IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.09.2021

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

WRIT APPEAL NO.1263 OF 2021
AGAINST
W.P.No.2779 OF 2017
AND
C.M.P.NO.8056 OF 2021

M/s.Mando Automotive India Private Limited,
(Company into which Mando India Ltd.
was amalgamated)
Rep., by its Authorized Signatory,
J.Sundararajan,
Plant-II, F 64, SIPCOT Industrial Park,
Irrungattukottai, Sriperumbudur-602 117.
.. Appellant/Petitioner

-vs-

The Deputy Commissioner of Income-tax,
Corporate Circle 4(1), 4th Floor, Main Building,
121, Mahatma Gandhi Road,
Chennai-600 034.
.. Respondent/Respondent

Appeal under Clause 15 of Letters Patent against the order dated 12.02.2021 in W.P.No.2779 of 2017 and set aside the same.

Prayer in W.P.No.2779 of 2017:- Writ of Certiorarifi to call for the records of the respondent and quash the impugned order in AAACM7698H/13-14 dated 31.12.2016 made under section 143(3) R.W.S. 92CA (3) of the Income Tax Act 1961 for the Assessment 2013-14.

For Appellant : Mr.N.V.Balaji

For Respondent : Ms.Hema Muralikrishnan,
Senior Standing Counsel

JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

This appeal by the appellant-assessee is directed against the order dated 12.02.2021, in W.P.No.2279 of 2017.

2.The said Writ Petition was filed challenging a draft assessment order dated 31.12.2016, passed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act' for brevity), for the Assessment Year 2013-14.

3.The learned Single Bench had dismissed the Writ Petition and also expressed its views as to how the appellant-assessee could have thought of filing a composite return in its name for the assessment year under consideration together in order to arrive at the tax liability of the appellant-assessee and that of Mando India Limited, which had merged with the assessee with effect from 01.03.2013. The learned Single Bench, further proceeded to observe that in any event, the purpose of filing income tax return is only to ascertain the tax liability, which the assessee has done in an half-hearted manner by filing the return in the name of the non-existing company Mondo India Limited on the date of filing such return. Further, the learned Single Bench observed that the appellant-assessee has not questioned the exercise taken by the respondent before passing the impugned draft assessment order and the Transfer Pricing Officer (TPO), while determining the arm's-length and the value of the transaction with the associated enterprises. Therefore, the learned Single Bench was not inclined to interfere with the draft assessment order and accordingly, dismissed the Writ Petition.

4.The assessee's case before this Court is that a Writ Court ought not to have upheld the draft assessment order dated

31.12.2016, for the Assessment Year 2013-14, passed in the name of a non-existing transferor company/amalgamating company, even though the assessee had intimated the fact of amalgamation to the Assessing Officer. It is further contended that the learned Writ Court had erred in holding that the assessee had not questioned the exercise taken by the Assessing Officer before passing the impugned order, nor raised any objection regarding the jurisdiction. In fact, by letter dated 15.12.2016, the assessee intimated the respondent about the fact of the merger and also pointed out that there is a jurisdictional defect and the notices issued for the Assessment Year 2013-14 were not in accordance with law. Further more, it was submitted that for the Assessment Year 2013-14, both the entities were in existence and the online system of filing of return does not allow two companies to file return for the same assessment year and therefore, the return for the assessment year under consideration was filed in the name of the transferor company. Further, it is submitted that there is no question of any misleading the Department as alleged, merely because, the assessee had filed the return using the PAN of the amalgamating company and this was done because the online filing of the return does not permit the assessee to file a separate return in respect of the income of the transferor company using the PAN of the transferee company. The seal of approval granted to the draft assessment order would mean that by consent, jurisdiction can be conferred on an Assessing Officer to make assessment on a non-existing company and this would be wholly impermissible in law. Furthermore, the question of filing a composite return was not feasible or possible and this observation made by the learned Single Bench was not tenable. Further, observation/finding has been recorded by the learned Single Bench, distinguishing the decision of the Hon'ble Supreme Court of India in Principal Commissioner of Income Tax vs. Maruti Suzuki India Ltd. [(2019) 107 taxmann.com 375 (SC)] and the decision of the High Court of Delhi in Spice Entertainment Ltd. vs. Commissioner of Service Tax [2012 (280) ELT 43 (Delhi)]. Further, the learned Single Bench ought to have noted that even in Maruti Suzuki India Ltd. (cited supra), the scheme of amalgamation provided that all liabilities of the transferor company shall stand transferred to the transferee company, however, the Court still quashed the assessment order, since it was passed in the name of non-existing transferor company.

5.The Revenue seeks to sustain the order passed by the learned Single Bench firstly on the ground that as against the draft assessment order, a Writ Petition is not maintainable, as it is always open to the assessee to file an objection before the Dispute Resolution Panel to question the correctness of the draft assessment order. That apart, the assessee has got another remedy, after the assessment is completed by the Assessing Officer, by filing an appeal before the Commissioner of Income Tax (Appeals).

6.The learned Standing Counsel placed reliance on the decision of the Division Bench of this Court in the case of M/s.Oasys Green Tech Private Ltd. vs. Income Tax Officer [W.A.Nos.534 and 535 of 2020, dated 30.07.2020] and submitted that in the said decision, the Court had distinguished the decision in Maruti Suzuki India Ltd. (supra) and in particular, took note of the conduct of the assessee and dismissed the Writ Appeal and confirmed the order passed by the learned Single Bench. Therefore, it is submitted that the appellant should be relegated to avail the remedy available under the Act and it is for the appellant to choose the appropriate remedy as they may be advised.

7.We have elaborately heard Mr.N.V.Balaji, learned counsel appearing for the appellant-assessee and Ms.Hema Muralikrishnan, learned Senior Standing Counsel appearing for the respondent-Revenue.

8.As noticed above, the order impugned in the Writ Petition was a draft assessment order passed under Section 143(3) read with Section 144C of the Act. Before the draft assessment order could be passed, there have been several rounds of discussion between the Assessing Officer and the assessee. We find that the notice under Section 142(1) read with Section 129 dated 02.11.2016, was issued to the assessee in connection with the assessment for the assessment year under consideration, directing them to appear in person and furnish as many as 30 details, which include the date of incorporation along with the details of the merger/de-merger or amalgamation, since the year in which the company was incorporated; details of the share holding percentage of the company, etc. In response to the said notice, the assessee, by reply dated 15.12.2016, gave a brief background of the company in the first three paragraphs of the said letter and what we can gather from the said communication qua the jurisdiction is the statement of the assessee that the notices for the assessment have not been served to the company as required by the statute in prescribed and proper manner and their submissions on merits would be without prejudice to the said position. It would be difficult for us to read this sentence in the reply dated 15.12.2016 to mean that the assessee had questioned the jurisdiction of the Assessing Officer to exercise power as is canvassed before us, as well as what was canvassed before the learned Single Bench. Thus, the Assessing Officer appears to have been left with no other option, except to proceed with the draft assessment order.

9.Considering the totality of the facts and circumstances of the case, we are of the view that since the jurisdictional aspect is not a pure question of law as arisen in this case and also taking note of the conduct of the assessee in the manner in which they have approached the problem, than what is being now focused before this Court, we are of the view that the appellant-assessee should definitely avail the remedy provided under the Act.

10.The learned counsel for the appellant-assessee submitted that even much prior to the reply dated 15.12.2016, in response to the notice under Section 142(1) dated 02.11.2016, the assessee had brought to the notice of the Assessing Officer about the amalgamation and this was done by the assessee not once, but twice and therefore, the assessee is entitled to canvass that the assessment cannot be done on a non-existing person. In our view, this issue is not purely a question of law, but a mixed question of law and fact. That apart, it appears that the assessee has pointed out about the amalgamation and the Assessing Officer having taken note of those points, had issued a questionnaire and called for as many as 30 details, some of which pertain to the amalgamation and the shareholding pattern etc. Therefore, the issue as to whether the assessment could have been completed by passing a draft assessment order on a "non-existing entity" is a matter to be decided before the authorities in the remedies provided to the assessee under the Act and not before a Writ Court.

11.The learned Writ Court, while dismissing the Writ petition, had made certain observations, some of which may affect the assessee when we relegate the assessee to avail the remedies under the Act. Therefore, we are of the view that all those observations and the findings should be vacated and the assessee should be free to raise all issues before the assessing authority, before whom they choose to approach, challenging the draft assessment order.

12.In the result, the Writ Appeal is dismissed and the findings rendered by the learned Writ Court while dismissing the Writ Petition are vacated in its entirety and the assessee is granted liberty to avail the alternative remedy provided under the provisions of the Income Tax Act, 1961, making it clear that the appellant-assessee will be entitled to canvass the issue as to whether the assessment, in the case on hand, is an assessment on a non-existing entity and whichever authority, before whom the assessee approaches, shall decide the matter on merits and in accordance with law. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-IX)

// True Copy //

Sub Assistant Registrar

abr

To

The Deputy Commissioner of Income-tax,
Corporate Circle 4(1),
4th Floor, Main Building,
121, Mahatma Gandhi Road,
Chennai-600 034.

+1cc to M/s.N.V.Balaji, Advocate, S.R.No.47417
+1cc to M/s.Hema Muralikrishnan, Senior Standing Counsel, S.R.No.47030

W.A.No.1263 of 2021

SJ(CO)
RLP(20/10/2021)