



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.01.2022

PRONOUNCED ON : 22.04.2022

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.NO.12310 OF 2021
AND WMP.NO.13097 OF 2021

(THROUGH VIDEO CONFERENCING)

M/s.Texmo Precision Castings Uk Ltd.,
Level 2, OXO House,
4, Joiner Street,
Sheffield S203RW
United Kingdom,
Represented by its Director
M/s.Damayanti Ramachandran

... Petitioner

vs.

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

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

... Respondents

Prayer:

Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari, calling for the records in CIT/IT/CHE/113(263)/2020-21 dated 30/03/2021 for the Assessment Year 2015-16 on the file of the 1st respondent and quash the same.

For Petitioner : Mr.R.Sandeep Bagmar

For Respondents : Mrs.Hema Muralikrishnan
Senior Standing Counsel.



O R D E R

The petitioner has challenged impugned order dated 30.03.2021 passed by the 1st respondent bearing reference in CIT/IT/CHE/113(263)/2020-21 for the Assessment Year 2015-16 under Section 263 of the Income Tax Act, 1961. The impugned order is being challenged primarily on the ground that it is without jurisdiction as it has been passed contrary to Section 263 of the Income Tax Act, 1961.

2. By the impugned order, the 1st respondent has set aside the final order of the assessment dated 19.2.2018 passed by the 2nd respondent. Relevant portion of the impugned order reads as under:-

The Assessee Company, a tax resident of United Kingdom filed its return of income for AY-2015-16 on 02.02.2017 admitting nil income. The case of assessee was selected for scrutiny and the assessment was completed U/s.143(3) of IT Act an addition of Rs.4,19,86,627/- Gross tax at the rate of 15% (6297994) was taxed on the assessed income.

2. Texmo Precision Castings UK Limited is a company registered and incorporated in UK. TPC (UK) is engaged in the business of providing Market and support Services in UK to the Indian firm Texmo Precision Castings, India. The assessee Company levies professional charges for the services rendered to the Indian firm. During the P.Y relevant to the A.Y 2015-16, the assessee Company received professional charges 15% margin and Director's salary to the tune of Rs.4,19,86,627/- including TDS borne by the Indian Company.

The break up is as follows:

Professional Charges	: Rs.2,58,05,691/-
15% Margin	: Rs.38,70,852/-
Director's Salary	: Rs.54,47,732/-
TDS	: Rs.70,52,015/-
Exchange Rate Difference	: Rs.1,89,663/-

3. The assessee Company claimed that as per India UK DTAA Treaty, the receipts are not taxable in India and therefore claimed refund of the amount of TDS deducted by the Indian Firm.



WEB COPY

4. In the assessment it was concluded that, the Marketing Services' provided by TPC UK cannot be placed outside the bracket of Consultancy Services. The services rendered by the assessee Company has ultimately facilitated transfer of knowledge and experience that are made available to TPC India. Hence, the contention of the assessee was rejected and the receipts obtained towards these services are taxable in India as per India UK DTAA Treaty.

Total receipts obtained from TPC India :
Rs.4,19,86,627/-
Tax payable thereon @ 15% :
Rs.62,97,994/-

5. The order shows that the AO has determined the PF of the assessee in India but has not thoroughly examined the applicability of 115JB. The entire receipts are held to emanate from India but the profit has been estimated at 25% without any basis. This was questioned to the assessee vide letter No.CIT/IT/CHE/113/2020-21 dated 15.03.2021 as follows:-

" Please refer to the above subject and the order under Section 143(3) dated 19.02.2018 for A.Y.2015-16. It is observed that the Assessing Officer has given a finding of assessee having a Permanent Establishment in India and the assessed income could have been taxed under Section 115JB also. Since the Assessing Officer has not examined this aspect during the assessment, please show cause as to why the said order may not be considered as erroneous insofar as it is prejudicial to the interest of the Revenue.

2. Your reply should reach this office on or before 22.03.2021".

6. In response, the assessee submitted reply dated 20.03.2021, which has been considered.

7. As can be seen from the perusal of the assessment order framed in this case the A.O. has failed to make any enquiry regarding the estimation of income and this failure makes the order erroneous. This has been upheld in CIT vs. GK Kabra 211 ITR 336 (AP). No enquiry tantamount to non application of mind and the same was also held to be prejudicial to the interest of revenue in the



WEB COPY

case of CIT v. Bhagwan Das (2005) 272 ITR 367 (All.) (HC). It is not on the basis of conjecture and surmises that the order is under revision. There is concrete basis of the same as the issue has not been looked into (Principal Commissioner of Income Tax, Kolkata-3 vs. India Finance Ltd) (2017) 81 taxmann.com 135 (Calcutta).

8. The above reply of the assessee has been perused and it is observed that the applicability of the provisions of Section 115JB have not been thoroughly examined since there is a finding in the Assessment Order that the assessee has a PE in India. The AO arrived at the estimated profit 25% without any basis. Therefore, 115JB provision was required to be looked into and since the same has not been examined, therefore the assessment framed vide Assessment Order dated 19.02.2018 requires to be set aside since the same is erroneous insofar it is pre-judicial to the interest of Revenue.

9. The Assessing Officer is directed to thoroughly examine the issue after giving opportunity of being heard to the assessee.

3. It is submitted that the earlier a draft assessment order dated 29.12.2017 was passed by the Deputy Commissioner of Income Tax [International Taxation] under Section 143(3) r/w 144C of Income Tax Act, 1961. The case of the petitioner is that the petitioner accepted the draft assessment order pursuant to which the assessment order dated 19.02.2018 came to be passed under Section 143(3) of the Income Tax Act, 1961 against which the petitioner preferred an appeal under Section 246A of the Income Tax Act, 1961 in Form No.35 before the CIT (Appeals).

4. Petitioner is a UK-based company engaged in services. The petitioner has entered into a Marketing Service Agreement dated 1.4.2009 with a Indian partnership firm called Texmo Precision Castings (TPC), from India. The petitioner received commission from the said partnership firm during 2014-15 for a sum of Rs.4,19,86,627/. While making payments to the petitioner, the said partnership firm deducted an amount of Rs.70,52,015/- towards tax and remitted the amount to the income tax department in Form 26 A S.

5. Under these circumstances, the petitioner filed refund claim for the aforesaid amount deducted as tax and remitted by the said partnership. The case of the petitioner was selected for scrutiny under CASS and a notice under section 143(2) was issued to the petitioner on 19.9.2017.



6. On merits the petitioner replied to the same stating that section 9(1)(vii)(b) of the Income Tax Act, 1961 was not applicable as it specifically excludes amount payable in respect of services utilised in the business or profession carried on by such person outside India or for the purpose of making or earning any income from any source outside India. It was therefore submitted that income earned by the petitioner would not be deemed to have accrued or arise in India as same is for carrying business/profession outside India. The petitioner also stated that the petitioner was entitled for the benefit of Article 13 of India-UK DTAA signed under Section 90(2) of the Income Tax Act, 1961.

7. The petitioner was thereafter issued to the show cause notice dated 22.12.2017 by the 2nd respondent to show cause as to why the services provided by the petitioner should not be treated as a "consultancy services" and taxed under section 9(1)(vii) of the Income Tax Act, 1961. The petitioner also replied to the same on 26.12.2017.

8. A draft assessment order was passed on 29.12.2017 under section 143(3) read with section 144C(1) of the Income Tax Act, 1961. The petitioner therefore requested the 2nd respondent to pass a final assessment order in order to take issue in appeal. Under these circumstances, the 2nd respondent passed final assessment order dated 19.2.2018.

9. The petitioner also preferred an appeal before the CIT (A). The CIT (A) also called for a remand report from the 2nd respondent which was issued on 12.02.2022 to which also the petitioner appears to have given a response on 18.03.2020.

10. It is in this background, the 1st respondent issued a notice under Section 263 of the Income Tax Act, 1961 on 15.3.2021 to revise the above Assessment Order passed on 19.02.2018. The show cause notice was limited to examination of the committee of MAT provisions under section 115JB of the Income Tax Act, 1961.

11. In the said notice, it was stated that the 2nd respondent failed to note that the petitioner is having a permanent establishment in India and therefore would have been taxed under Section 115JB of the Income Tax Act, 1961.

12. The learned counsel for the petitioner submitted that the petitioner is a marketing company from UK and caters to the need of the manufacturing partnership firm viz., Texmo Precision Casting, which is engaged in manufacture of casting mould for medical equipments and aerospace equipments. It is submitted that the petitioner and the manufacturing firm in India have



entered into marketing service agreement dated 01.04.2009 whereby the petitioner is required to provide marketing service to Texmo Precision Casting company.

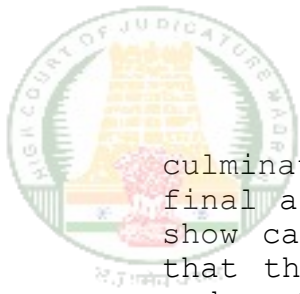
13. It is the specific case of the petitioner that during the period in dispute for the relevant assessment year 2015-16 [Previous year 2014-15], the petitioner received a sum of Rs.4,19,86,627/- as consideration under the aforesaid agreement for providing marketing services. It is the further case of the petitioner that the aforesaid amount is not taxable in India and that the draft assessment order was passed on 29.12.2017 referred to supra, pursuant to which the final assessment order dated 19.02.2018 has been passed.

14. Learned Counsel for the petitioner further submits that under Explanation 1(c) to Section 263(1), the Commissioner is barred to revise an order of assessment which is subject matter of appeal. It is submitted that receipt of Rs.4,19,86,627/- which was the subject matter of appeal before the Commissioner of Income Tax Appeals and therefore the Commissioner under Section 263 of the Income Tax Act, 1961 cannot revise an order of assessment in relation to income which is subject matter of appeal.

15. That apart, the learned counsel for the petitioner submitted that the original draft assessment order dated 29.12.2017 preceded the show cause notice dated 22.12.2017, wherein the petitioner was merely asked to explain why the services provided by the petitioner to Texmo Precision Casting (India) [Manufacturing Partnership firm] should not be treated as consultancy services and taxed under Section 9(1)(VII) of the Income Tax Act, 1961.

16. The learned counsel for the petitioner further submits that the petitioner is from UK, the transaction between the petitioner and the Indian Partnership Firm engaged in manufacturing of goods for which the petitioner has provided marketing assistance is covered by India-UK Double Taxation Avoidance Agreement dated 11.02.1994. It is submitted that as per Article 13(4) of the aforesaid agreement, the term "Fees for technical services" means a payment of any amount to any person in consideration for rendering of technical or consultancy services [including provision of services of technical or other personal. It is therefore submitted that the services provided by the petitioner can neither be called as technical services or consultancy services.

17. It is further submitted that it cannot be said that the petitioner was having permanent establishment in India and that the proceeding mentioned by the AC (IT) / DC (IT) which



culminated in the draft assessment order dated 29.12.2017 and final assessment order dated 19.02.2018 were beyond the scope of show cause notice dated 22.12.2017. It is therefore submitted that the impugned proceedings seeking to nullify the assessment under Section 253 of the Income Tax Act, 1961 is without jurisdiction.

18. It is further submitted that the CIT(A) and Commissioner under Section 263 are officers of the same rank and have equal powers. It is submitted that what the Commissioner can do under Section 263, is the same under Section 251 of the Act by the CIT(A).

Power of CIT(A) u/s 251 -

- (a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment" "...
- (c) in any other case, he may pass such orders in the appeal as he thinks fit"

Power of CIT u/s 263 - "263(1)-

"... pass such order thereon as the circumstances of the case justify, including an order of enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment."

19. It is submitted that it is for this precise reason, there is a statutory bar under Section 263 to invoke provisions of Section 263 when the same income is subject matter of appeal, as appeal is a continuation of assessment proceedings. This has been confirmed by order of Division Bench of this Court in Renuka Philip v ITO, (2018) 409 ITR 567 (Mad), wherein it was held as under:

"22.The above explanation makes it clear that when the appeal is pending before the Commissioner, the exercise of jurisdiction under Section 263 of the Act is barred. The Commissioner in the order dated 14.03.2012 states that the appeal pertains to the claim made by the assessee under Section 54 of the Act and it has got nothing to do with the order passed by the Assessing Officer under Section 54F of the Act. The said finding rendered by the Commissioner is wholly unsustainable, since the assessee went on appeal against the re-assessment order dated 31.12.2009 stating that his claim for



WEB COPY

deduction under Section 54 of the Act should be accepted.

23. Therefore, in the process of considering as to what relief the assessee is entitled to, the Assessing Officer held that the assessee is entitled to claim deduction under Section 54F of the Act and assigned certain reasons for that. Therefore, the larger issue was pending before the Commissioner of Appeals, and in such circumstances, the Commissioner could not exercise power under Section 263 of the Act on account of the statutory bar. Therefore, on this ground also, the assumption of jurisdiction under Section 263 of the Act was wholly erroneous."

20. It is therefore submitted that invocation of Section 263 is prohibited in view of specific bar under Explanation 1(c) to Section 263(1) of the Act. It is submitted that for invoking provisions of Section 263, the Commissioner has to satisfy twin conditions that the order of the Assessing Officer is 'erroneous' and 'prejudicial to the interest of the revenue'. It is submitted that the order dated 19.02.2018, Assessing Officer was not prejudicial to the interest of revenue.

21. In the present case, if the revision is sought to be made, the tax to be levied is much lesser than what was originally sought to be demanded by the Assessing Officer in Original Assessment Order. This plea was raised before the Commissioner in reply to Show cause notice that the order is not prejudicial to the interest of the revenue by providing computation of taxes. The learned counsel has referred to the following particulars:-

Particulars	Receipts treated as Fees for Technical Services	Receipts treated as income from business or profession
Gross Receipts	Rs.4,19,86,627	Rs.4,19,86,627
Income from business or profession - 25% of the gross receipt*	-	Rs.1,04,96,656
Tax as per Normal Provisions of the Act	Rs.62,97,994	Rs.42,41,489
Minimum Alternate Tax as per Section 115JB*	NA	Rs.19,61,689



WEB COPY

Particulars	Receipts treated as Fees for Technical Services	Receipts treated as income from business or profession
Tax Liability higher of the Minimum Alternate Tax or Normal provisions of the Tax	Rs.62,97,994	Rs.42,41,489

22. However, in the impugned order, the Commissioner has not dealt with this issue and neither has come to any finding as to how the order dated 19/02/2018 is prejudicial to the interest of revenue. A reference was also made from the following passages which is reproduced below [CIT v Gabriel India Ltd. (1993) 203 ITR 108 (Bom)] :-

11. From the aforesaid definitions it is clear that an order cannot be termed as erroneous unless it is not in accordance with law. If an Income-tax Officer acting in accordance with law makes a certain assessment, the same cannot be branded as erroneous by the Commissioner simply because, according to him, the order should have been written more elaborately. This section does not visualise a case of substitution of the judgment of the Commissioner for that of the Income-tax Officer, who passed the order, unless the decision is held to be erroneous. Cases may be visualised where the Income-tax Officer while making an assessment examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income either by accepting the accounts or by making some estimate himself. The Commissioner, on perusal of the records, may be of the opinion that the estimate made by the officer concerned was on the lower side and left to the Commissioner he would have estimated the income at a figure higher than the one determined by the Income-tax Officer. That would not vest the Commissioner with power to re-examine the accounts and determine the income himself at a higher figure. It is because the Income-



WEB COPY

tax Officer has exercised the quasi-judicial power vested in him in accordance with law and arrived at a conclusion and such a conclusion cannot be termed to be erroneous simply because the Commissioner does not feel satisfied with the conclusion. It may be said in such a case that in the opinion of the Commissioner the order in question is prejudicial to the interests of the Revenue. But that by itself will not be enough to vest the Commissioner with the power of suo motu revision because the first requirement, viz., that the order is erroneous, is absent. Similarly, if an order is erroneous but not prejudicial to the interests of the Revenue, then also the power of suo motu revision cannot be exercised. Any and every erroneous order cannot be the subject-matter of revision because the second requirement also must be fulfilled. There must be some prima facie material on record to show that tax which was lawfully exigible has not been imposed or that by the application of the relevant statute on an incorrect or incomplete interpretation a lesser tax than what was just has been imposed.

23. It was submitted that the Assessing Officer has examined the aspect of permanent establishment in the Assessment order dated 19/02/2018 and concluded that the receipt of Rs.4,19,86,627/- is to be taxable as Fees for Technical Services in view of specific provision under Article 7(9) of the India-UK DTAA, where profits include items of income which are dealt with separately in other Articles of this convention, then the provisions of those Articles shall not be affected by the provisions of this Article. Therefore, the Assessing Officer has taken legally tenable position to tax the income under the head fees for technical services. Therefore, it is not known as to how order of the Assessing Officer is erroneous.

24. It is submitted that a specific plea was raised by the petitioner in its reply to Show cause notice. However, the same was not considered by the Commissioner in the impugned order and it was erroneously assumed jurisdiction and concluded that the order dated 19/02/2018 is erroneous. CIT v Gabriel India Ltd. (1993)203 ITR 108 (Bom), it was observed as under:-

"14. We may now examine the facts of the present case in the light of the powers of the Commissioner set out above. The Income-tax



WEB COPY

Officer in this case had made enquiries in regard to the nature of the expenditure incurred by the assessee. The assessee had given detailed explanation in that regard by a letter in writing. All these are part of the record of the case. Evidently, the claim was allowed by the Income-tax Officer on being satisfied with the explanation of the assessee. Such decision of the Income-tax Officer cannot be held to be "erroneous" simply because in his order he did not make an elaborate discussion in that regard. Moreover, in the instant case, the Commissioner himself, even after initiating proceedings for revision and hearing the assessee, could not say that the allowance of the claim of the assessee was erroneous and that the expenditure was not revenue expenditure but an expenditure of capital nature. He simply asked the Income-tax Officer to re-examine the matter. That, in our opinion, is not permissible. Further inquiry and/or fresh determination can be directed by the Commissioner only after coming to the conclusion that the earlier finding of the Income-tax Officer was erroneous and prejudicial to the interests of the Revenue. Without doing so, he does not get the power to set aside the assessment. In the instant case, the Commissioner did so and it is for that reason that the Tribunal did not approve his action and set aside his order. We do not find any infirmity in the above conclusion of the Tribunal. In the light of the foregoing discussion, we answer the question referred to us in the affirmative, that is, in favour of the assessee and against the Revenue."

25. Learned counsel also placed reliance on the following decision in Commissioner of Income Tax v. Sunbeam Auto Ltd., (2011) 332 ITR 167 (Del), wherein it was observed as under:-

"19. Thus, even the Commissioner conceded the position that the Assessing Officer made inquiries, elicited replies and thereafter passed the assessment order. The grievance of the Commissioner was that the Assessing Officer should have made further inquiries rather than accepting the explanation. Therefore, it cannot be said that it is a case of "lack of inquiry".



WEB COPY

20. Having put the record straight on this aspect, let us proceed further. Is it a case where the Commissioner has concluded that the opinion of the Assessing Officer was clearly erroneous and not warranted on the facts before him and, viz., the expenditure incurred was not revenue expenditure but should have been treated as capital expenditure? Obviously not. Even the Commissioner in his order, passed under section 263 of the Act, is not clear as to whether the expenditure can be treated as capital expenditure or it is revenue in nature. No doubt, in certain cases, it may not be possible to come to a definite finding and therefore, it is not necessary that in all cases the Commissioner is bound to express a final view, as held by this court in *Gee Vee Enterprises*, [1975] 99 ITR 375. But, the least that was expected was to record a finding that the order sought to be revised was erroneous and prejudicial to the interest of the Revenue (see *Seshasayee Paper*, [2000] 242 ITR 490 (Mad)). No basis for this is disclosed. In sum and substance, the accounting practice of the assessee is questioned. However, that basis of the order vanishes in thin air when we find that this very accounting practice, followed for a number of years, had the approval of the income-tax authorities. Interestingly, even for future assessment years, the same very accounting practice is accepted.

24 Likewise, whether the Commissioner should have recorded a definite finding or not, may not be very relevant factor in the present case where on the facts of this case we have found that the opinion of the Assessing Officer in treating the expenditure as revenue expenditure was plausible and thus there was no material before the Commissioner of Income-tax to vary that opinion and ask for fresh inquiry.

26. The learned counsel also referred to the decision of this Court in *Principal Commissioner of Income Tax v. Abhijit Bhandari* (2009) 414 ITR 485 (Mad), it was observed as under:-



WEB COPY

"57. In view of the reasons stated above, we find no reason to interfere with the order of the learned Single Judge. The issues raised on facts have been finally decided. A "possible view" had been arrived at stating that there was only one single residential unit. The appellant herein had not provided any additional material for us to hold a contrary view to the view held by the learned Single Judge."

27. It is further submitted that when two views are possible, Section 263 of the Income Tax Act, 1961 cannot be invoked. In this connection, the decision of the Court in. *Malabar Industial Co. Ltd. v Commissioner of Income Tax*, (2000) 2 SCC 718, was referred to wherein it was held that when there are two view possible for same subject matter of income, and the Assessing Officer has resorted to tax the said income by choosing one of the possible views, in such scenarios provisions of section 263 cannot be invoked. A reference was made to para No.11, which reads as under:-

"11. In the instant case, the Commissioner noted that the Income Tax Officer passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the Income Tax Officer failed to apply his mind to the case in all perspective and the order passed by him was erroneous. It appears that the resolution passed by the Board of the appellant Company was not placed before the Assessing Officer. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. He accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. On these facts the conclusion that the order of the Income Tax Officer was erroneous is irresistible. We are, therefore, of the opinion that the High Court has rightly held that the exercise of the jurisdiction by the Commissioner under Section 263(1) was justified."

28. Learned counsel for the petitioner further submitted that the impugned order was beyond the scope of Show cause notice. The Commissioner of Income Tax under Section 263 of the



Income Tax Act, 1961 issued Show cause notice with the following reason:

"... It is observed that the Assessing Officer has given a finding of assessee having a Permanent Establishment in Indi and the assessed income could have been taxed u/s. 115JB also."

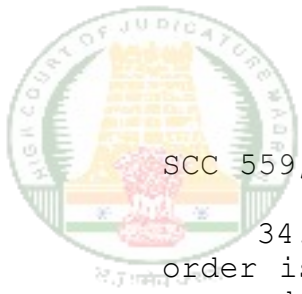
29. However, in the impugned order, it supplied new reason altogether to sustain the impugned proceedings, which are otherwise wholly without jurisdiction as stated above. In the impugned order, the Commissioner of Income Tax for the first time has observed that the Assessing Officer has failed to make enquiry regarding the estimation of income and this failure makes the order erroneous and concluded that the Assessing Officer arrived at the estimated profits of 25% without any basis. Whereas as seen from the reasons provided in SCN, the CIT, nowhere calls upon the Petitioner to show-cause on the aspect of estimation of income at 25% being erroneous.

30. It is therefore submitted that the impugned order has travelled beyond the scope of show-cause notice and is liable to be quashed. [Oryx Fisheries Private Ltd. v. Union of India and Others, (2010) 13 SCC 427].

31. Finally, it was submitted that the impugned order was issued without Document Identification Number. It is submitted that Circular No. 19 of 2019, states that income-tax authorities shall not issue orders manually and without document identification number (DIN), except in exceptional circumstances. In these exceptional cases, the authority has to record reasons in the format provided in the circular as to why order is issued manually and without DIN .

32. In the present case impugned order dated 30/03/2021 was issued without DIN and no reasons have been stated as is required by the said Circular. It is after the passing and receipt of the impugned order, the Petitioner received communication dated 31/03/2021, stating that order u/s 263 purportedly dated 31/03/2021 is having a DIN ITBA/REV/M/REV5/2020-21/1032062505(1). This communication is an after thought because the impugned order is dated 30/03/2021 and issued in contravention to Circular No.19 of 2019.

33. It is submitted that when a statute describes or requires a thing to be done in a particular manner; it should be done in that manner or not at all. [Taylor v Taylor (1876) Ch.D 426, followed in Ramchandra Keshav Adke v Govind Joti (1975) 1



SCC 559, Para 25] 17.

34. It is submitted that as per Circular in para 4 if an order is issued without following procedure in para 2 and 3, the same shall be treated as invalid and shall be deemed to have never been issued. Therefore, it is submitted that the impugned order is non-est and is liable to be quashed.

35. It is further submitted that the 1st respondent vide impugned order has set-aside the assessment order dated. 19/02/2018 which was subject matter of appeal and therefore impermissible. It is submitted that there cannot be two parallel proceedings under the statute for the same subject matter.

36. Learned counsel for the petitioner in the alternative submitted that if the assessment order is set aside, then the tax demand and the findings of the Assessing Officer insofar as receipt taxable as Fees for Technical Services is also set aside and the Respondents do not seek to contest the taxability of receipt as Fees for Technical Services. For the above reasons, it is prayed that the writ petition be allowed.

37. Opposing the prayer, Mrs.Hema Muralikrishnan, learned Senior Standing Counsel for the respondents submits that the petitioner has not challenged the finding of the Deputy Commissioner of Income Tax in the draft assessment order dated 29.12.2017 as confirmed by the assessment order dated 19.02.2018 and therefore, the scope of the appeal of the petitioner was only relating to the consultancy charges on which a tax of Rs.62,97,994/- has been demanded from the petitioner. The learned Senior Standing counsel for the respondents further submits that the submission of the the petitioner is devoid of merits. It is submitted that the petitioner has an alternate and efficacious remedy and therefore the jurisdiction of this Court under Article 226 of Constitution of India not be invoked.

38. The learned counsel for the respondents submits that both under Section 246A r/w 251 of the Income Tax Act, 1961, the Appellate Commissioner as also the Commissioner of Income Tax under Section 263 of the Income Tax Act can nullify the assessment, save that in the appellate proceedings, the Appellate Commissioner can pass fresh order of assessment, as if it were the assessment order against which the remedy lies before the Tribunal. In this case, the petitioner's appeal has been allowed indirectly and the matter has been remitted back to the second respondent to pass fresh assessment order and therefore, there is no case made out for interference under Article 226 of the Constitution of India.



39. In this connection, a reference was made to the decision of the Honourable Supreme Court in Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Ltd & Others, (1985) 1 SCC 260. Learned Senior Standing Counsel for the respondents also placed reliance on the decision of the Honourable Supreme Court in CIT versus Vijaybhai N Chandrani, (2013) 357 ITR 713 and the decision of this Court in Dr.Nedunchezian versus Dy. CIT, (2005) 279 ITR 342 (Mad) .

40. It is submitted that the petitioner has admitted that the petitioner has denied that it has a permanent Establishment in India vide letter dated 13.10.2017. It is submitted that an issue regarding the visit of Mr.Arjunan Ramachandran, incidentally, the director of the petitioner who is a partner in the partnership firm was raised. Therefore, it cannot be said that the petitioner had no notice of the aforesaid proposal.

41. It is submitted that in the assessment, the 2nd respondent has assessed the income towards fees for technical services at the concessional rate of tax as per DTAA and 15% and not as a separate business income and therefore it is submitted that the allegation of the petitioner that the finding of the 2nd respondent with regard to permanent Establishment was made without putting the petitioner to any notice cannot be countenanced particularly in the light of the fact that the petitioner had raised an issue in his reply.

42. It is further submitted that the issue relating to application of Section 115JB was never subject matter of the proceedings before the 2nd respondent. It is submitted that in the appeal before the CIT (A) a remand report was given by the 2nd respondent. It was however confined to taxability of receipts as fees for technical services only because the petitioner herein has agitated the said issue before the CIT (A).

43. It is submitted the fact that the 2nd respondent failed to examine the issue from the perspective of 115JB and thus it shows that the order passed by the 2nd respondent was erroneous and prejudicial to the interest of the revenue and therefore the invocation of Section 263 cannot be questioned. It is submitted that where permanent Establishment is determined in India, tax has to be determined on the basis and the tax rate in the case of non-resident at the rate of 40% whereas the case of a non-resident having no permanent Establishment taxes to be paid at 15% as per Article 13 of the UK-India DTAA. It is submitted that once there is finding of fact regarding permanent Establishment in India, the assessment has to be completed under Section 115JB of the Income Tax Act, 1961.



WEB COPY

44. It is submitted that the profit that was required to be worked out valid estimation or from the books of the petitioner was not done. It is therefore submitted that the order was erroneous and prejudicial to the interest of the revenue and therefore the jurisdiction has been rightly invoked Section 263 of the Income Tax Act, 1961

45. The issue that arises for consideration in this writ petition whether the notice issued to the petitioner under Section 263 of the Income Tax Act, 1961, pursuant to which, the impugned order dated 30.03.2021 was without jurisdiction or not. Explanation Section 1(c) of the Income Tax Act, 1961, Explanation 1(c) to Section 263 reads as under:-

"1(c) : Where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal (filed on or before or after the 1st day of June 1988), the powers of the (Principal Commissioner or) Commissioner under this sub-section shall extend (and shall be deemed always to have extended) to such matters as had not been considered and decided in such appeal)."

46. A reading of the above Explanation, makes it clear the power of the Principal Commissioner or Commissioner under sub-section extends to such matters as had not been considered and decided in an appeal. The appeal has not been considered and decided. Thus, there is no embargo under Section 263 of the Income Tax Act, 1961 for the 1st respondent to pass order.

47. The scope of appeal before the Appellate Commissioner is confined to tax ability of receipts towards technical services only. The Assistant Commissioner has not been considered the issue from the point of view Section 115 JC of the Income Tax Act, 1961.

48. Whether the facts on merits warrants invocation of Section 11JB of the Income Tax Act, 1961 or not would render the proceedings without jurisdiction. Invocation of Section 263 of the Income Tax Act, 1961 by the first respondent on 15.03.2021 vide notice bearing Reference No.CIT/IT/CHE/113/2020-21 which has culminated in the impugned order dated 30.03.2021 cannot be said to be without jurisdiction merely because the intimation of DIN to the order passed under Section 263 was one day after the order was passed. Para No.5 of the CBDT Circular No.19/2019 dated 14.08.2019 makes it clear that communication issued manually can be regularised within 15 days of the issuance. Para 5 of Circular reads as under:-



WEB COPY

"The communication issued manually in the three situations specified in para 3- (i), (ii) or (iii) above shall have to be regularised within 15 days of its issuance, by-

i) uploading the manual communication on the system.

ii) compulsorily generating the DIN on the System.

iii) communicating the DIN so generated to the assessee/any other person as per electronically generated pro-forma available on the system.

49. Para 7 of the said Circular reads as under:-

"7. Further, in all pending assessment proceedings, where notices were issued manually, prior to issuance of this Circular, the income-tax authorities shall identify such cases and shall upload the notices in these cases on the Systems by 31st October, 2019."

50. As the scope of judicial review under Article 226 of the Constitution of India is limited, I am refraining for discussing on merits of the case. Suffice to state that the proceeding initiated by the 1st respondent was not without jurisdiction.

51. The argument of the petitioner that the assessment order was not prejudicial to the interest of revenue and therefore the proceeding under Section 263 was liable to be quashed cannot be countenanced. A proceeding under Section 263 of the Income Tax Act, 1961 cannot be scuttled. Further, the petitioner participated in the proceeding initiated under Section 263 of the Income Tax Act, 1961. Therefore, it is not open to the petitioner to turn around to state that the proceeding was without jurisdiction.

52. Under these circumstances, I do not find any merits in the present writ petition. This writ petition is therefore liable to be dismissed with liberty to the petitioner to work out the Appellate remedy before the Appellate Tribunal under Section 254 of the Income Tax Act, 1961. If the petitioner files such an appeal within a period of 30 days from the date of receipt of a copy of this order, the Appellate Tribunal shall entertain such appeal and pass appropriate orders on merits and in accordance with law.



53. This Writ petition is therefore dismissed in terms of the above observation. No costs. Consequently, connected miscellaneous petition is closed.

WEB COPY

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

kkd

To

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

Copy To

The Commissioner,
Income Tax Appellate Tribunal,
Chennai.

+1cc to Mr.R.Sandeep Bagmar, Advocate, S.R.No.27850
+1cc to Mrs.Hema Muralikrishnan, Advocate, S.R.No.27870

W.P.No.12310 of 2021

SR(CO)
PM/31/05/2022