

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.02.2021

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

Writ Petition No.6202 of 2019
and
WMP. No.7049 of 2019

M/s.Freight Systems (India) Private Limited,
Represented by its National Head - Finance & Accounts,
Mr.P.Vijaya Kumar,
New No.257, Old No.125/2,
AngappaNaicken Street,
Chennai - 600 001.Petitioner

Vs

1.The Deputy Commissioner of Income Tax,
Corporate Circle -II (1),
Room No.511, 5th Floor,
Main Building, Aayakar Bhawan,
121, Uttamar Gandhi Salai,
Nungambakkam, Chennai - 600 034.

2.The Secretary,
Dispute Resolution Panel - Panel - II,
4th Floor, Kendriya Sadan,
Koramangala,
Bengaluru - 560 034. Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorarified Mandamus, to call for the Final Assessment Order dated 29.10.2010 passed by the 1st Respondent herein under Section 143 (3) read with Section 144-C (13) of the Income Tax Act for the AY 2006-07 and quash the same as the consequential proceedings in furtherance of the aforementioned Order dated 29.10.2010, pending before the 2nd respondent herein, is barred by limitation in terms of Section 153(2A) of the Act and consequentially direct the 1st respondent herein to grant a refund of Rs.4,72,88,068/- due to the Petitioner herein along with interest for delayed refund for a period from the said assessment year to the date of grant of refund.

For Petitioner : Mr.Kamal Sawhney, Senior Counsel
for Mr.S.Muthuvenkatraman

For Respondents: Ms.Hema Muralikrishnan,
Senior Standing Counsel

ORDER

The petitioner, an assessee on the file of the Deputy Commissioner of Income Tax/R1, challenges a final assessment order dated 29.10.2010 passed in terms of Section 143 (3) r/w 144C (13) of the Income Tax Act, 1961 (in short 'Act') for Assessment Year (A.Y.) 2006-07 in consequence of an order passed by the Dispute Resolution Panel (DRP) dated 29.10.2010, as barred by limitation in terms of Section 153 (2A) of the Act. A direction is also sought to R1 to refund the tax paid/adjusted in settlement of demand raised under the impugned assessment order along with interest.

2. The sequence of dates and events is that, a return of income was filed on 29.11.2006 revised on 19.10.2007, that was selected for scrutiny. A Transfer Pricing Order (TPO) was passed on 31.10.2009 and a draft assessment made by the Assessing Officer on 31.12.2009. As against the draft assessment order, objections were filed before the DRP that were disposed on 17.09.2010. The aforesaid proceedings had transpired in Mumbai and on 26.02.2010, the assessment of the petitioner stood transferred from Mumbai to R1 in Chennai. In compliance with the directions of the DRP dated 17.09.2010, a final assessment order was passed by R1 on 29.10.2010 that was challenged in appeal before the Income Tax Appellate Tribunal (Tribunal). During the pendency of the appeal, the entire demand arising from order dated 29.10.2010 was collected by way of adjustment of refunds for other assessment years.

3. The Tribunal remanded the matter to the DRP by order dated 24.01.2013 on the agreement of both the parties before it that the issue relating to the Freight Forward Segment had been omitted to be considered by the DRP. On remand, the DRP heard the matter on 10.03.2014. The aforesaid proceedings took place before the authorities at Chennai. Pending orders from the DRP, Chennai, the DRP, Bangalore /R2 was constituted and the file of the petitioner stood transferred to R2. Post transfer, no orders were passed by the DRP and hence the petitioner argues, relying on the provisions of Section 153 (2A) as it stood prior to amendment vide Finance Act, 2016, with effect from 01.06.2016, that an order of fresh assessment ought to have been passed before the expiry of one year from the end of the financial year

when the order of the Tribunal was received by the Chief Commissioner or Commissioner of Income Tax. Thus, since the order of the Tribunal had been passed on 24.01.2013, and no order of final assessment was passed within the period as stipulated under 153(2A), the proceedings are barred by time.

4. Assuming that the order of the Tribunal dated 24.01.2013 was received prior to the completion of that financial year i.e. on or before 31.03.2013, proceedings became barred on 31.03.2015. If received after 01.04.2013, proceedings would have been barred by 31.03.2016. Since no order was passed prior to 31.03.2016, the petitioner addressed the Chief Commissioner of Income Tax (International Taxation, Bangalore) for annulment of the proceedings and refund of the amount collected. This was followed by further reminders, in between which proceedings were initiated by R2 for assessment, in which the petitioner had participated.

5. I have heard Mr.Kamal Sawhney, learned Senior Counsel appearing for Mr.Muthuvenkatraman, learned counsel for the petitioner and Ms.Hema Muralikrishnan, learned Senior Standing Counsel for the respondents.

6. The main defence putforth by the Revenue is that there is no limitation for finalization of proceedings pending before the DRP and that the provisions of Section 153 do not apply to such matters. I have had occasion to deal with the similar issue in the matter of Roca Bathroom Products Private Limited Vs. The Dispute Resolution Panel -2 and others in W.P. Nos.919, 922, 1068 & 1070 of 2020 and vide order dated 23.12.2020, have opined as follows:

'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.'

7. Nothing has been stated in the course of the arguments in this matter, to persuade me to take a different view from what I have already taken. Additionally, the Bombay High Court, in Vodafone India Services (P) Ltd., Vs. Union of India (361 ITR 531), paragraph 47, states that the process before the DRP is a continuation of assessment proceedings as only thereafter would a final appealable assessment order be passed.

8. An alternative argument put forth is that even if one were to take the view that the provisions of Section 153 would not apply to the scheme of assessments under Section 144C, Courts have consistently held that a reasonable limitation should be read into provisions dealing with the finalisation of assessments and, by no stretch of the imagination, can seven years be construed to be a reasonable period. I agree, though there is really no necessity for me to consider the alternate argument, in the light of my having accepted the primary argument.

9. This Writ Petition is allowed. The impugned final assessment order dated 29.10.2010 is quashed. There is a direction to R1 to refund the amounts remitted by the petitioner in connection with the demand raised under the impugned order, along with applicable interest in terms of Section 244A of the Act, within a period of four (4) weeks from today.

Sd/-
Assistant Registrar (CS VIII)

//True Copy//

सत्यमेव जयते
Sub Assistant Registrar

rkp

To

1. The Deputy Commissioner of Income Tax,
Corporate Circle -II (1),
Room No.511, 5th Floor,
Main Building, Aayakar Bhawan,
121, Uttamar Gandhi Salai,
Nungambakkam, Chennai - 600 034.

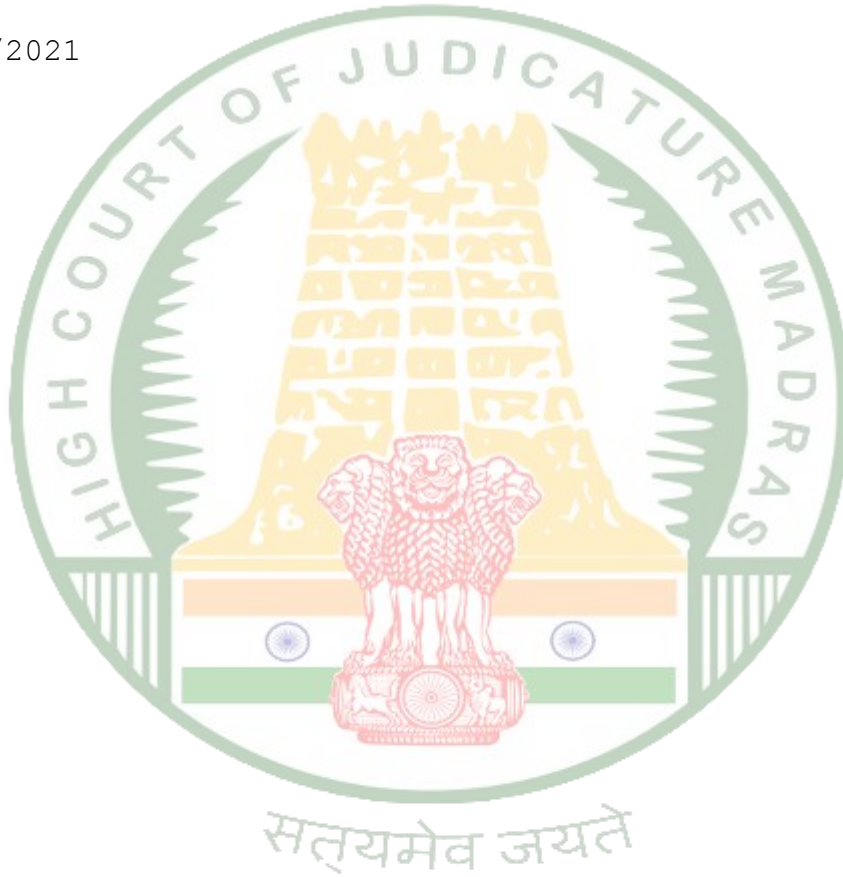
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2.The Secretary,
Dispute Rolution Panel - Panel - II,
4th Floor, KendriyaSadan,
Koramangala, Bengaluru - 560 034.

+1cc to Ms. Hema Muralikrishnan, Advocate Sr.8970

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srg 26/03/2021



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