IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3545 OF 2019

Oracle Financial Services Software Limited ...Petitioner
vs.
1. Assistant Commissioner of Income Tax,
Circle (13(1)(1) & 2 Ors. ...Respondents

Shri G.C. Srivastava a/w. Shri Sukhsagar Syal i/b Shri Sameer Dalal for petitioner.

Shri Akhileshwar Sharma for respondent Nos.1 and 2.

CORAM : K.R. SHRIRAM &
N. J. JAMADAR, JJ.
DATE : 10th JANUARY, 2022
(THROUGH VIDEO CONFERENCE)

P.C.:

1. At the outset, Shri Sharma points out that there is an error in paragraph 4 of the affidavit-in-reply filed by one Ashok Charan, affirmed on 20th March 2020 inasmuch as it is erroneously mentioned that *the assessment is opened within a period of four years from the relevant assessment year*. Shri Sharma states that there is another matter of the same petitioner for a different assessment year and hence the error has crept in. Shri Sharma prays that paragraph 4 of the affidavit-in-reply be considered as deleted. We accept the statement of Shri Sharma and order accordingly.

2. Petitioner is impugning a notice dated 6th March 2019 issued under

section 148 of the Income Tax Act, 1961 ('The said Act') by respondent No.1 seeking to reopen the assessment for the Assessment Year 2013-14 and the order dated 18th October 2019 disposing of the objections raised by petitioner.

3. Petitioner is engaged in the business of providing comprehensive information technology solutions to banks and other financial institutions worldwide. Petitioner develops and markets software products and operates in primarily in two business segments : (i) Products and (ii) Services. Under the product business, petitioner markets its package application software and derives revenue from license fee, customization fee and annual maintenance charges. Under the Service business, petitioner provides services to customers which includes IT solutions and consulting and professional services according to customer's requirements and standards.

4. Petitioner has subsidiaries in different countries, who function as a value added distributors and market/distribute software products and services in their respective jurisdictions.

5. Each of the subsidiaries scout for potential customers, negotiate the

terms of sale and enter into contracts with them for selling petitioner's products and services, in their respective jurisdictions. For distributing the software products and services of petitioner to foreign customers there exists a 'Marketing Service Agreement' between petitioner and its overseas subsidiaries ('MSA').

6. Having entered into contracts with customers, the overseas subsidiaries, in turn, subcontract some of the contract work to petitioner, for the task of execution.

7. The installation and implementation of the product at the location of the overseas customers requires the presence and supervision of technical personnel. These personnel are temporarily seconded by petitioner on employment basis to the overseas subsidiaries to perform such functions. During the period of secondment, the personnel are kept on employment and payroll of the overseas subsidiaries, which, meets their salary and related expenses. In terms of the Marketing Services Agreement entered into between petitioner and the overseas subsidiaries, these expenses are then reimbursed by petitioner to the said subsidiaries, on a cost to cost basis.

8. For the assessment year under consideration, A.Y. 2013-14, petitioner filed its return of income on 29th November 2013. The return of income was processed and an intimation under section 143(1) of the Act was issued.

9. Petitioner's case was selected for scrutiny assessment and in the course of assessment, petitioner filed, *inter-alia,* a copy of its Audited Financial Statements, Tax Audit report in Form 3CD under section 44AB of the Act and Accountant's report in Form 3CFB under section 92E of the Act. In the course of assessment proceedings, petitioner was asked to file details of foreign remittances made by it. In its reply dated 6th December 2016, petitioner explained that the foreign remittance made by it during the year were towards reimbursement of expenses incurred by the overseas subsidiaries on its behalf. Petitioner filed necessary details including Form 15CA and Form 15CB which contained details of remittances made to foreign companies and Accountant's report on whether such remittances required deduction of tax at source or not. Several invoices and debit notes raised by the overseas subsidiaries on petitioner for reimbursing the employees cost were also filed.

10. A Reference was made by respondent No.1 to joint Commissioner of Income Tax, Transfer Pricing Officer, 3(1), Mumbai ('TPO'). TPO gave a report/order dated 20th September 2016.

11. An Assessment order came to be passed on 27th February 2017. More than four years after relevant assessment year, petitioner received the impugned notice dated 6th March 2019 under section 148 of the Act. Petitioner also received by a communication dated 31st May 2019, the reasons for reopening the assessment. Paragraph Nos. 2, 3, 4, 5 and 6 of the reasons read as under :

> *2. It is found from Note 31 (expenditure in foreign currency) of the Financial Statements for A.Y. 2013-14 of the assessee company that the assessee has debited a amount of Rs.655.277 Crores as 'Employees Costs'.*
>
> *3 It is pertinent to mention here that in A.Y. 2015-16, an amount of Rs.693.406 Crore is debited as employee cost. Out of total employee cost of Rs.693.406 Crore, a sum of Rs.626.416 Crore (90.33% of 693.406) has been disallowed u/s. 40(a)(i) of the Act as per various Double Taxation Avoidance Agreements (DTAAs) for non-deduction of TDS u/s. 195 of the Act in assessment order u/s. 143(3) of the Act. This amount of Rs.626.416 crore is termed as 'reimbursement of the employee salary and related expenses' as per submission made by the assessee company.*
>
> *4. During the scrutiny assessment for A.Y. 2015-16, the assessee had contended that payments made on account of salary expenditure are mere reimbursement of expenses without any markup, which was actually incurred by the foreign subsidiaries on behalf of the Indian company. Further, stated that these expenses are incurred during the course of business activity of the Indian company for earning income from the sources situated outside India and hence the same is*

not taxable as Fee for Technical Services (FTS). Also, submitted that there was no service made available to the Indian company due to the fact that the service was actually rendered by the Indian company. However, the contentions of the assessee were rejected on the following grounds :
………
5. The nature of expenses under the head 'Employee Cost' in the note 30 in the financial year i.e., F.Y. 2014-15 and in Note 31 in F.Y. 2012-13 is the same. Although further break-up of employee cost of Rs.655.277 Crore in A.Y. 2013-14 is not available on record, a sum of Rs.591.911 Crore (90.33 % of total employee cost) is liable to be disallowed on pro-rata basis in A.Y. 2013-14 being reimbursement of employee salary and related expenses as it is similar to the nature of amount of Rs.626.416 Crores in the A.Y. 2015-16.
……….
6. It is pertinent to mention here that assessment records for A.Y. 2013-14 is duly perused and it is found that the issue in question here is neither discussed nor considered and examined by way of any questionnaire, order-sheet, noting and assessee's submission during the original assessment proceedings and the assessing officer has not given any opinion on the issue in the A.Y. 2013-14. Therefore, the reopening or assessment does not involve any change of opinion.
…………"

12. Since the reopening has been proposed more than four years after relevant assessment year and as scrutiny assessment under section 143(3) of the Act has been completed, proviso to section 147 of the Act applies. In view thereof, the onus is on respondents to show that there was failure on the part of petitioner to truly and fully disclose material facts. Respondents have thought it necessary to reopen on two grounds: first, in a later assessment year, i.e., assessment year 2015-16, the contention of assessee that payments made on account of salary expenditure are mere

reimbursement of expenses without any markup, and these expenses were incurred during the course of business activity of the Indian company for earning income from the sources situated outside India and there was no service made available to the Indian company due to the fact that the service was actually rendered by the Indian company were rejected. The second ground is that the issue in question here, as noted in the reasons, was neither discussed nor considered and examined by way of any questionnaire, order-sheet noting an assessee's submission during the original assessment proceedings and the Assessing Officer has not given any opinion on the issue and hence it does not involve change of opinion.

13. Shri Shrivastava straightaway went to deal with the second point raised, non-consideration of the issue in the original assessment proceedings and submitted that the Assessing Officer who has formed an opinion to reopen the assessment is not correct.

14. We also agree with Shri Shrivastava. If one considers the communication dated 6th December 2016, copy whereof is at Exh. 'E' to the petition, from petitioner to the Deputy Commissioner of Income Tax 13(1)(1), item 8 therein refers to details/nature of Foreign Remittances. The same reads as under :

"We refer to the captioned notices, our submissions dated 6th

> *May 2016, 28th July 2016, 23rd August 2016, 7th October 2016 and 24th October 2016 and also to our time to time discussions with your good-self for the captioned proceedings. In this regard, we further submit as under :*
>
> *…………………*
>
> ***8. Details/Nature of Foreign Remittances :***
>
> *During the course of the earlier hearing, your goodself had asked us to provide details of foreign remittances made by the Company. In this regard, we submit that details of the remittance (i.e. purpose of remittances, amounts, etc.) are appearing in the copy of ITS subsequently provided to us.*
>
> *In this regard, as would be noted from the ITS form, the foreign remittances made by the Company during the year, are towards reimbursement of expenses incurred by foreign group companies on the Company's behalf, fees for professional and technical services, foreign tax payments, rent payments, insurance premium, referral commission, etc. In this regard, we are enclosing, as annexure J, sample copies of Form 15CA / 15CB, alongwith relevant invoice copies, which evidence the nature of the remittance."*

15. We have also seen the annexures to the said letter which are placed in the petition and those annexures do refer to payment made on account of reimbursement of payroll expenses to subsidiaries incurred outside India and paid to Oracle Financial Services Software INC on behalf of petitioner. The documents expressly mention that since the payment is to be made on account of reimbursement only, no tax is required to be deducted.

Therefore, a query has been raised and it has been answered.

16. We should also note that an order under section 92CA(3) of the Act was passed by TPO. Shri Sharma submitted that the order under section

92CA(3) is only concerning whether the amount paid to the companies outside India was correct. Of course, Shri Sharma is correct but what is relevant to note is that this subject has also been discussed by the TPO in his order dated 20th September 2016 (internal page 8). TPO's order finds a mention and reference in the impugned order dated 27th February 2017 at paragraph 4.1.2 and paragraph 4.1.3. Therefore, entire issue regarding petitioner paying huge reimbursement cost on account of salary reimbursement cost of its employee every year was in the active consideration before the Assessing Officer.

17. Shri Sharma was right in stating that this issue has not been discussed specifically in assessment order. But it is settled, law as held in ***Aroni Commercials Ltd. Vs. Deputy Commissioner of Income-Tax-2(1)*** [1], once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised.

18. In view of the above, we are satisfied that it is nothing but a change of opinion on the part of the new Assessing Officer, who issued the notice

1 [2014] 44 taxmann.com 304 (Bombay)

under section 148 of the Act. Change of opinion does not constitute justification and/or reasons to believe income chargeable to tax has escaped assessment.

19. Shri Sharma also submitted that during the scrutiny for the Assessment Year 2015-16, the Assessing Officer had rejected petitioner's contention as made and recorded in the reasons. We are not going into the merits of the decision of the Assessing Officer for the Assessing Year 2015-16. But still, the query that we posed to Shri Sharma was, if a different opinion/view is expressed by an Assessing Officer in the later years, can that be considered as non-disclosure of material facts by an assessee in an earlier year. Shri Sharma stated that in the Assessment year 2015-16, new material was called for by the Assessing Officer. That still would not help respondents because the Assessing Officer who passed the original assessment order for the assessment year 2013-14 was satisfied with the explanation given to him and perhaps might have even called for the same material and formed an opinion different from what the Assessing Officer has formed for Assessment year 2015-16. In our view, just because an Assessing Officer has asked some extra queries and come to an opinion in later year, different from the opinion which was expressed conclusively by an officer in the earlier year, would not help

respondents to take their case out of the restrictions imposed by proviso to section 147 of the Act.

20. In these circumstances, we allow the petition in terms of prayer clause (a), which reads as under :

> *"(a) this Hon'ble Court may be pleased to issue a Writ of Certiorari or writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the Petitioner's case and after examining the legality and validity thereof quash the notice dated 6th March 2019 issued by Respondent No.1 under section 148 of the Act seeking to reopen the assessment for the assessment year 2013-14 and the order dated 18th October 2019 passed by Respondent No.1, disposing off the objections raised by the Petitioner."*

21. Petition disposed.

(N. J. JAMADAR, J.) **(K.R. SHRIRAM, J.)**