax Officer, [1981] 7 Taxman 13 (SC)

(xxix) UCO Bank Vs Commissioner of Income-tax, [1999] 104 Taxman 547 (SC)



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- (xxx) UTI Mutual Fund Vs Income-tax Officer,
[2013] 31 taxmann.com 222 (Bombay)
- (xxxi) UOI & Ors. Vs Kaumudini Dayal & Anr,
(2001) 10 SCC 231
- (xxxii) The Commissioner of Income Tax Vs Tata Autocomp
Systems Ltd., ITA No.1320 of 2012
- (xxxiii) The Commissioner of Income Tax-I, Mumbai Vs
Alstom Projects India Limited, ITA No.362 of 2014
- (xxxiv) CIT Vs JK Charitable Trust, (2009) 1 SCC 196
- (xxxv) Nokia India Private Limited Vs Additional
Commissioner of Income Tax and Ors.,
(2018) 301 CTR (Del) 665
- (xxxvi) Javer Jivan Mehta Vs Assistant Commissioner of
Sales Tax (Appeals), VIII Circle and Ors,
[1998]111 STC 199 (Guj)
- (xxxvii) Savitri Rani Malik Vs Commissioner of Income Tax,
(1991) 93 CTR (Gau) 163
- (xxxviii) T.N.Dadha Pharmaceuticals Vs Collector of
Central Excise, Madras, AIR 2003 SC 1556
- (xxxix) MIOT Hospitals Ltd., Vs The State of Tamil Nadu and
Ors., [2020] 78 GSTR 299 (Mad)
- (xxxx) Peeru Lal, Mohan Lal Vs Commissioner of Income-tax,
[2002] 124 Taxman 316 (Rajasthan)
- (xxxxi) ACIT Vs Hotel Blue Moon, [2010] 188 Taxman 113 (SC)
- (xxxxii) CIT Vs Gitson Engineering, [2015] 53 taxmann.com
108 (Madras).
- (xxxxiii) CWT Vs Sona Properties Ltd., (2008) 216 CTR 217
(Bombay)
- (xxxxiv) Alamelu Veerappan Vs ITO, W.P.No.30060 of 2017

10. In particular, a reference was made to the decision of the Income Tax Appellate Tribunal in Dongfang Electric Corporation Vs Deputy Commissioner of Income Tax vide order dated 25.10.2017 in I.T.A.No.572/Kol/2014 and in I.T.A.No.487/Kol/2015.



11. On the other hand, the challenge to the impugned order passed by the 1st respondent/Dispute Resolution Panel is defended by the Income Tax Department on the ground that the petitioner had not raised such objection before the 2nd respondent/Transfer Pricing Officer when a reference was made to the 2nd respondent/Transfer Pricing Officer on 17.02.2009 pursuant to an approval by the Commissioner of Income Tax dated 18.11.2008. Therefore, it was not open for the petitioner to question the jurisdiction of the 1st respondent/Dispute Resolution Panel.

12. Learned standing counsel for the respondents/Income Tax Department submits that as per Section 153(1)(a) of the Income Tax Act, 1961, normally an assessment has to be completed within a period of two years from the end of the assessment year in which income became assessable. It is submitted that as per proviso to Section 153(1), for the assessment year commencing from 01.04.2004 or any subsequent assessment years, 24 months in clause (a) of Section 153(1) was amended to be read as 21 months.

13. It is submitted that as per 2nd proviso to Section 153(1), for the assessment commencing from 01.04.2005 and subsequent assessment years and where during the course of proceeding for the assessment of total income, a reference under sub-section (1) of Section 92CA is made on or after 01.06.2007, two years in clause (a) of Section 153(1) shall be 33 months. Thus, there is an exception provided under the statute.

14. Learned standing counsel for the respondents/Income Tax Department relied on the following decisions of the High Courts:-

(i) Hyundai Motor India Ltd., Vs Secretary, Income Tax Department, (2017) 86 taxmann.com 284 (Madras);

(ii) Hyundai Motor India Ltd., Vs DCIT, [2020] 119 taxmann.com 302 (Madras);

(iii) Lahmeyer Holding Vs DDIT, [2015] 59 taxmann.com 336 (Delhi)

15. I have heard the learned counsel for the petitioner and the learned standing counsel for the respondents/Income Tax Department. I have also perused the impugned order and the case laws cited by the learned counsel for the petitioner. I have also examined the provisions of the Income Tax Act, 1961.

16. It is the case of the respondents/Income Tax Department that the decision to refer to the 2nd respondent/Transfer Pricing Officer was made on 11.11.2008 and therefore internally a communication was sent to the Commissioner of Income Tax for



getting appropriate approval to make a reference to the 2nd respondent/Transfer Pricing Officer.

17. It is further submitted that the approval was also granted by the Commissioner of Income Tax on 18.11.2008 and it is pursuant to the aforesaid approval, a reference was made to the 2nd respondent/Transfer Pricing Officer on 17.02.2009.

18. Before proceeding further with, it will be useful to refer to Section 153(1) of the Income Tax Act, 1961. Same is reproduced below:-

"153. Time limit for completion of assessments & reassessments.

(1) No order of assessment shall be made under Section 143 or Section 144 at any time after the expiry of-

(a) two years from the end of the assessment year in which the income was first assessable; or

(b) one year from the end of the financial year in which a return or a revised return relating to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year, is filed under sub-section (4) or sub-section (5) of Section 139; whichever is later:]

Provided that in case the assessment year in which the income was first assessable in the assessment year commencing on the 1st day of April, 2004 or any subsequent assessment year, the provisions of clause (a) shall have effect as if for the words "two years", the words "twenty one months" had been substituted:

Provided further that in case the assessment year in which the income was first assessable is the assessment year commencing on the 1st day of April, 2005 or any subsequent assessment year and during the course of the proceeding for the assessment of total income, a reference under sub-section (1) of section 92CA-

(i) was made before the 1st day of June, 2007 but an order under sub-section (3) of that section has not been made before such date; or



the provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words "two years", the words "thirty-three months" had been substituted."

25. There are no restriction under the provisions of the Income Tax Act, 1961 on an Assessing Officer to make reference within a period of 21 months from the end of the assessment year in which the income became assessable where there are transaction with associated enterprises/related persons



attracting Chapter X of the Income Tax Act, 1961.

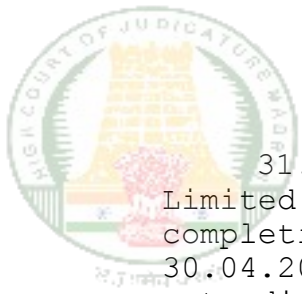
26. Such reference to a Transfer Pricing Officer has be with the previous approval of the Principal Commissioner or the Commissioner as the case may be. In this case, the reference was made with the approval of the Commissioner.

27. Even in the explanatory notes to the provisions of the Finance Act, 2007 which was circulated by the Central Board of Direct Taxes vide Circular No.3/2008, dated 12.03.2008, it has been clarified that the provisions that existed prior to the amendment did not provide adequate time to the Assessing Officer for completing assessment or reassessment in case where a reference was made under Section 92CA of the Income Tax Act, 1961, to the Transfer Pricing Officer for determination of the Arm's-Length price of an International Transaction. Since the time-limit for selection of cases for scrutiny was one year from the end of the month in which the return was filed, it was noticed that the reference was made to the Transfer Pricing Officer after one year of filing of the return and therefore the Transfer Pricing Officers were not getting adequate time to make a meaningful audit of transfer price increases referred to them.

28. Thus, with the view to give sufficient time to make audit of transfer price and also to provide assessing officer sufficient time to make assessment cases involving International Transactions, the time-limit specified in Sections 153 and 153B of the Income Tax Act, 1961 for completing the assessment or reassessment in cases where a reference has been made to the Transfer Pricing Officer was revised.

29. The clarification also stated that the revised time-limits in such cases, shall be the time-limits specified under the aforesaid Sections, as increased by 12 months. The clarification also states that the Transfer Pricing Officer shall determine the Arm's-Length price atleast 2 months before the expiry of the statutory period for making the assessment or reassessment. Thus, a time-limit has been provided in the statute, making it obligatory for the Transfer Pricing Officer to complete audit of transfer price and is completed in time.

30. Thus, there is nothing in the provision which limits the reference to be made before the expiry period of 21 months wherever provisions of Section 92C or 92CA of the Income Tax Act, 1961 are attracted. The reference to the decision of the Hon'ble Supreme Court in the case of State of Punjab and others vs Shreyans Industries Limited and others, (2016) 4 SCC 769 is therefore distinguishable on facts and not appliable to the facts of the present case. Although several cases were cited, reference was invited to the above decision and another of the Tribunal in Dongfang Electric Corporation Vs Deputy Commissioner of Income Tax vide order dated 25.10.2017 in I.T.A.No.572/Kol/2014 in I.T.A.No.487/Kol/2015.



31. In State of Punjab and others vs Shreyans Industries Limited and others, (2016) 4 SCC 769, the last dates for completing the assessment had expired on 30.04.2004, 30.04.2005, 30.04.2006 and 30.04.2007 and provisions for extending the time for reopening the assessment under Section 11 (10) of the Punjab General Sales Tax Act, 1948, long after the expiry of three years.

32. There, the Court noted that for Assessment Year 2000-2001, order of extension was passed more than three years after the last date and for Assessment Year 2001-2002. It was more than two years after the last date and therefore upheld order of the High Court.

33. The Court held that when the last date of assessment expired, it vested a valuable right in the assessee which cannot be lightly taken away. As a consequence, sub-section (11) of Section 10 has to be interpreted in the manner which is equitable to both the parties.

34. As different considerations are applicable under the different enactments, the ratio laid down by the Hon'ble Supreme Court in the case of State of Punjab and others vs Shreyans Industries Limited and others, (2016) 4 SCC 769 (referred to supra) rendered in the context of Punjab General Sales Tax Act, 1948 cannot be applied to de-horse the provisions of the Income Tax Act, 1961.

35. The decision of the Tribunal in Dongfang Electric Corporation Vs Deputy Commissioner of Income Tax, (referred to supra) relied upon by the learned counsel for the petitioner is also distinguishable. There, repeated opportunity was given to the Income Tax Department to produce any letter to prove that the Assessing Officer had made a reference of the International Transaction to the Transfer Pricing Officer. What was produced before the Income Tax Appellate Tribunal was an approval of the Director of Income Tax (IT) dated 27.12.2011 for the Assessment Year 2009-2010. On facts, it was held that the letter of approval signed by the I.T.O (tech) International Taxation did not meet the requirements of Section 92CA(1) of the Income Tax Act, 1961, which specifically requires reference by the Assessing Officer to the Transfer Pricing Officer, for computation of the Arm's-Length Price in relation to International Transactions. These considerations are not applicable to the facts of the case. That apart, the decision of the Income Tax Appellate Tribunal is not binding on this Court, although the ratio laid therein may have persuasive value. Therefore, I am unable to agree with the contention of the learned senior counsel for the petitioner.

36. Admittedly in the present case, the proceedings for making a reference under Section 92CA(1) of the Income Tax Act,



1961 by the 3rd respondent/Additional Commissioner of Income Tax to the Jurisdictional Commissioner of Income Tax started prior to expiry of normal period of limitation under the 1st proviso to Section 153(1) of the Income Tax Act, 1961 and during the course of assessment.

37. The permission was also granted by the Commissioner of Income Tax on 18.11.2008 to make a reference under Section 92CA (1) of the Income Tax Act, 1961 though the actual reference was made only on 17.02.2009. Since the case of the petitioner falls under Chapter X of the Income Tax Act, 1961, special period of limitation under the 2nd proviso to Section 153(1) of the Income Tax Act, 1961 was attracted for completing the assessment.

38. On perusing the records, it is noticed that the petitioner has wholeheartedly participated in the proceedings before the 2nd respondent/Transfer Pricing Officer pursuant to the reference made on 17.02.2009 by the 3rd respondent/Additional Commissioner of Income Tax. Before the 2nd respondent/Transfer Pricing Officer also no objection was raised by the petitioner regarding limitation.

39. After, the 2nd respondent/Transfer Pricing Officer passed a Transfer Pricing Order dated 30.10.2009 under Section 92CA (2) of the Income Tax Act, 1961, the petitioner was also issued with a Show Cause Notice dated 23.11.2009 by the 3rd respondent/Additional Commissioner of Income Tax.

40. Even before the 3rd respondent, before the Draft Assessment Order was passed on 31.12.2009, the petitioner did not raise any objection regarding limitation.

41. It is for the first time before the 1st respondent/Dispute Resolution Panel, the Petitioner raised the objection regarding the limitation to proceed with the assessment for the first time which has been rightly overruled by the 1st respondent/Dispute Resolution Panel.

42. Therefore, it is not open for the petitioner to challenge the jurisdiction of the 3rd respondent/Additional Commissioner of Income Tax to refer to the 2nd respondent/Transfer Pricing Officer to pass a Transfer Pricing Order after 31.12.2008. Since the petitioner had also not questioned the jurisdiction of the 2nd respondent/Transfer Pricing Officer when the reference was made on 17.02.2009, there was also acquiescence by the petitioner to the reference to the 2nd respondent/Transfer Pricing Officer. The petitioner is therefore estopped from questioning the aforesaid reference made to the 2nd respondent/Transfer Pricing Officer.



43. As mentioned above, both 1st and the 2nd proviso to Section 153(1) of the Income Tax Act, 1961 only specify the time-limit within which assessment has to be completed. Both operate under different circumstances. Former applies in the case of normal assessment while the later applies where Chapter X is attracted. The 2nd proviso to Section 153(1) of the Income Tax Act, 1961 does not state that the reference also should be made before the expiry of 21 months where chapter X of the Income Tax Act, 1961 are attracted for completing the assessment. Therefore, there is no merits in the present writ petition.

44. In the light of the above discussion, the present Writ Petition is therefore liable to be dismissed. It is accordingly dismissed. No costs. Consequently, connected Miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

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To:

1. The Dispute Resolution Panel (DRP),
Income-Tax Department, Room No.217, II Floor,
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+1cc to Mr.Hema Muralikrishnan, Advocate, S.R.No.27697

+1cc to Mr.Arun karthick, Advocate, S.R.No.27763

W.P.No.22901 of 2010

SR(CO)
CT(16/07/2021)