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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.04.2021

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THE HONOURABLE MR.JUSTICE S.M. SUBRAMANIAM

W.P.Nos.8100 & 26641 of 2015, 20254 & 20255 of 2016,
32866 & 32867 of 2017 & 33706 of 2018

and

M.P.Nos.1, 2 of 2015, W.M.P.Nos.17420 & 17421 of 2016,
880 & 881 of 2016, 36224 to 36227 & 39113,
39115 of 2018 & 24527 & 24529 of 2020

W.P.No.8100 of 2015 :-

Watanmal Boolchand & Co., Ltd.,
(a body corporate established under the
laws of Hong Kong, having its office at
15-17, Wyndham Street, Man Cheung Building
10/Floor, Hong Kong),
Rep., by its Authorised Representative,
M/s.C.Ramaswamy & B.Srinivasan,
Chartered Accountants,
Mr.N.S.Sriram,
No.37, Alagiri Nagar, 2nd Street,
Vadapalani, Chennai-600 026.

.. Petitioner

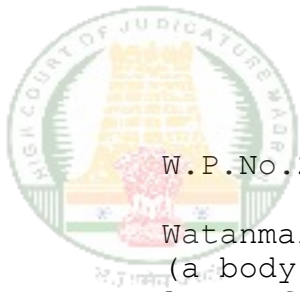
-vs-

1.The Assistant Director of Income Tax,
International Taxation-II,
121, Nungambakkam, High Road, Chennai.

2.The Deputy Commissioner of Income Tax,
International Taxation - 2(2),
121, Nungambakkam High Road, Chennai.

.. Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records of the first respondent in PAN No.AABCW3559Q in impugned notice under Section 148 of the Act dated 28.03.2013 and the consequent proceedings issued by the second respondent dated 05.03.2015 and quash the same.



W.P.No.26641 of 2015 :-

Watanmal Boolchand & Co., Ltd.,
(a body corporate established under the
laws of Hong Kong, having its office at
15-17, Wyndham Street, Man Cheung Building
10/Floor, Hong Kong),
Rep., by its Authorised Representative,
M/s.C.Ramaswamy & B.Srinivasan,
Chartered Accountants,
Mr.N.Vijay Kumar
No.37, Alagiri Nagar, 2nd Street,
Vadapalani, Chennai-600 026.

.. Petitioner

-vs-

1.The Deputy Director of Income Tax,
International Taxation-II(1),
121, Nungambakkam, High Road,
Chennai-600 034.

2.The Deputy Commissioner of Income Tax,
International Taxation - II(2),
121, Nungambakkam High Road,
Chennai-600 034.

.. Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records of the first respondent in PAN No.AABCW3559Q and quash the impugned notice under Section 148 of the Act dated 28.03.2014 passed by the first respondent and the consequent proceedings dated 16.12.2014.

W.P.Nos.20254 & 20255 of 2016 :-

Watanmal Boolchand & Co., Ltd.,
(a body corporate established under the
laws of Hong Kong, having its office at
15-17, Wyndham Street, Man Cheung Building
10/Floor, Hong Kong),
Rep., by its Authorised Representative,
M/s.C.Ramaswamy & B.Srinivasan,
Chartered Accountants,
Mr.N.Vijay Kumar
No.37, Alagiri Nagar, 2nd Street,
Vadapalani, Chennai-600 026.

.. Petitioner



-vs-

The Deputy Commissioner of Income Tax,
International Taxation - II(2),
121, Nungambakkam High Road,
Chennai-600 034.

.. Respondent

Petitions filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records of the respondent in PAN No.AABCW3559Q and quash the impugned notices under Section 148 of the Act dated 03.03.2016 and 30.03.2015 respectively passed by the respondent and the consequent proceedings dated 24.05.2016 issued by the respondent.

W.P.Nos.32866 & 32867 of 2017 :-

Watanmal Boolchand & Co., Ltd.,
(a body corporate established under the
laws of Hong Kong, having its office at
15-17, Wyndham Street, Man Cheung Building
10/Floor, Hong Kong),
Rep., by its Authorised Signatory,
Mr.Gulab M.Assomal

.. Petitioner

-vs-

The Deputy Commissioner of Income Tax,
International Taxation - II(2),
Room No.409, 4th Floor, 16, BSNL Building,
Tower-I, Greams Road, Chennai-600 006.

.. Respondent

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records of the respondent in PAN No.AABCW3559Q and quash the impugned notices under Section 148 of the Act dated 22.03.2017 passed by the respondent and the consequential speaking order dated 05.12.2017 passed by the respondent.

W.P.No.33706 of 2018 :-

Watanmal Boolchand & Co., Ltd.,
(a body corporate established under the
laws of Hong Kong, having its office at
15-17, Wyndham Street, Man Cheung Building
10/Floor, Hong Kong),
Rep., by its Authorised Signatory,
M/s.C.Ramaswamy & B.Srinivasan,
Chartered Accountants,
Mr.N.Vijay Kumar, Partner,
No.37, Alagiri Nagar, 2nd Street,
Vadapalani, Chennai-600 026.

.. Petitioner



-vs-

1.The Assistant Commissioner of Income Tax,
International Taxation - II(2),
Room No.410, 4th Floor, BSNL Building (Tower-1),
No.16, Greams Road, Chennai-600 006.

2.The Deputy Commissioner of Income Tax,
International Taxation - II(2),
Room No.410, 4th Floor, BSNL Building (Tower-1),
No.16, Greams Road, Chennai-600 006.

.. Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records of the first respondent in notice No. ITBA/AST/S/148/2017-18/1009542513(1), the impugned notice under Section 148 of the act dated 29.03.2018 passed by the first respondent and the consequential speaking order dated 10.12.2018 passed by the second respondent and quash the same.

For Petitioner : Mr.Arvind P. Datar,
(In all W.Ps.) Senior Counsel
For Mr.R.Sivaraman

For Respondents : Ms.Hema Muralikrishnan,
(In all W.Ps.) Senior Standing Counsel

COMMON ORDER

The lis on hand is instituted for quashing of the notices issued under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for assessment. The consequential proceedings issued in continuation of Section 148 notices are also under challenge.

2.Since the facts are identical in all the writ petitions, W.P.No.8100 of 2015 is taken as the lead case and the facts of the case are as follows:-

2.1.The petitioner-company, Watanmal Boolchand & Co. Ltd., is a body incorporated in Hong Kong under the Companies Ordinance 1932, that is, relevant Laws of Hong Kong. The petitioner-company was incorporated in the year 1948. The petitioner-company is engaged in the trading business and branded and unbranded products and general merchandise. The brands are owned by the petitioner-company either by way of Brand Registration or Assignments. It has no manufacturing



facility of its own. The petitioner-company sources the goods mainly from China and shifts the goods directly to its customer at Africa and South America. The petitioner-company is continuing its business in Hong Kong since 1948.

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2.2. One of the group companies of the writ petitioner-company, viz., Watanmal (India) Private Limited (hereinafter referred to as "Watanmal India"), is engaged in the business of providing trade, management and logistic support services to the petitioner-company in terms of the agreement between the parties. Watanmal India was incorporated in the year 2003. The petitioner-company entered into an Administration Agreement dated 01.04.2005 with Watanmal India for providing non-exclusive back office services such as correspondence with the customers, maintenance of documents for exports, liaising with the inspection agency for obtaining import license, liaising with the shipping companies and reporting back to the petitioner-company. Under this Agreement, Watanmal India provided services to the petitioner-company in sourcing and supplying goods to its customers in Africa and South America. Under the Agreement, Watanmal India is paid on cost plus basis. It is relevant to note that the goods are neither purchased, sources, supplied, nor dealt with in India by the parties. The Transfer Pricing Officer (TP) of Watanmal India has passed an order dated 07.05.2014 and determined arm's length price of transaction between the two entities.

2.3. On 14.03.2013, the International Taxation Unit of the Income Tax Department carried out survey proceedings under Section 133A of the Act at the premises of Watanmal India and collected various documents and records including the Agreement for the relevant period. Relying on the documents found during the survey, the Assistant Director of Income Tax, International Taxation-II, Chennai, the first respondent herein, issued a notice under Section 148 of the Act dated 28.03.2013, the order impugned, initiating assessment proceedings under Section 147 of the Act for the assessment year 2006-07.

2.4. In reply to the said impugned notice, the petitioner-company filed a response dated 05.04.2014 stating that the petitioner has neither any business operations, nor any source of income taxable in India. Therefore, the impugned notice issued is beyond the jurisdiction under the Act and without authority of law.

2.5. The first respondent again issued a letter dated 27.05.2013 stating that the petitioner-company has a "business connection" in terms of Section 9 of the Act and Watanmal India is a permanent establishment in India which carried on the core/primary business activities and function for the



petitioner-company. Therefore, the business connection through Watanmal India constitutes the "Agency Permanent Establishment" for the petitioner-company in India and again asked the petitioner company to file a return of income for the assessment year 2006-07 under Section 148 of the Act. The jurisdictional TPO based on the reference made by the Assessing Officer, by order dated 07.05.2014 while making assessment for Watanmal India for the assessment year 2006-07, determined the arm's length price between the petitioner-company and Watanmal India, both being "associated enterprises" in terms of Section 92C of the Act. Based on the information provided by Watanmal India and comparable price determined, the TPO adopted profit margin of 21.94% in place of claim of 7.63% by Watanmal India. As a consequence, an upward adjustment to the tune of Rs.30,59,033/- was made to the sales/revenues of Watanmal India. In other words, arm's length price of the transaction between the petitioner-company and Watanmal India was determined and income in the hands of Watanmal India was increased. The order of the TPO as per the provisions of Section 92CA(3) of the Act is binding on the first respondent.

2.6.The Deputy Commissioner of Income Tax, International Taxation-2(2), Chennai, the second respondent herein, had issued show cause notice dated 05.03.2015 asking the petitioner-company to show cause as to why not the petitioner-company be declared to have business connection in India based on the reasons enumerated therein. In the reasons given in the notice, the second respondent has changed the reasons to assess the petitioner-company after four years, i.e., the petitioner-company having "Agency Permanent Establishment" (as taken in the notice issued under Section 147 of the Act) "Business Connection" in India under Section 9 of the Act. The petitioner-company has no other remedy other than to file a writ petition before this Court, as the second respondent will pass their re-assessment order any day and leading to heavy pecuniary demand on the petitioner-company. The actions initiated by the respondents under Section 148 of the IT Act provided cause for the petitioner to file the present writ petition.

3.COUNTER AFFIDAVIT FILED BY THE SECOND RESPONDENT:-

3.1.The second respondent filed a counter affidavit stating that the proceedings under Section 148 of the Act cannot be termed as a "reassessment", but only an assessment, inasmuch as the petitioner has not filed any return of income under the Act for the assessment year 2010-11 and the activities being carried on by the petitioner-company came to light pursuant to the survey conducted in the premises of Watanmal India under Section 133A of the Act on 14.03.2013. This is the first assessment being undertaken against the petitioner for the assessment year 2010-11 and therefore, the basic parameters for testing the



proceedings under Section 148 of the IT Act, viz., whether the proceedings under Section 148 amount to change of opinion, whether there has been a failure on the part of the assessee to make a true and full disclosure of all material facts etc., do not apply to the present case. The issues in proceedings against the petitioner involve a deep analysis of the facts as emanating from various agreements entered between the petitioner and Watanmal India, the statements put forth by the petitioner in its application for Advance Ruling before Inland Revenue Department, Hong Kong, the decision given by the said authority and bearing the same has in the context of Indian Laws and the Income Tax Act, 1961 in particular etc. These factual aspects and analysis ought not to be undertaken in a writ proceedings and hence, this Court may record the petitioner to statutory remedies available to them under the Act by dismissing the writ petition.

3.2.The counter affidavit further proceeds without prejudice to the above contentions stating that the Watanmal Group was established in 1908 by late Shri.Lalchand Watanmal with the scope to have its business activity as a general merchandise trading company. In 1948, a company named Watanmal Boolchand & Company Ltd. (hereinafter referred to as "WBC"), the petitioner was incorporated in Hong Kong. Till the year 2004, the principal activity of the company remained import and export of general merchandise. Subsequently, WBC forayed into the branded food market segment, a move that has been profitable for the group. A lion's share of the company's revenue today comes from this category. The group owns the brand names Gino, Jago, Pomo, Palmo and Forte. The company's turnover has ranged from USD 239Mn to USD 450Mn since the foray into the branded segment. It was at this juncture in 2003, the Watanmal Group started a company in India incorporated as Watanmal India. Vide an Administration Agreement dated 01.04.2004, which is reproduced by the petitioner in its affidavit, Watanmal India was mandated to carry out certain operations as follows, which provided for certain restrictions as well:-

"To correspond with the customers of the First Party (WBC) with regard to the prices, terms and conditions, delivery schedules, follow up for payment with the customers of the First Party (WBC) in respect of the products dealt by the First Party;

To maintain documents for export by the First Party (WBC) to their customers (including invoices, Bill of Lading, Packing List, Certificate of Origin and inspection certificates);



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To liaise with the inspection agencies for obtaining import licence and shipping lines for transport of the products;

To furnish necessary feedback to the First Party (WBC) regarding purchases, sales, collection, goods returned by customers, expenses incurred in relation to purchase and sale of the products, movement/off-take of the products of the First Party (WBC) in different territories on a fortnightly basis;

It is expressly understood between the parties that the Second Party, i.e., WIPL (or its employees) shall not represent itself as an agent/representative of the First Party; and

It is also expressly understood between the parties that the Second Party (or its employees) shall not on behalf of the First Party have any authority to conclude/alter any terms of any contract, receive payments, give guarantee or warranties, or by any act or deed pledge the credit or impose or attempt to impose any contractual or other obligations of the First Party."

3.3.The said initial Administration Agreement was subsequently revised/alterd vide a Trade Services Agreement dated 01.04.2005 to include the following functions that were restricted in the Administration Agreement, viz.,

(i) Negotiate on behalf of the First Party (WBC) with the customers on their orders for the products and conclude and sign the contracts and agreements as authorized agent for the First Party;

(ii) Source the products on most favourable terms from the world markets in accordance with the requirements and directions of the First Party and negotiate and conclude the agreements and contracts for the supply of the products for sale to the customers;

(iii) The other salient features of the revised Trade Service Agreement are as follows:-

(a) The Second Party, i.e., WIPL undertakes to the First Party that during the duration of this Agreement and a further one year after expiration or termination of this Agreement, the Second Party shall not whether directly or indirectly through association or partnership or cooperation in any form with any third party including taking shareholding in a company provide similar service to any other



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persons or companies trading in or selling products in corporation with the products to or in the African Market; and

(b) This Agreement constitutes the whole and complete agreement between the Parties and supersedes all prior discussions and agreements if any between the Parties with respect to the subject matter of this agreement.

3.4. These functions were omitted to be mentioned by the petitioner in their affidavit. It is also to be noted that based on the above agreement, the petitioner-company preferred an application for Advance Ruling before Inland Revenue Department, Hong Kong pleading as under:-

"WIP did in fact have the general authority to negotiate and conclude all sales and purchases contracts (and habitually did exercise that authority) of the branded food products on behalf of WBC. Kindly note that clause 2 of the Administrative Agreement (which states that WIP has no general authority to negotiate and conclude contracts on behalf of WBC) has been varied by conduct of the relevant parties.

(i) All the terms of the purchase and sales contracts re-branded food products were negotiated and concluded by WBC's related company, WIP, in India on behalf of WBC by email or fax;

(ii) WBC was not involved in any of the purchase and sales activities re-branded food products. The work done in Hong Kong was limited to providing banking facilities and maintaining bank accounts in Hong Kong;

(iii) The relevant products were shipped directly from the suppliers in France, USA, Italy, Malaysia, Ghana, Peru, China and Singapore directly to customers in West Africa, Central Africa and other parts of the world outside Hong Kong. No shipment of goods passed through Hong Kong; and

(iv) As all the sales and purchases were effected outside Hong Kong, we therefore opine that the relevant sales should be treated as offshore and the profits so derived should not be chargeable to Hong Kong profits tax.

3.5. WBC did not send its own staff overseas to negotiate and conclude sales and purchases. However, it is to be noted that there were two Directors of WBC viz., Mr. Sakraney, K.L. and



Mr. Ganapathy Viswanathan stationed in the India Office of Watanmal India. Staff of Watanmal India in India were involved in the negotiation and conclusion of sales and purchases on behalf of WBC, i.e., the petitioner with the overseas customers and suppliers. They acted under the authority of clause 3.1.3. and clause 3.1.8 of the Trade Services Agreement between WBC and Watanmal India under which Watanmal India was appointed as the fully accredited agent of WBC, the petitioner in the negotiation and conclusion of sales and purchase for WBC.

3.6. The petitioner's own submissions before the Inland Revenue Authority, Hong Kong state as under:-

"Please note that all except one of the directors of the company are stationed overseas. Kindly note that Mr. Sakraney N.L. (based in Hong Kong). This include Mr. K.L. Sarkraney (based in India), Mr. Sakraney P.K (based in USA), Mr. Sarkraney H.L (based in Singapore) and Mr. Ganapathy Viswanathan (based in India). There are no staff in Hong Kong responsible for negotiation and conclusion of sales or purchases of branded food products (See para 4 below) there are no staff in Hong Kong.

Kingly note that Mr. Sakraney N.L (based in Hong Kong) is only responsible for the negotiation and conclusion of sales or purchases of non-branded food products in Hong Kong, the profits of which are classified as on shore and offered to Hong Kong profits tax."

3.7. On analysis of the above, the following inferences are brought to the notice of this Court:-

- (a) Shri N.L. Sakraney based in Hong Kong was responsible for unbranded products;
- (b) Shri K.L. Sakraney and Ganapathy Viswanathan, i.e., significant component of management, sitting in India were responsible for the branded products division; and
- (c) Inland Revenue Authority, Hong Kong while arriving at the conclusion as mentioned by the petitioner in Point No.6 of the affidavit, "as the trading profits arising from the sale of branded food products to customers overseas are offshore in nature and are not chargeable to Hong Kong profits tax", has been cognizance of following facts and based its ruling on the following assumption:



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"In making this ruling, the Commissioner assumes that effective from 1 April 2005, all contracts for sales and purchases of branded food products of WBC were and would be placed with or placed by, negotiated by and concluded by WIPL, or the employees of WIPL, in India on behalf of WBC pursuant to the Trade Services Agreement dated 1 April 2005 in the manner as described in the Agreement".

3.8. During the course of survey operations, various evidences were collected which went on to prove that the sites of management and control of the petitioner is in India at Unit-4, 7th Floor, Crest Building, Ascendas IT Park, CSIR Road, Taramani, Chennai-600 113, i.e., the premise of Watanmal India, in association with all the functions related to the business activity of the petitioner, which are being carried out there and there exists a business connection as per Explanation 2(a) of Section 9(1) of the IT Act.

3.9. The petitioner vide objections filed in letter dated 24.11.2017, questioned the reopening of the assessment under Section 147 of the Act both legally and factually. Based on material evidences collected during the survey and sworn statement recorded, it is established that the sites of the management and control of the petitioner is in India, i.e., at the office of WIPL located at WIPL Unit-4, 7th Floor, Crest Building, Ascendas IT Park, CSIR Road, Taramani, Chennai-600 113 and all the functions relating to the business activity of the petitioner being carried out in India, in association with Watanmal India. Thus, there exists a business connection of the petitioner in India, as per Explanation 2 of Section 9(1) of the Act. Based on these aspects, reasons were formed and recorded and after obtaining approval of the Commissioner of Income Tax (International Taxation), notice under Section 148 was issued to the petitioner on 22.03.2017. The officer, who recorded reasons forming opinion of income escaping assessment, had issued the notice under Section 148 of the Act, after getting due approval from the appropriate authority. In response to the said notice, the petitioner filed its return of income. Subsequently, due to change of incumbency, notice under Section 143(2) read with Section 129 was issued on 01.09.2017. As the objections raised are contrary to the evidences as stated above, they are overruled and rejected and the same are elaborately discussed and communicated to the petitioner vide office letter dated 05.12.2017.

3.10. The notice under Section 148 of the IT Act was issued to treat the petitioner as a taxable entity in India as per Explanation 2 of Section 9(1) of the Act, i.e., by virtue of the



business connection in the form of Watanmal India, a dependent agent. The same had been the stand taken in the order dated 05.12.2017 and in the show cause notice dated 22.03.2017. The respondent has the jurisdiction by virtue of Section 9(1) of the IT Act, since the petitioner, a foreign company, has income accruing or arising in India as explained above.

4.THE ARGUMENTS ON BEHALF OF THE PETITIONER:-

4.1.The learned Senior Counsel appearing on behalf of the writ petitioner contended that it is a classic case where the respondents exercised their power without jurisdiction. The basic principles to be adhered to under the provisions of the IT Act had been violated. Admittedly, the petitioner-company is a non-resident and was not assessed any income under the territory of India. When there is no income derived within the territory of India, there is no question of filing any return of income, nor payment of tax would arise. The mixed questions of facts and law, necessarily to be considered by the respondents, are not considered in its right perspective and by adopting an erroneous interpretation of the provisions of the Act, impugned proceedings are initiated under Section 148 of the IT Act.

4.2.The learned Senior Counsel referred to Section 5 sub-Clause (2) of the Act and submitted that there is no income derived in India by the petitioner-company and therefore, the question of applicability of the Act would not arise at all. As far as Section 6(3)(ii) is concerned, the learned Senior Counsel contended that the said clause was incorporated by the Finance Act, 2016 with effect from 01.04.2017 and therefore, the said clause, that is, "it is place of effective management, in that year, is in India" would not be applicable for the purpose of instituting assessment proceedings under Section 148 of the IT Act. Retrospective application of the said clause would be bad in law and therefore, the impugned proceedings are liable to be set aside. Reiterating the same, it is contended that when there is no income accrued or derived in India, the question of assessment would not arise at all. Thus, the petitioner cannot be construed as a person liable to pay tax under the Act and thus, the initiation of proceedings are misconceived and based on the erroneous interpretation of the provisions of the Act.

4.3.The learned Senior Counsel further referring to Section 9 of the Act contended that when it is established that the petitioner has not accrued any income within the territory of India, then the "income deemed to accrue or arise in India" cannot be applied as far as the petitioner-company is concerned.

4.4.The learned Senior Counsel solicited the attention of this Court with reference to the ingredients under Section 147 of the Act by contending that the Assessing Officer must have



'reason to believe' that any income chargeable to tax has escaped assessment. In the present case, when there is no income, there is no escapement; and when there is no return, there is no assessment. Thus, the basis on which the proceedings are initiated under Section 147 of the Act by the respondents are absolutely untenable and beyond the scope of the provisions of the Act. No assessment order was issued under Section 143(3), nor under Section 147 of the IT Act. In the absence of any such assessment order, opening of assessment or reassessment is impermissible under Section 147 of the Act. Thus, the notice issued under Section 148 of the IT Act is in violation of the ingredients stipulated under Section 147 of the IT Act.

4.5. It is further contended that absolutely there is no business activity in India, there is no manufacturing unit, not even a single product is sold within the territory of India by the petitioner-company. Thus, the company is only providing logistic support to the company at Hong Kong and goods are supplied in African Countries and South America and in other countries. Therefore, the question of invoking the provisions of the Act as applicable in India does not arise at all. Though the company is functioning from the year 1948, there is no business activity in India even now. Thus, the respondents cannot act based on some fictions which all are erroneous facts and circumstances and thus, the very initiation itself is in violation of the provisions of the Act and the provision would not be applicable as far as the petitioner-company is concerned.

4.6. It is contended that under Section 151 of the IT Act, sanction for issue of notice is to be obtained and the respondents have not produced any document to establish that the sanction was obtained from the competent authorities as contemplated under Section 151 of the Act. Reiterating the grounds raised, the learned Senior Counsel relied on the circular issued by the Central Board of Direct Taxes (CBDT) in its Circular No.1/2004 dated 02.01.2004. Relying on the said circular, it is contended that "in some cases the entire or major portion of the Revenue generating activities of the non-resident enterprise is performed by the BPO (Business Process Outsourcing) unit in India. The extent to which global profits of a non-resident enterprise is to be attributed to the activities of the BPO unit in India in these various circumstances, has been under consideration in the Board. The manner and extent of such attribution of profits will evidently depend on the facts of each case and the nature of services rendered by the BPO unit and the same has to be determined in accordance with the provisions of the treaty applicable and the domestic law. The Board is, however, of the view that in a case where the non-resident, carrying on manufacture and sale of



goods or merchandise or provision of services outside India, outsources some of its incidental activities, viz., conclusion of contracts and procurement of orders (which enable the core activities to be carried on aboard) to an I.T-enabled entity in India, which constitutes a permanent establishment of the non-resident, then the insignificant profit which is difficult to determine and attributable to the conclusion of such contracts or procurement of such orders can be considered to be embedded in the income of the permanent establishment taxable in India, if the price charged in respect of the above services by the permanent establishment is an arm's length/fair market price. In such a situation, therefore, no income shall separately accrue or arise or be deemed to accrue or arise to the non-resident principal in India.

4.7. Relying on the above circular issued by the CBDT, the learned Senior Counsel contended that the said circular by the Board is binding all the authorities and the circular is to be followed by all the authorities under Section 119 of the IT Act. Thus, it is mandatory on the part of the respondents to look into the instructions given in the circular and accordingly, act with reference to the facts.

4.8. The learned Senior Counsel for the petitioner relied on the judgment of the four Judges Bench of the Hon'ble Supreme Court in the case of Raza Textiles Ltd. vs. Income Tax Officer, Rampur reported in (1973) 1 SCC 633. The relevant paragraph 3 is extracted hereunder:-

"3. Aggrieved by that order the appellant went up in appeal to the Appellate Assistant Commissioner. The Appellate Assistant Commissioner rejected the appeal on the ground that the same was not maintainable. He took the view that an appeal lay only under Section 30 (1A). But before such an appeal can be entertained the appellant must satisfy two conditions, namely, (1) he had deducted the tax due from the non-resident in accordance with the provisions of Sub-section 3(B) and (2) that he had paid the sum deducted to the Government. The appellant having not complied with those two conditions, the Appellate Assistant Commissioner held that the appeal was incompetent. The order of the Appellate Assistant Commissioner was confirmed by the Tribunal. Thereafter the appellant moved the High Court under Article 226 of the Constitution. That application came up before a single Judge. The single Judge after going into the matter in detail came to the



conclusion that M/s. Nathirmal and Sons is not a non-resident firm and that being so the appellant was not required to act under Section 18(3B). He accordingly, set aside the order impugned. The revenue went up in appeal against the order of the learned single Judge to the Appellate Bench. That Bench allowed the appeal with the observations, "In the present case the question before the Income-tax Officer, Rampur, was whether the firm Nathirmal and Sons was non-resident or not. There was material before him on this question. He had jurisdiction to decide the question either way. It cannot be said that the officer assumed jurisdiction by wrong decision on this question of residence". The Appellate Bench appears to have been under the impression that the Income-tax Officer was the sole judge of the fact whether the firm in question was resident or non-resident. This conclusion, in our opinion, is wholly wrong. No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari. If the High Court comes to the conclusion, as the learned single Judge has done in this case, that the Income-tax Officer had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the assessee was entitled for the writ of certiorari prayed for by him. It is incomprehensible to think that a quasi-judicial authority like the Income-tax Officer can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen. In our opinion the Appellate Bench is wholly wrong in opining that the Income-tax Officer can "decide either way".

4.9. Further, the learned Senior Counsel is of an opinion that in the event of not considering these factors, it would affect the NRI companies working in India and the repercussion would be wider. Thus, the writ petition is to be allowed.

5. THE ARGUMENTS ADVANCED ON BEHALF OF THE RESPONDENTS:-

5.1. The learned Senior Standing Counsel strenuously objected the contentions raised on behalf of the petitioner by stating that the writ petitions are not maintainable. It is not as if the respondents have initiated proceedings without any basis



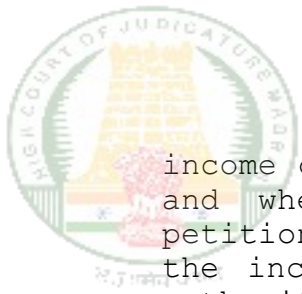
under Section 147 of the Act and issued notice under Section 148 of the Act. There are abundant materials to establish that the entire business activities of the petitioner-company are happening in India and therefore, they are amenable to the provisions of the I.T. Act and thus, the initiation of assessment proceedings under Section 148 is in order and there is no infirmity as such.

5.2.Relying on Explanation 2(a) to Section 147, it is contended that, where no return of income has been filed by the assessee although his total income or the total income of any other person in respect of which he is assessable under the Act during the previous year exceeded the maximum amount, which is not chargeable to income tax is a ground for initiation of proceedings under Section 147.

5.3.In the present case, admittedly, the petitioner has not filed any return of income and there was no assessment order. The petitioner has not subjected for assessment. Thus, the case would fall under the above provision and on confiscation of material evidences, the authorities competent instituted action for assessment under Section 147 of the IT Act.

5.4.With reference to the contentions raised on behalf of the petitioner that in the absence of any assessment order, there is no question of reopening of assessment would arise under Section 147, the learned Senior Standing Counsel answered by stating that Section 147 unambiguously stipulates that "assess or reassess in respect of any income chargeable to tax has escaped assessment for any assessment year". Thus, a fresh assessment in the absence of the assessee submitting return of income is possible. Thus, the powers conferred is exercised in the present case for assessment in view of the fact that there is a reason to believe that the income chargeable to tax has escaped assessment on collection of materials from the petitioner-company.

5.5.With reference to the arguments advanced by the petitioner regarding Section 5(2), Section 6(3)(ii) and Section 9, the learned Senior Standing Counsel replied by stating that Section 9 would be the answer for all such arguments. Section 9 (1)(i) enumerates that "all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property India, or through or from any asset or source of income in India or through the transfer of a capital asset situate in India". The petitioner-company squarely falls under the categories stipulated in Section 9(1)(i) and thus, there is no impediment for the Income Tax Authorities for initiating action under Section 147 and issuing notice under Section 148. When Section 9 provides

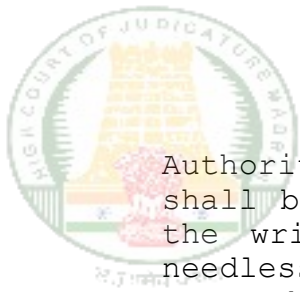


income deemed to accrue or arise in India directly or indirectly and when the respondents have obtained materials from the petitioner-company, which constitute a reason to believe that the income chargeable to tax has escaped assessment, then the authorities competent had rightly invoked the provisions of Section 147 and issued notice under Section 148 enabling the petitioner to submit their returns and further objections, if any, for proceeding with the matter.

5.6.The learned Senior Standing Counsel raised the question of maintainability of the writ petition on the ground that the employees and the management officials of the writ petitioner-company have given statements, and material evidences were collected by the Income Tax Authorities and when the authorities formed an opinion that there is a reason to believe that the income chargeable to tax has escaped assessment, then the petitioner has to submit their documents, evidences and objections including the reliance placed on by them with reference to the circular issued by the CBDT to the Assessing Officer, who in turn, should proceed with the enquiry by affording opportunity to the petitioner. Thus, the initiation of 147 proceedings is not conclusive and it is only pending and thus, the writ petition is premature and liable to be dismissed.

5.7.With reference to the grounds raised by the learned Senior Counsel on behalf of the petitioner that the sanction as required under Section 151 of the IT Act has not been obtained, the learned Senior Standing Counsel produced copy of the sanctioning letter issued by the competent authorities. It is contended that prior to 2015, the Joint Commissioner is competent to grant sanction, as far as the assessment under Section 147 is concerned. As far as the reassessment is concerned, it is to be given by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner. However, after the amendment in the year 2015, all such sanctions are to be given by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner. In the present case, for the relevant assessment year prior to 2015, i.e., 2006-07, the Joint Commissioner has granted sanction, which is in accordance with the provisions of Section 151 existing prior to the amendment made in the year 2015. With reference to the assessments after 2015, the Principal Commissioner has granted sanction and therefore, the requirement of Section 151 has been fully complied with.

5.8.The learned Senior Standing Counsel made a submission that this Court passed an interim order dated 18.12.2017, directing the petitioner to participate in the proceedings and the respondent was directed to proceed with the matter and before the writ petitions are heard for disposal, if the



Authorities are able to complete the proceedings, then an order shall be passed and kept in a sealed cover till the disposal of the writ petitions. The Court, further, ordered that it is needless to state that the petitioner should cooperate with the respondent to complete the proceedings with regard to the impugned notice. Pursuant to the interim orders passed, the respondents proceeded with the assessment and assessment orders are passed and as directed by the High Court, the orders are kept in a sealed cover.

5.9. With reference to the judgment of the Hon'ble Supreme Court in Raza Textiles Ltd., (supra), the learned Senior standing Counsel submitted that the said judgment is not applicable with reference to the facts and circumstances of the case. In the present writ petition, admittedly, the petitioner-company has not filed any return of income, nor an assessment order is passed by the competent authority. However, in the case before the Hon'ble Supreme Court, it is an appellate order and the appeal filed by the assessee was rejected by the Appellate Assistant Commissioner on the ground that the same was not maintainable. Thus, the facts are not comparable at all. Thus, the ratio laid down in the case of Raza Textiles Ltd., (supra) would not be applicable with reference to the present writ petition.

5.10. The learned Senior Standing Counsel reiterated that as per Section 9(1)(i), the petitioner-company is deriving income indirectly in India and buying and selling of product was facilitated by the Indian Company and therefore, the income accrued in India is taxable and they are falling within the ambit of the provisions of the Act and thus, the initiation of proceedings are in consonance with the provisions of law and further, the petitioner had already participated in the proceedings and the assessment orders are already passed by the competent authority and kept in a sealed cover and therefore, the respondents may be permitted to open the sealed cover and issue the assessment order to the petitioner-company, who in turn, if aggrieved, may prefer appeal as contemplated under the provisions of the Act.

ANALYSIS:-

6. Considering the pleadings and arguments, let us now consider Sections 5(2)(a) and 5(2)(b) of the Act. The said provision contemplates that subject to the provisions of the Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which - (a) is received or is deemed to be received in India in such year by or on behalf of such person; or (b) accrues or arises or is deemed to accrue or arise to him in India during such year. Finding arrived by the respondents/Department in their proceedings reveals that, the income accrues or deemed to



accrue or arise in India. When such a finding is arrived based on certain materials collected from the premises of the petitioner company, then the respondents must be allowed to proceed with the assessment in the manner known to law. In other words, the disputed facts in this regard deserves to be adjudicated.

6.1. Section 6 contemplates "Residence in India" and Section 6(3)(ii) contemplates "its place of effective management, in that year, is in India". However, the said clause was substituted by the Finance Act 2016 with effect from 01.04.2017. Prior to the said amendment, the clause existed was that "during that year, the control and management of its affairs is situated wholly in India". The contention of the petitioner is that, prior to 01.04.2017, the control and management of its affairs is situated wholly in India was not applicable, as far as the petitioner-company is concerned and after 01.04.2017 alone, the petitioner would come under the provisions of Section 6(3). Thus, the action initiated prior to 01.04.2017 by retrospectively applying the amended clause would be bad in law and untenable. However, the respondents contended the evidences collected reveals that the petitioner company falls within the meaning of Section 6, even prior to the amendment on 01.04.2017. With reference to the findings of the respondents in their proceedings, certain incriminating materials were collected and statements were obtained from the officials of the petitioner company and thereafter, the respondents formed an opinion that the income accrues or arises or is deemed to accrue or arise in India. Thus, further enquiry and scrutiny is inevitable even with reference to the pre-amendment provision of Section 6(3)(ii) that "during that year, the control and Management of its affairs situated wholly in India" and has stated it is mixed question of fact and law, which all are to be considered during the assessment by the competent authority.

6.2. Section 9 denotes income deemed to accrue or arise in India and Section 9(1)(i) reads as follows:-

"Section 9(1)(i)

"(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India or through the transfer of a capital asset situate in India."

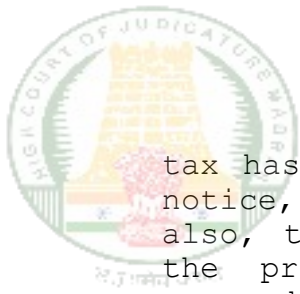
6.3. The above ingredients of Section 9 would reflect that all income accruing or arising whether directly or indirectly through or any business connection in India or through or from any property in India is to be construed as income deemed to



6.4. Mindful reading of Section 147 would reveal that "If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned.

6.6. The amended Section 147 which stipulates "has reason to believe" is also wider enough to cover the materials or informations made available to the Assessing Officer for assessment or for reassessment. Thus, it is the subjective satisfaction of the Assessing Officer and such subjective satisfaction must be based on certain acceptable reasons. The very legislative intention of the provision is to ensure that the competent authorities did not exceed their jurisdiction. However, the tax liable for assessment is also not escaped and in order to have a balancing approach, the provision confers power to the Assessing Officer to assess or reassess the income escaped assessment and for invoking the provision, such Assessing Officer is bound to assign reasons.

6.7 Section 147 contemplates that the Assessing Officer may assess or reassess. Thus, Section 147 provides the scope for assessment and for reassessment. Assessment would arise in cases, where no return of income is filed. Reassessment would arise, if the assessment order is passed under the provisions of the Income Tax Act. Even in such cases, the Assessing Officer is empowered to invoke Section 147, if any other income chargeable to tax, which has escaped assessment. Thus, even after initiation of proceedings under Section 147 of the Act, if the Assessing Officer identified that any other income chargeable to



tax has escaped assessment, and such informations, comes to his notice, subsequently during the course of the proceedings, then also, the authority is empowered to exercise the powers. Thus, the provision contemplates that during the course of the proceedings, if any other information is identified regarding the tax, which has escaped assessment, then also, he can recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned. The language employed in Section 147 of the Income Tax Act would provide not only wider meaning and power to the competent authority, but the provision adopts a holistic approach, so as to confer powers to the Assessing Officer to cull out the truth with reference to certain informations, documents, evidences, which were either provided by the assessee or not provided by the assessee or not considered during the original assessment. Various complex circumstances prevailing can be fit in with the provision, in view of the wider concept contemplated under Section 147 of the Act.

6.8. The first proviso to Section 147 would not be applicable with reference to the facts of the case on hand. The proviso to Section 147 would be applicable where an assessment under Section 143(3) or the Section has been made for the relevant assessment year. In the present case, admittedly, no return of income was filed by the petitioner and no assessment order has been passed by the competent authority. Thus, the said proviso clause would not be applicable at all.

6.9. However, Explanation 2 to Section 147(a) would be applicable with reference to the facts of the present case. Explanation 2 to Section 147(a) enumerates that "for the purposes of this Section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, viz.,

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;"

6.10. In the backdrop of these provisions, this Court has to consider whether the initiation of proceedings under Section 147 of the Act and the consequential notice issued under Section 148 are in consonance with the provisions of the Act or not.

7. The facts and circumstances are required to be considered for the purpose of arriving a decision, whether any income can be construed as deemed to accrue or arise in India. Only, if it is established by the Department that the income deemed to accrue or arise in India, they are empowered to invoke the



provisions of Section 147 for assessment. In the event of establishing that income deemed to accrue or arise in India with reference to the facts, then such a person is the resident of India, as there was an income deemed to accrue or arise in India. Therefore, Section 9 is to be considered at the first instance to form an opinion, whether there is any income deemed to accrue or arise in India, as far as the petitioner-company is concerned.

8. Let us consider the actions initiated as well as the reasons furnished for initiation of action under Section 147 of the Act. Notice under Section 148 was issued in proceedings dated 28.03.2013 stating that the authority has reasons to believe that the income chargeable to tax for the assessment year 2006-07 has escaped assessment within the meaning of Section 147 of the Act. It is established by the respondents that necessary administrative sanctions were granted by the competent authorities as contemplated under Section 151 of the Act. Thus, the contentions raised by the petitioner that there was no sanctioning by the competent authority is incorrect. The respondents produced documents to establish that necessary sanction was accorded by the competent authority of the Income Tax Department.

9. The petitioner-company vide their reply dated 05.04.2013, has stated that the petitioner-company incorporated outside India under the laws of Hong Kong and they neither have any business operation at their own, nor any source of income taxable in India. Thus, the notices issued to the petitioner-company are beyond the jurisdiction and without any authority of law. In response to the assessee's reply to the notice issued under Section 148 of the IT Act, the respondents in proceedings dated 27.05.2013 provided reasons with reference to Section 9(1) of the IT Act holding that income deemed to accrue or arise in India is established in the case of the petitioner-company. In the said proceedings dated 27.05.2013, the respondents have stated that Watanmal India, the Indian company, which is the associated enterprise of the petitioner-company, is working for the petitioner and on behalf of the petitioner and constitutes the petitioner's agency permanent establishment in India. The letter further states that the petitioner had been inappropriately advised about the provisions of the IT Act and its applicability and the principles of Cross Border Taxation.

10. In this context, the respondents relied upon Section 9(1) of the Act and arrived a conclusion that the petitioner is having business operations in India and further, the notice under Section 148 of the Act was issued after examining the facts in great detail and after due application of mind.



Accordingly, the petitioner-company was obligated to file the return of income as requested in the notices issued.

11. Reference to the TPO under Section 92CA of the IT Act was issued in proceedings dated 06.08.2013, who in turn, requested the petitioner to send the copies of annual reports and also the computation of total income.

12. In proceedings dated 21.02.2014, reasons for reopening of assessment have been provided. The reasons for reopening of assessment provided by the respondent-Department read as under:-

"(i) It is noticed that depreciation claimed @ 15% in respect of 'improvement to lease hold property'. The allowable depreciation for improvement of lease hold property is only 10%. Hence the excess depreciation claimed under improvement to lease hold property for Rs.1,08,825/- need to be disallowed and added with the total income;

(ii) As per Form 3CD filed along with the return of income, it is seen that as per Column 27(a), it has been clearly mentioned that the assessee has not complied with the provisions of Chapter XVII B regarding deduction of TDS and also observed that tax has not been deducted on advertisement for Rs.60,000/- which needs to be disallowed u/s.40(1)(ia) of the Income-tax Act;

(iii) Further, a survey under Section 133A was conducted on 14.03.2013 so as to verify the transactions with reference to its Associate Enterprise, M/s.Watanmal Boolchand and Company Ltd. (WBC), Hong Kong. M/s.WBC and its international transaction and other issues like TPO adjustments, if any. Survey revealed that existence of various trade service agreements between M/s.WIPL and M/s.WBC depicting the following kinds of services:

Handling enquiries from the customers from time to time received for the products.

Corresponding with the customers with regard to the prices, terms and conditions, delivery schedules and follow up for payment.

Negotiating on behalf of WBC with the customers on their orders for the products and conclude and sign the contracts and agreements as authorised agent of WBC.



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Keeping records of the transactions handled by WIPL for WBC including filing and keeping invoices, bills of lading, packing lists, certificates of origin and inspection certificates and payment records.

Liaisoning with and organise booking with shipping lines for shipment and inland transportation of the products.

Providing written reports to WBC on transactions concluded and enquiries and complaints received and handled by WIPL including by not limited to sales, collections, goods returned by customers, expenses incurred by WIPL in the transactions or matters handled, shipment and movement of the products in different territories.

Sourcing the products on most favourable terms from the world markets and negotiate and concluding the agreements and contracts for the supply of the products for sale to the customers.

As seen from the above, the Indian Company does major and critical functions and developed the supply chain management with reference to both the suppliers and customers. The Indian company - M/s.Watanmal India Pvt. Ltd., even negotiates the price by its highly skilled employees. The Indian Company provides Trade Services to the group companies which have to be compensated certainly by higher amount. During the course of survey, it is learnt that the AE, i.e., M/s.Watanmal Boolchand and Company Ltd., (WBC), Hong Kong is not having technical capacity and manpower to assist the assessee in this regard.

The AE, i.e., M/s.Watanmal Boolchand and Company Ltd., (WBC), Hong Kong is making voluminous sales of Rs.996,34,75,470/- (AY 2006-07) on account of trade services rendered by this Indian Company and the gross receipts shown by this Indian Company on this voluminous trade services rendered as high as of Rs.996,34,75,470/- is very low at Rs.2,30,00,497/-. This is apparently negligible on prudent commercial business lines to render such high services.

This clearly clearly shows that the assessee company is receiving only very meagre amount, i.e.,

Rs.2,30,00,497/-

Rs.996,34,75,470/- = 0.2%



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as fees for its trade services. This is very minimal and difficult to carry on the business for any prudent business concern. From this, it appears that M/s.Watanmal India Pvt. Ltd., has understood the income by not disclosing the true/real income for A.Y.2006-07 on its trade services with its AE, i.e., M/s.Watanmal Boolchand and Company Ltd., (WBC), Hong Kong.

In fact, the service income of Rs.2,30,00,497/- earned for A.Y.2006-07 does not commensurate with the functions and the level of human resources employed. The mark up must be on the basis of sales turnover of AE, i.e., Watanmal Boolchand and Company Ltd., (WBC), Hong Kong. In the case of Li Fund India vs. ACIT, (ITA No.5156/Del/2010), the ITAT, Delhi, had told that for the sourcing/purchasing/critical services rendered by the Indian Company, the cost plus 5% mark up is definitely not on the arms length. In that case, the Hon'ble ITAT had also held that the Indian Company should be compensated by mark up on the FOB value of the goods sources through the assessee.

Even if 3% of the sales turnover is attributed to the Indian Company (i.e., if the Watanmal Boolchand and Company Ltd., (WBC), Hong Kong, has compensated the Indian Company on 3% of its sales), the Indian assessee company should have earned an income of Rs.29,89,04,264/-. However, it has compensated by only Rs.2,30,00,497/- and accordingly income has escaped to the minimum extent of Rs.27,59,03,767/-."

13.The petitioner-company has relied on the proceedings of the TPO and stated that Watanmal India provides assistance to Watanmal Group for the movement of goods from the suppliers in Malaysia, Singapore, USA, China to the AE end customers who are primarily located in Africa. Accordingly, Watanmal India does the following functions:-

- (i) Sourcing Assistance;
- (ii) Majestic Support;
- (iii) Sale Support for Oil Goods; and
- (iv) Accounting Support.

14.Relying on the said contentions, the petitioner contended that they have no business activities in India. However, the reasons stated for reopening of assessment provide various other components relatable to the business activities and therefore, this Court cannot enter into such disputed controversies which



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all are to be adjudicated with reference to the documents and evidences in entirety. It may not be possible to express any opinion with reference to such factual controversies in a writ proceedings. Even in reply dated 02.02.2015, in response to the notice issued by the authorities under Section 143(2) read with Section 129 dated 05.12.2014, the petitioner has stated that WBC is not an assessable entity at all in India and the Department is not competent to initiate assessment proceedings against it under the Act. It is relevant to consider the show cause notice issued by the respondents in proceedings dated 05.03.2015. The show cause notice issued pursuant to the reopening of assessment and the notice under Section 148 reveal that in 2002, the group was reorganized and two holding companies were created in British Virgin Island, viz., Prime Target Development Inc and Portilio Holdings Corp. The shares of WBC were held by Prime Target Development Inc. In 2003, the Watanmal Group started a company in India in the name of Watanmal India with its shares held by Portilio Holdings Corp. Thus, WBC and Watanmal India became associated enterprises. The show cause notice contemplates that the integral functions like board meetings, managing the sales and marketing team, managing the procurement team, administering the logistics of food products to various countries, appointment of employees, determination of salary, etc., were being carried out on behalf of Watanmal Group in India from the business premises of Watanmal India. In other words, India was the place of effective management of all the business affairs of WBC, Hongkong.

15. It is further contended that in order to confirm these findings and to check the veracity of accounts and volume of business activity conducted in India by WBC, a survey under Section 133A of the Act was conducted on 14.03.2013 at the business premises of Watanmal India situated at Unit IV, 7th Floor, Crest Building, Ascend IT Park, Taramani, Chennai where the business activities of WBC are being undertaken. The operation resulted in the discovery of books of accounts and other documents from the business premises of Watanmal India, which have been impounded as per Annexure ANN/GE/WIPL/LS/IMP with impounding order dated 15.03.2013 and hard disks of the servers, computers and laptop of key personnel and executives responsible for conduct of business of Watanmal Group, which have been impounded as per Annexure ANN/GE/WIPL/Hard Disk/IMP with impounding order dated 16.03.2013, which confirmed the allegations that the business activities of the foreign/non-resident company WBC was being carried on from the premises of Watanmal India at Chennai. Statements on oath under Section 133A(3) of the Act were recorded from various executives/persons responsible for conduct of business of Watanmal Group who were present in the premises of Watanmal India at the time of survey operation. The evidences gathered from the premises of Watanmal



India along with the statements recorded clearly establish that all the business activities of WBC including negotiation and conclusion of contracts, fixation of price for purchase and sale, negotiation and conclusion of LCs, logistics maintenance and supervision, marketing strategies are being undertaken by the employees of Watanmal India on behalf of WBC. It establishes the presence of the foreign/non-resident company in India through the business connection with Watanmal India, which was in fact found to be its associated enterprises, India was the place of effective management of all business affairs of WBC, Honk Kong.

16. It is relevant to consider the detailed analysis of the crucial evidences found during the course of survey proceedings by the respondent/Department, which reads as follows:-

"3.A detailed analysis of the crucial evidences found during the course of survey proceedings is as follows:-

I. the administration agreement between WBC and WIPL dated 01.04.2004 (Annexure I) impounded vide ANN/GE/WIPL/LS/IMP-21 pg nos 1-8 provides for the following services to be rendered by WIPL viz.

- ♦ to correspond with the customers of the FIRST PARTY (WBC) with regard to the prices, terms and conditions, delivery schedules, follow up for payment with the customers of the FIRST PARTY (WBC) in respect of the products dealt by the FIRST PARTY;
- ♦ To maintain documents for export by the FIRST PARTY (WBC) to their customers (including invoices, Bill of Lading, Packing List, Certificate of Origin and inspection certificates);
- ♦ To liaise with the inspection agencies for obtaining import licence and shipping lines for transport of the products;
- ♦ To furnish necessary feedback to the First Party (WBC) regarding purchases, sales, collection, goods returned by customers, expenses incurred in relation to purchase and sale of the products, movement/off-take of the products of the First Party (WBC) in different territories on a fortnightly basis;

II. Subsequently a Trade Service Agreement between WBC and WIPL dated 01.04.2005 (ANNEXURE II) impounded vide ANN/GE/WIPL/LS/IMP-11 pg nos 14-22 was signed, which provides for an elaborate range of services to be performed by WIPL as follows:

The second party shall provide the following



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services to the First Party from India;

- ◆ Handle enquiries from the customers from time to time received for the products;
- ◆ correspond with the customers with regard to the prices, terms and conditions delivery schedules and follow up for payment;
- ◆ Negotiate on behalf of the First Party with the customers on their orders for the products and conclude and sign the contracts and agreements as authorized agent for the First Party;
- ◆ Keeping records of the transactions handled by the second party for the first party including filing and keeping invoices, bills of lading, packing lists, certificates of origin and inspection certificates and payment records.
- ◆ Liaise with inspection agencies and obtain import licences and where applicable and necessary, handle customs clearance matters for the shipment and delivery of the products in different customers.
- ◆ Liaise with and organise booking with shipping lines for shipment and inland transportation of the products.
- ◆ Provide written reports to the first party on transactions concluded and enquiries and complaints received and handled by the second party including by not limited to sales, collections, goods returned by customers, expenses incurred by the second party in the transactions or matters handled, shipment and movement of the products in different territories.
- ◆ Source the products on most favourable terms from the world markets in accordance with the requirements and directions of the First Party and negotiate and conclude the agreements and contracts for the supply of the products for sale to the customers;
- ◆ Provide such services and support as may be required from time to time by the first party relating to the trade on the products.

III. With this agreement WBC approaches the Commissioner, Inland Revenue Department, Hong Kong on 22.09.2005 with an application for an



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advance ruling (ANNEXURE III), for not treating the trading profits on sale of branded food products so derived by the company as not chargeable to Hong Kong profits tax and the reasons for filing of application annexed to such application are as follows:-

(i) All the terms of the purchase and sales contracts re branded food products were negotiated and concluded by WBC's related company, WIP, in India on behalf of WBC by email or fax.

(ii) WBC was not involved in any of the purchase and sales activities re branded food products. The work done in Hong Kong was limited to providing banking facilities and maintaining bank accounts in Hongkong.

(ii) WBC was not involved in any of the purchase and sales activities re-branded food products. The work done in Hong Kong was limited to providing banking facilities and maintaining bank accounts in Hong Kong;

(iii) The relevant products were shipped directly from the suppliers in France, USA, Italy, Malaysia, Ghana, Peru, China and Singapore directly to customers in West Africa, Central Africa and other parts of the world outside Hong Kong. No shipment of goods passed through Hong Kong; and

(iv) As all the sales and purchases were effected outside Hong Kong, we therefore opine that the relevant sales should be treated as offshore and the profits so derived should not be chargeable to Hong Kong profits tax.

IV.WBC receives a ruling u/s 88A of the Inland Revenue Ordinance, Hongkong from Inland revenue Department on 05.06.2006 (Annexure to Sworn statement of Shri Easwaran Sundaresan, CEO of the Group) (ANNEXURE IV) as follows:

(a) WBC is a company incorporated in Hong Kong. Its principal activities are the import and export of general merchandise.

(b) Watanmal (India) Private Limited ("WIP") is a company incorporated in India. WBC and WIP have common shareholders.

(c) By a Trade Service Agreement dated on 1 April 2005, WBC engaged WIP as authorized agent to negotiate and conclude all the purchase and sale contracts of branded food products on behalf of WBC.

(d) When WIP received an order from overseas



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customers, addressed either to WBC or to the Watanmal Group, staff of WIP in India would negotiate and conclude the purchase price with the suppliers by email or fax. WIP in India would then place a purchase order on behalf of WBC with the suppliers by email or fax. Formal purchase contract was prepared for every order in India by staff of WIP who would then send the same to suppliers by email or fax.

(3) Overseas customers would place with staff of WIP in India by e-mail or fax their purchase orders to WBC. Staff of WIP would then negotiate and conclude the prices and quantities of branded food products with WBC's customers by email or fax. Staff of WIP in India would also prepare sale contracts under letterhead of WBC.

(f) Shipment of goods would not pass through Hong Kong. Inventory would not be maintained in Hong Kong to fulfil orders of branded food products.

(g) WBC maintained banking facilities in Hong Kong and paid the suppliers by telegraphic transfer, letter of credit ("L/C") document against acceptance ("D/A") or document against payment ("D/P"). There was no negotiation of L/C with the suppliers carried out in Hong Kong.

(h) Customers settled their accounts by D/P, D/A or telegraphic transfer. There was no negotiation of L/C with the customers carried out in Hong Kong."

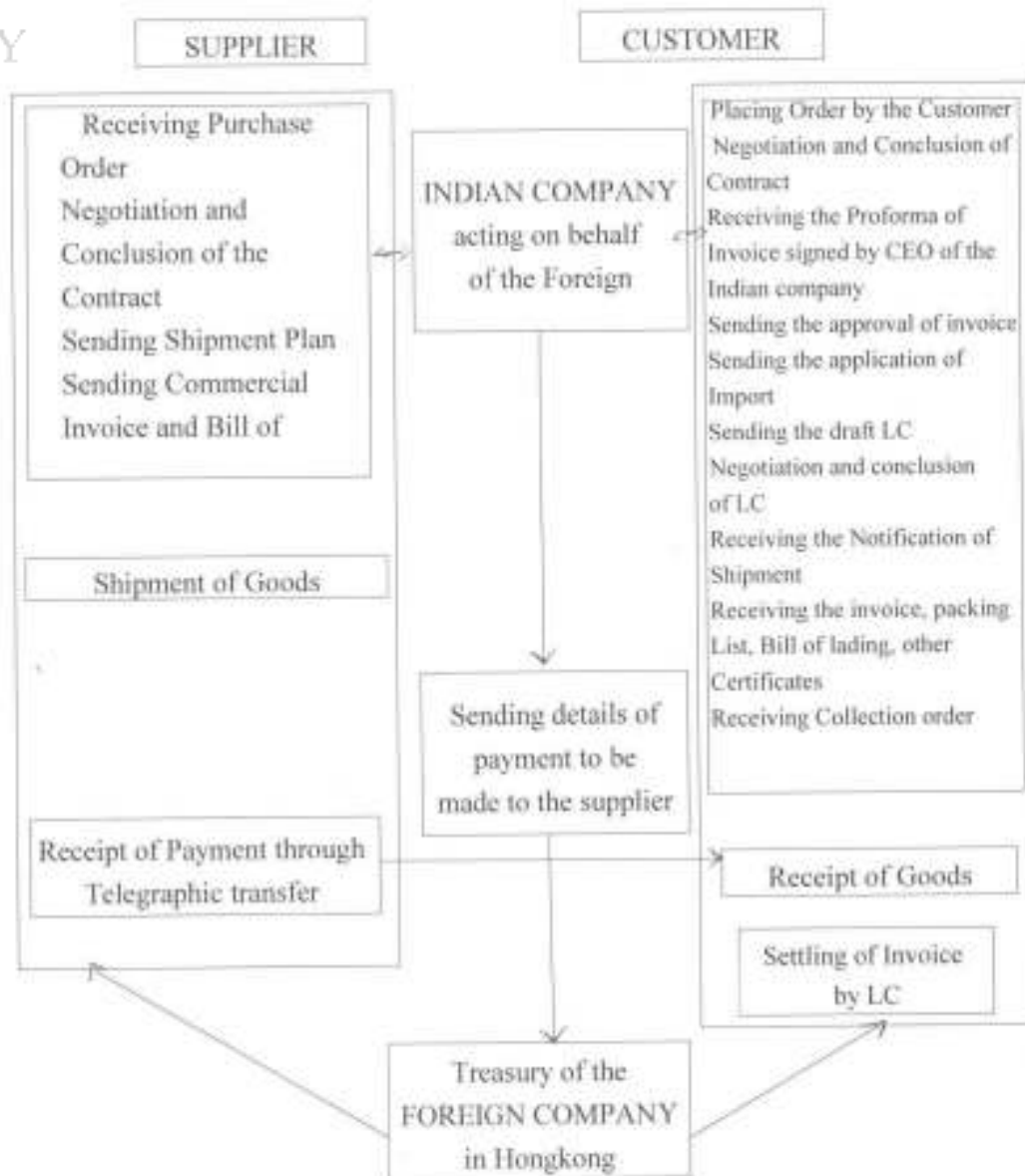
17. Based on the evidences collected and the detailed analysis made with reference to the crucial evidences, the Commissioner made an assumption stating that effective from 1st April, 2005, all contracts for sales and purchases of branded food products of WBC were and would be placed with or placed by, negotiated by and concluded by Watanmal India, or the employees of Watanmal India in India on behalf of WBC pursuant to the Trade Services Agreement dated 01.04.2005 in the manner as described in the agreement. The ruling relied on in this regard is that the trading profits arising from the sale of branded food products to customers overseas are offshore in nature and are not chargeable to Hong Kong profits tax. The period for which the ruling applies has also been considered by the authorities.

18. Pertinently, the modus operandi of WBC and Watanmal India are explained by Shri. Easwaran Sundaresan, the CEO of the Group. The said details were also considered by the authorities competent.



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19. The analysis of the activities carried out by Watanmal India on behalf of WBC in India is detailed as under in a chart:-



20. Based on the modus operandi, the authorities made a finding that for all purposes under Section 9 of the Act, the income shall be deemed to accrue or arise in India. Once the income accrued or arose in India, then they became amenable to the provisions of the Act and therefore, the respondents are empowered to invoke the provisions of Section 147 to assess the income, as the petitioner had not submitted any return of income.

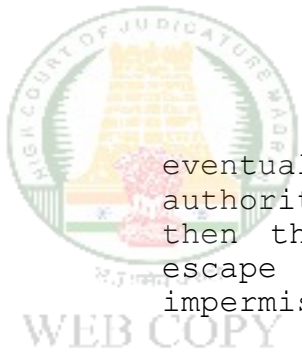


21. Citing all the facts, circumstances as well as the modus operandi of the petitioner along with the other company, show cause notices were issued. The petitioner instead of replying to the said show cause notice contending the details in its entirety, filed the writ petition to quash the notice issued under Section 148 as well as the notice dated 05.03.2015.

22. This Court is of the considered opinion that the show cause notice impugned dated 05.03.2015, cannot be assailed in view of the fact that many informations and evidences as well as the modus operandi of the petitioner-company are elaborated with reference to certain informations, statements and evidences collected by the respondents. All such details, informations and evidences are to be answered by the petitioner-company in order to cull out the truth and to form an opinion with reference to the grounds raised by the petitioner.

23. Undoubtedly, a writ against the show cause notice may be entertained, however on certain limited grounds. A writ against the show cause notice is entertained only to ascertain whether the show cause notice has been issued by the competent authority or if there is any lack of jurisdiction. Even in other cases, where a mala fide intention is raised, then also a writ against the show cause notice may be entertained. However, regarding the disputed facts, circumstances and evidences, no writ can be entertained against a show cause notice. The petitioner cannot be permitted to adjudicate the disputed facts and circumstances in a writ proceedings with reference to the documents and evidences. Such an exercise is to be done by the authorities competent by examining the evidences and the documents and by affording opportunity to the persons concerned. Therefore, the law is settled regarding the entertainability of the writ petition against a show cause notice, so also the notice issued under Section 148 of the Act. In both the cases, it is to be construed that the facts are to be adjudicated. However, if the petitioner is able to establish that the proceedings are initiated without jurisdiction or authority, then alone a writ can be entertained and even in such circumstances, the order passed without jurisdiction is to be quashed and the matter is to be remanded back for re-consideration by the competent authority.

24. The purpose and object of the statutes are to be protected. Any person falling within the ambit of the tax net, can never be allowed to escape from the clutches of Law. Thus, even in cases, where notice was issued by an incompetent authority having no jurisdiction, such erroneous orders are liable to be set aside and the matter is to be remanded back to the authority competent for reconsideration and to decide the matter afresh on merits and in accordance with law. In the



eventuality of not providing an opportunity to the competent authority of the Income Tax Department to reconsider the issues, then the persons, who are liable to pay tax are allowed to escape from the clutches of the Statute and the same is impermissible.

25. Payment of tax is the law. Exoneration is an exception. Exceptions are to be granted only on exceptional circumstances, where law permits. Thus, strict interpretation of tax law is of paramount importance and a holistic approach is imminent in the interest of Revenue. With these principles, this Court has to consider the contents in the Show Cause Notice issued by the respondent Department in proceedings dated 05.03.2015.

26. Looking into the spirit of Section 9(1)(i) of the Act, in the context of the contents made in the show cause notice dated 05.03.2015, it is sufficient to form an opinion that the matter requires effective and elaborate adjudication in order to cull out the truth with reference to the pleadings and grounds raised by the petitioner.

27. The petitioner has approached this Court at initial stage only on the ground that the respondents have no authority to invoke Section 147 of the Act. However, perusal of the reasoning given in the show cause notice, it is suffice to arrive a conclusion that there are materials and evidences enough to allow the Department to proceed with the issues and adjudicate the same based on the materials and evidences available and by affording opportunity to the petitioner.

28. As far as the contentions of the petitioner are concerned, this Court is of the considered opinion that the case of the petitioner squarely falls under Section 9(1)(i) of the IT Act, which contemplates income deemed to accrue or arise in India and to satisfy the provisions of Section 9(1), the respondent-Department elaborated the details and made an analysis on the modus operandi of the petitioner and thus, the details are unambiguously recorded in the impugned show cause notice issued in proceedings dated 05.03.2015. Thus, all such analysis as well as evidences collected are to be answered and to be adjudicated and a final decision is to be taken by the authority. In view of the fact that the requirements of Section 9(1) of the Income Tax Act are satisfied with reference to the reasons furnished in the show cause notice, and further, this Court considered the implications of Section 5(2)(a) and 5(2)(b) of the Income Tax Act and Section 6(3)(ii) of the Income Tax Act in earlier paragraphs of this order. Once the income deemed to accrue or availed in India is prima facie established by the respondents, then all further adjudications are to be done by following the procedures contemplated under the Statutes and



29. The entire reading of the impugned show cause notice dated 05.03.2015 throws light on the issue and therefore, this Court has no hesitation in forming an opinion that there are prima facie materials and evidences enough to proceed against the petitioner under the provisions of the IT Act. However, the contentions in the impugned show cause notice alone cannot be a conclusive factor and all such facts, circumstances as well as the documents and evidences collected and recorded in the impugned show cause notice are to be adjudicated elaborately by the authorities competent by affording opportunity to the petitioner. Thus, the petitioner is bound to avail the opportunity in order to defend their case. The petitioner may not make an attempt to escape from the clutches of law based on unsustainable grounds, which all are not substantiated.

31. The business transactions, which all are complex in nature and made by the traders, many times in a calculated manner are to be adjudicated with expertise in the field and such an exercise must be allowed to be done by the competent authorities of the Income Tax Department and in the event of interference at the earliest stage and in the absence of any ground regarding the jurisdiction, the Court must in all fairness allow the authorities to proceed with the adjudication and pass an order of assessment enabling the petitioner to prefer an appeal even thereafter if any grievance exists.

32. In view of the fact that the petitioner could not able to establish any acceptable ground for the purpose of interference at the stage of issuance of a notice under Section 148 and the issuance of show cause notice and contrarily the respondents



could able to establish that sufficient materials are available on record, which were considered and scrutinised and a finding on such analysis is also recorded in the impugned show cause notice, there is no reason whatsoever to interfere with the actions of the respondent and thus, all the writ petitions fail and stand dismissed. In view of the fact that the respondents had already completed the assessment process and passed an assessment order and kept the same in a sealed cover, the respondents are permitted to open the sealed cover and communicate the assessment orders to the petitioner without any further delay enabling the petitioner to proceed further, if any grievance exist. Accordingly, all the writ petitions in W.P.Nos.8100 of 2015, 26641 of 2015, 20254 & 20255 of 2016, 32866 & 32867 of 2017 & 33706 of 2018 stand dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

abr

To

1. The Assistant Director of Income Tax,
International Taxation-II,
121, Nungambakkam, High Road, Chennai.
2. The Deputy Commissioner of Income Tax,
International Taxation - II(1),
121, Nungambakkam High Road, Chennai.
3. The Deputy Director of Income Tax,
International Taxation-II(1),
121, Nungambakkam, High Road,
Chennai-600 034.
4. The Assistant Commissioner of Income Tax,
International Taxation - II(2),
Room No.410, 4th Floor, BSNL Building (Tower-1),
No.16, Greams Road, Chennai-600 006.



5. The Deputy Commissioner of Income Tax,
International Taxation II(2),
Room No.409, 4th Floor, 16, BSNL Building,
Tower-I, Greams Road, Chennai - 600 006.

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+1CC to Mrs.Hema Muralikrishnan, Advocate, Sr.No.26156

W.P.Nos.8100 & 26641 of 2015,
20254 & 20255 of 2016, 32866
& 32867 of 2017 & 33706 of 2018

ASK (CO)
R.K. (15.07.2021)