

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	18.02.2021
Pronounced On	24.02.2021

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.Nos.32797 & 32801 of 2018
and

W.M.P.Nos.38008 & 38014 of 2018
and 6663 & 6666 of 2019

(Through Video Conferencing)

M/s.Durr India Private Limited,
Represented by its Director
Mr.Michael Berger,
No.471, 2nd Floor, Prestige Polygon,
Anna Salai, Nandanam,
Chennai - 600 035.

... Petitioner in
both W.Ps.

Vs.

1.The Assistant Commissioner of Income Tax (OSD)
Corporate Range 1,
121, Mahatma Gandhi Road,
Nungambakkam, Chennai - 600 034.

2.The Principal Commissioner of Income Tax 1,
121, Mahatma Gandhi Road,
Nungambakkam, Chennai - 600 034. ... Respondents in
both W.Ps.

Writ Petitions filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records on the files of the First Respondent and quash the impugned order in PAN:AAACD3568P in order No. ACIT (OSD) 2018-2019 both dated 26.11.2018 along with notice in PAN:AAACD3568P in Notice Numbers ITBA/AST/S/148/2017-18/ 1009498923 (1) and ITBA/AST/S/148/2017-18/ 1009424843 (1) dated 28.03.2018 and 26.03.2018 respectively issued under Section 148 of the Income Tax Act for the respective assessment years 2011-12 and 2013-2014.

For Petitioner : Mr.N.V.Balaji in both W.Ps.

For Respondents : Mr.Prabhu Mukunth Arunkumar
for M/s.Hema Muralikrishnan

Senior Standing Counsel in both W.Ps.

C O M M O N O R D E R

By this common order, both the Writ Petitions are being disposed of.

2. In W.P.No.32797 of 2018, the petitioner has challenged the impugned notice dated 28.03.2018 issued under Section 148 of the Income Tax Act, 1961 and the consequential communication dated 26.11.2018 of the first respondent overruling the objection of the petitioner for reopening the assessment for the Assessment Year 2011-12.

3. In W.P.No.32801 of 2018, the petitioner has challenged impugned notice dated 26.03.2018 issued under Section 148 of the Income Tax Act, 1961 and the consequential communication dated 26.11.2018 of the first respondent overruling the objection of the petitioner for reopening the assessment for the aforesaid Assessment Year 2013-14.

4. The reasons furnished by the first respondent for reopening of the assessment for the respective Assessment Years are identical. It has been stated that the petitioner follows a mercantile system of accounting and therefore the income accrues the moment bills are raised by the petitioner.

5. Since the petitioner was reducing a part of the bill amount from its Profit and Loss Account as excess billing, it is submitted that such adjustment on the liability side of the balance sheet will not affect the income already accrued as the accounting entries do not change or alter the income which had accrued to it.

6. Under these circumstances, the petitioner was called upon to show cause why a sum of Rs.7,74,20,000/- for the Assessment Year 2011-12 and Rs.58,45,26,000/- for the Assessment Year 2013-14 shown as billing in excess of revenue under the current liabilities to the total income should not be added to the income.

7. It is the case of the petitioner that it was adopting and arriving at the correct income for the purpose of payment of income tax by adopting percentage method of completion work irrespective of the amount billed to the client or the amount received by the petitioner.

8. The learned counsel for the petitioner submitted that the Institute of Chartered Accountant of India had issued Accounting Standard A.S-7 as early as 1983 which came to be revised in 2002. It is submitted that as per the aforesaid Accounting Standard, a company engaged in construction contract is required to recognise income based on the reliable estimation, contract revenue and contract cost associated with the construction contract

with reference to the stage of completion of contract activity at the reporting date.

9. The learned counsel for the petitioner submitted that under Section 5 and Section 145 of the Income Tax Act, 1961, both accrual/mercantile and the cash receipt method are recognised. The petitioner has been consistently following accrual method of accounting albeit percentage of work completed.

10. The learned counsel for the petitioner further submitted that the method followed by the petitioner has now been statutorily recognised by the Income Tax Department vide S.O.3079 (E) issued under Section 145(2) of the Income Tax Act, 1961 for the Assessment Year 2017-18 onwards.

11. The learned counsel for the petitioner further submits that a similar dispute for the Assessment Year 2009-10 is also pending before this Court in W.P.No.41845 of 2016. At the same time, the above method of accounting adopted by the petitioner for the Assessment Year 2010-11, Assessment Year 2012-13 and Assessment Year 2014-15 has been accepted by the Income Tax Department. He therefore submits that once there is a particular method of accounting is being followed, there is no justification for reopening the assessments.

12. The learned counsel for the petitioner further submits that the respondent has invoked Section 148 of the Income Tax Act 1961 for the Assessment Year 2011-2012 just three days prior to expiry of limitation under the proviso to Section 147 of the Income Tax Act, 1961 and for the Assessment Year 2013-2014 two days prior to the expiry of normal period of limitation under proviso to Section 147 of the Income Tax Act, 1961. He submits that the entire exercise was arbitrary and smacks of revenue bias.

13. The learned counsel for the petitioner further submits that prior to 29.09.2016, under Section 145(2) of the Income Tax Act, 1961, Accounting Standards was in force from 1996, as per which, if the fundamental accounting assumption relating to Going Concern, Consistency and Accrual are followed in financial statements, specific disclosure in respect of such assumptions are not required. Only when fundamental accounting assumption is not followed, such fact shall be disclosed.

14. He further submitted that as per the above notification, accrual refers to the assumption that revenue and cost are accrued, that is, recognised as they are earned or incurred (and not as money is received or paid) and recorded in the financial statements of the period to which they relate.

15. He further submitted that as per AS-7 of the Institute of Chartered Accountants of India revised in 2002, if the outcome of the construction contract can be estimated reliably, contract revenue and contract cost associated with construction contract should be recognised as revenue and expenses respectively by reference to the stage of completion of the contract activity at the reporting date.

16. The learned counsel for the petitioner relied upon the following decisions of the courts:-

- i. Commissioner of Income-tax, Delhi Vs. Woodward Governor India (P.) Ltd., [2009] 312 ITR 254 (SC) : [2009] 179 Taxman 326 (SC).
- ii. Commissioner of Income-tax Vs. Bilahari Investment (P.) Ltd., [2008] 299 ITR 1 (SC) : [2008] 168 Taxman 95 (SC).
- iii. MKB (Asia) (P.) Ltd. Vs. Commissioner of Income-tax, [2007] 294 ITR 655 (Gauhati) : [2008] 167 Taxman 256 (Gauhati).
- iv. Commissioner of Income-tax Vs. Syndicate Bank, [2003] 261 ITR 528 (Karnataka) : [2003] 127 TAXMAN 287 (KAR.).
- v. Commissioner of Income-tax Vs. Margadarsi Chi Funds (P.) Ltd., [1985] 155 ITR 442 : [1984] 19 Taxman 73 (Andhra Pradesh).

17. The learned counsel for the petitioner further submitted that the Hon'ble Supreme Court has frowned upon reopening of the assessment based on change of opinion and in absence of any failure to truly and fully disclose material that were required for assessment. Invocation of Section 148 and the proviso to Section 147 cannot be justified. In this connection, the learned counsel for the petitioner, relied upon the following decisions:-

- i. Commissioner of Income-tax, Delhi Vs. Kelvinator of India Ltd., [2010] 187 Taxman 312 (SC).
- ii. Income Tax Officer, Ward No.16(2) Vs. TechSpan India (P.) Ltd., [2018] 404 ITR 10 (SC) : [2018] 92 taxmann.com 361 (SC).
- iii. TANMAC India Vs. Deputy Commissioner of Income-tax, Circle I, Pondicherry, [2017] 78 taxmann.com 155 (Madras).
- iv. Commissioner of Income-tax, Chennai Vs. Schwing Stetter India (P.) Ltd., [2015] 378 ITR 380 (Madras) : [2015] 61 taxmann.com 19 (Madras).
- v. M/s.S.P.Mani and Mohan Diary Vs. The Assistant Commissioner of Income tax, order

dated 26.09.2019, passed by this Court in W.P.No.3648 of 2018.

vi.M/s.Asianet Star Communications Private Limited Vs. Assistant Commissioner of Income Tax, order dated 16.04.2019, passed by this Court in W.P.No.25328 of 2018 and batch.

18. These decisions were cited to state that once accounts were maintained in the course of business, they are to be taken as correct unless there are strong and sufficient reasons to indicate that they are unreliable. The learned counsel for the petitioner further submitted that in absence of any finding questioning the correctness or completeness of the accounts of the assessee, the accounts cannot be reopened.

19. He has further submitted that the respondents have not demonstrated any distortion in the accounts maintained by the petitioner for the purpose of computation of income. He submitted that even in the context of chit fund, the Hon'ble Supreme Court has recognised in Bilahari Investments Private Limited case referred to supra the revenue method of accounting in the case of chit fund business.

20. He submitted that there the Hon'ble Supreme Court has categorically held that recognition/identification of income under the Income Tax Act, 1961 is attainable by several methods of accounting. It could be attained by one or more method. Completed contract method is one of such methods and similarly, percentage of completion method is another method.

21. He therefore prays for quashing of the impugned notices issued under section 148 of the Income Tax Act, 1961 for the respective Assessment Years and the respective communications overruling the objection of the petitioner for reopening of the completed assessment for the contentious Assessment Years.

22. Defending the impugned order, the learned counsel for the respondents submitted that the petitioner has not filed any documents to substantiate the percentage of completion of the work at the time of respective assessments and therefore the respondents were justified in reopening the respective assessments.

23. He submitted that though in the audited balance sheet the petitioner had stated that it recognised the revenue from projects sales under the percentage of completion method, the petitioner had not filed any documents before the original Authority to substantiate the extent of percentage of completed work at the time of respective assessments and therefore the Department was justified in reopening the assessment.

24. I have considered the arguments advanced by the learned counsel for the petitioner and the respondent. I have also considered the decisions cited by the learned counsel for the petitioner.

25. Facts are not in dispute. The petitioner is engaged in supply and installation of paint booth for automobile companies. The petitioner has adopted mercantile method of accounting which is one of the recognized method for the purpose of recognition of income under the Income Tax Act, 1961.

26. The law on the subject is also clear. Every assessee is entitled to arrange its affair and follow the method of accounting which the department has earlier accepted. According to the petitioner, the method adopted by the petitioner has been accepted for the Assessment Years 2010-11, 2012-13, 2014-15 and thereafter.

27. As per the decision of the Supreme Court, it is only in those cases where the Department records a finding that the method adopted by the assessee results in distortion of profits, the Department can insist on substitution of the existing method. In this case, it is the contention of the Income Tax Department that the method followed by the petitioner has not disallowed the correct income.

28. The case laws also indicate that an ITO has liberty to examine the system of accounting regularly employed by the assessee to determine whether the system of accounting is defective and whether by following such system of accounting, correct profits can be deduced from the accounts book maintained by the assessee.

29. If on such scrutiny, an Income Tax Officer comes to a conclusion that with reference to the method of accounting followed by the assessee, correct profits cannot be deduced, it is open to him to apply to the provisions of Section 145 and make the assessment in an appropriate manner.

30. Even where advances are received (pre-paid amounts), if the assessee fails to perform the service as promised, it would be obliged to refund the advance payment received under the ordinary law of contract or special enactments, like the Consumer Protection Act.

31. Though in the context of construction contracts, the Central Government vide S.O.3079 (E) dated 29.9.2016 has officially recognized the Percentage of Completion Method for the Assessment Years 2017-18 onwards, the Supreme Court has given the seal of approval to the said

method in Commissioner of Income Tax Vs. Bilahari Investments Private Limited referred to supra.

32. This method was also recognised by the Institute of Chartered Accountants of India in AS-7 which was originally issued in the year 1983 and later revised in the year 2002. As per the aforesaid Standard in para 21 when the outcome of a construction contract can be estimated reliably, contract revenue and contract cost associated with the construction contract should be recognised as revenue and expenses respectively by reference to the stage of completion of the contract activity at the reporting date.

33. Thus, it cannot be said that the petitioner was not entitled to adopt percentage method of recognition of income for computation of income tax under accrual method of accounting. However, mere qualification in the Annual Report of the company containing the balance sheet and the profit and loss by itself is not sufficient to conclude that the petitioner has disclosed the percentage of the work completed during previous year relevant for the Assessment Year.

34. Further, the petitioner may have entered into several contracts with different clients with varied terms and conditions. These documents are required to be produced before the Assessing Officer at the time of assessments. The purpose of accounting under the Income Tax Act, 1961 is to ascertain the taxable income and to determine the tax payable by an assessee. Therefore, these documents and other ancillary documents are required to be produced before an Assessing Officer or Income Tax Officer during the assessment.

35. Further, a Proper Certification whether by an In-House Department of the Assessee or by an Independent Chartered Engineer certifying the percentage of work completed under the contract was required to be produced by the assessee before the Income Tax Officer for the purpose of assessment.

36. What was the term of the contract under which the revenue was generated or the bill raised on a client or a customer cannot be certified in the Audited Profit and Loss Account and the Balance Sheet. At best, they can corroborate what is there in the contract. Therefore, unless those supporting documents are produced, it cannot be said that there was full disclosure.

37. The enclosures filed before the Assessing Officer at the time of Section 143(3) Assessment do not indicate the same. Therefore, it cannot be said that there was true and full disclosure of all materials that

were required for assessment before the Assessing Officer by the petitioner. At the same time, it is to be noticed that the reasons given in the communications dated 05.11.2018 for reopening the respective assessment have merely questioned the method of accounting adopted by the petitioner and show it was issued in a mechanical manner.

38. It is noticed that as per Explanation 1 to Section 147 of the Income Tax Act, 1961, production before the Assessing Officer of the account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of Section 147 of the Act. In fact, Explanation incorporates the reasons given in the decision of the Hon'ble Supreme Court in Calcutta Discount Co. Ltd. Vs. Income Tax Officer, (1961) 41 ITR 191 (SC).

39. At the same time, the conclusions arrived in the impugned communications dated 26.11.2018 overruling the objections of the petitioner for the reopening of the assessments by the impugned notices are not conclusive. They are only prima facie views of the Assessing Officer. It is for the petitioner to establish that it has correctly followed the accounting method by producing the supporting documents to substantiate the percentage of work that was completed for the purpose of proper determination of taxable turnover for payment of income tax. Mere disclosure in the Profit and Loss Account and Balance Sheet is not sufficient.

40. Therefore, I do not find any justifiable reasons to interfere at this stage of the re-assessment proceedings. Therefore, the first respondent is therefore directed to complete the re-assessment after examining the documents to be produced by the petitioner and pass re-assessment orders on merits.

41. The petitioner is therefore directed to file documents to substantiate its cases before the first respondent within a period of thirty days from date of receipt of a copy of this order. The first respondent shall pass orders within a period of 60 days thereafter.

42. It is made clear that the orders to be passed shall be confined to the issue relating to percentage of the work completed and the recognition of income alone and no other issues other than the one in respect of which notices under Section 148 have been issued shall be considered by the first respondent.

43. The Writ Petitions stand disposed of with the above observations. No cost. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1.The Assistant Commissioner of Income Tax (OSD)
Corporate Range 1,
121, Mahatma Gandhi Road,
Nungambakkam, Chennai - 600 034.

2.The Principal Commissioner of Income Tax 1,
121, Mahatma Gandhi Road,
Nungambakkam, Chennai - 600 034.

+2ccs to Mr.Balaji , Advocate SR.No.11217,11218

+1cc to M/s.Hema Muralikrishnan, Advocate SR.No. 10937

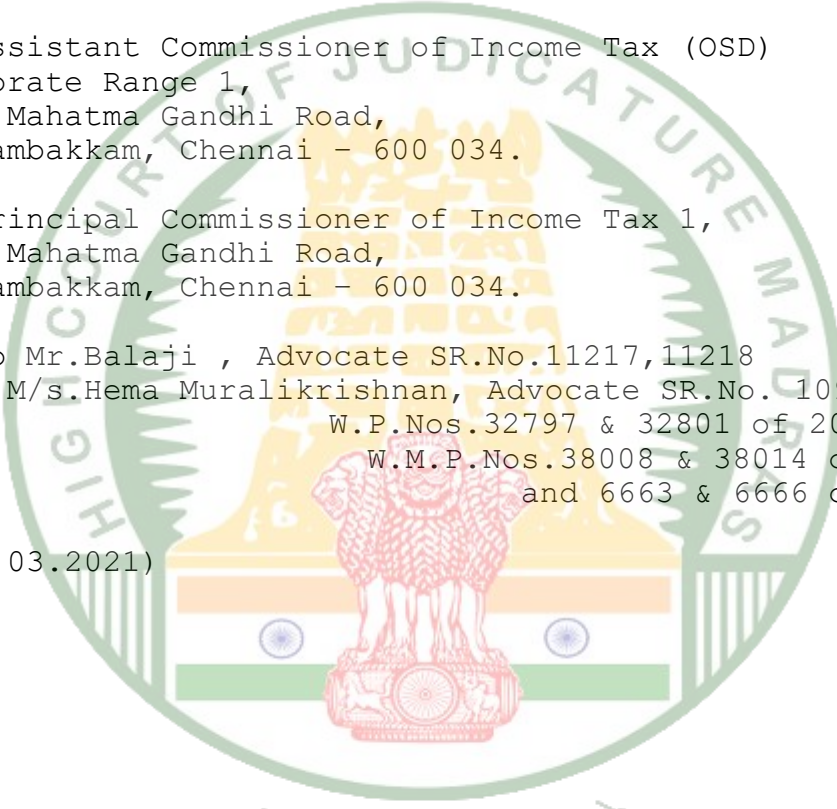
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