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W.P.Nos.22661 & 22667 of 2



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 16.11.2022

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THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P.Nos.22661 & 22667 of 2021 and
WMP.Nos.23902, 23903, 23904, 23907, 23908, 23909 & 23910 of 2021 &
WMP.Nos.730, 731, 732 & 733 of 2022

Amec Foster Wheeler Iberia SLU – India Project Office,
[PAN: AABCF8922G],
6th Floor, Zenith Building,
Ascendas IT Park, CSIR Road, Taramani,
Chennai 600 113,
Represented by its Authorized Signatory,
VenkatramaKatipalla

... Petitioner in both WPs

Vs

1. Deputy Commissioner of Income-tax,
International Taxation Circle-1(1),
BSNL Building, 4th Floor,
No.16, Greaves Road, Chennai-600 006.

2. Deputy Commissioner of Income-tax,
Transfer Pricing Officer -1(1),
BSNL Building, 5th Floor,
No.16, Greaves Road, Chennai-600 006.

... Respondents in both WPs

PRAYER in WP.No.22661 of 2021: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records of the 1st Respondent of the case leading to the issue of Impugned Notice under section 148 of the Act dated December 12, 2019 for AY 2016-17 in DIN: ITBA/AST/S/ 148/2019-20/1022206169(1) and the Consequential Order



rejecting the objections dated July 23, 2021 in DIN: ITBA/AST/F/17/2021-22/1034394266(1) and quash the same.

PRAYER in WP.No.22667 of 2021: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records of the case leading to the issue of Impugned Transfer Pricing Notice under section 92CA(2) of the Act dated November 24, 2020, for the AY 2016-17 in DIN: ITBA/TPO/S/92CA/2020-21/1028710721(1) on the file of the 2nd Respondent and quash the same.

(In both WPs)

For Petitioner : Mr.Nishant Thakkar
Hiten Chande and
Ms.JasminAmalsadvala
for Mr.R.Venkata Narayanan

For Respondents : Mrs.HemaMuralikrishnan,
Senior Standing Counsel and
Mr.Prabu Mukund Arunkumar,
Junior Standing Counsel

COMMON ORDER

The petitioner is a company, incorporated in Spain, and a regular assessee under the provisions of the Income Tax Act, 1961 (in short 'Act'). It is engaged in the business of providing project management consultancy as well as engineering, procurement and construction services in the setting up of oil and gas refineries as well as storage and transportation terminals.

2. This common order disposes two Writ Petitions, one raising a duel challenge, to a notice under Section 148 of the Act dated 12.12.2019 and an



order dated 23.07.2021 rejecting the objections of the petitioner in regard to assumption of jurisdiction for re-assessment under Section 147 of the Act, and the other, a notice dated 24.11.2020, issued by the Transfer Pricing Officer (TPO)/R2.

3. The sequence of dates and events leading to the cause of action agitated in these Writ Petitions is as follows:

i) The proceedings relate to assessment year (AY) 2016-17. In the financial year relevant to that year, the petitioner had sought and obtained a Nil tax withholding certificate in respect of certain amounts that it had received from Indian Oil Corporation Limited and Indian Oil LNG Private Limited for providing project management consultancy services.

ii) A return of income had been filed by the petitioner in time, duly accompanied by relevant financials.

iii) The return was not processed under regular provisions; instead, on 12.12.2019 it received a notice under Section 148, in compliance of which a return was filed, in line with the regular return filed earlier.

iv) The petitioner also sought the reasons on the basis of which the notice under Section 148 had been issued.

v) In line with the procedure laid down by the Hon'ble Supreme Court in *GKN Drive shafts (India) Ltd. V. Income Tax Officer* (259 ITR 19), objections



were raised by the petitioner to the assumption of jurisdiction under Section 147 of the Act.

vi) The objections were kept pending and a reference had been made by the assessing officer/R1, even pending such objections, to the Transfer Pricing Officer/R2, for determination of Arms' Length Price of international transactions entered into by the petitioner with Associated entities situated outside the country.

vii) R2 issued a notice under Section 92CA of the Act on 24.11.2020. In response thereto, the petitioner requested that the TPO defer the matter till such time the objections to assumption of jurisdiction were disposed by R1.

viii) The request was ignored and a notice once again came to be issued on 01.07.2021 calling for compliance with the requirements under earlier notice dated 24.11.2020.

ix) This exchange was repeated over the months till July, 2021. Finally, on 23.07.2021, the objections raised by the petitioner to the assumption of jurisdiction were rejected.

x) The TPO has, thereafter, issued a notice on 16.08.2021 under Section 92CA(2) of the Act calling for compliance with the earlier notices issued by him.

xi) Digressing for a moment at this juncture, it is pertinent to note that several grounds have been raised in the Writ Petition touching upon the alleged illegalities in the re-assessment proceedings. However, the sole ground pursued



and argued when the matter is taken up for hearing on 17.10.2022 is that no notice was issued under Section 143(2) of the Act by R1 within the statutory time limit provided, which, according to the petitioner, vitiates the proceedings in full.

xii) The petitioner has, admittedly, filed a return of income pursuant to notice under Section 148 on 07.01.2020. The argument of the petitioner is that a re-assessment under Section 147 of the Act is required to be framed in line with the procedure set out for framing of a regular assessment under the Act.

(xiii) The proviso to Section 143(2) of the Act fixes a timeline of 6 months from the end of the financial year in which the return was furnished, for the issue of notice under Section 143(2), or 6 months from 31.03.2020, being 30.09.2020. The Taxation and other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (in short 'TOLA Act') extends the aforesaid timelines to 31.03.2021.

xiv) However, no notice under Section 143(2) had been received at the time when the Writ Petition was filed, which is on 22.09.2021, long past the expiry of limitation. This, according to Mr.Nishanth Thakkar, learned counsel for the petitioner, vitiates the proceedings fatally, as a consequence of which, the impugned notice under Sections 148, the order disposing the objections to assumption of jurisdiction and the subsequent reference to the TPO are all liable to be set aside as being bad in law.



4. The specific argument is that assumption of jurisdiction by an officer commences with, and is triggered by, the issuance of a notice under Section 143(2) and failure to do so, would compromise the proceedings fatally.

5. The petitioner relies on several decisions in support of its submissions, being:

(i) *Assistant Commissioner of Income-tax v. Hotel Blue Moon* (321 ITR 362(SC))

(ii) *Deputy Commissioner of Income Tax & Another v. Indus Towers Limited* [SLP(Civil) Diary No(s).34285/2018 dated 21.01.2019]

(iii) *Sapthagiri Finance & Investments v. Income-tax Officer, Ward 1(4), Kanchipuram* [(2012) 25 taxmann.com 341 (Mad.)]

(iv) *Commissioner of Income-tax, Chennai v. Alstom T & D India Ltd.* [(2014) 45 taxmann.com 424 (Madras)]

(v) *N.Ahamed Ali, Legal heir of Shri S.Naina Mohammed (deceased) v. The Income Tax Officer, Ward II(2), Erode* [Tax Case (Appeal) No.766 of 2014 dated 19.11.2014]

(vi) *The Commissioner of Income Tax, Trichy v. M/s.Fathima Thanga Maaligai, 141/1, Bharathiar Road, Karaikal 609 602* [TCA.Nos.582 & 583 of 2014 dated 15.09.2014]

(vii) *CIT V.Alstom T&D India Ltd.* (226 Taxman 103) (Mad.)

(viii) *PR. Commissioner of Income-tax v. Shri Jai Shiv Shankar Traders (P) Ltd.* (383 ITR 448 (Del.))

(ix) *Pr. Commissioner of Income-tax v. Silver Line* (383 ITR 455 (Del.))

(x) *Commissioner of Income Tax v. Deep Baruah* (329 ITR 362 (Gauhati))

(xi) *Indus Towers Ltd. v. Deputy Commissioner of Income tax, Circle-11(1)* [(2017) 82 taxmann.com 430 (Delhi)]

(xii) *Alpine Electronics Asia Pte. Ltd. v. Director General of Income-tax* (341 ITR 247(Delhi))



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6. Mrs. Hema Muralikrishnan, learned Senior Standing Counsel appearing for the respondents would argue that non-issue of a notice under Section 143(2) is not fatal to the framing of re-assessment. She distinguishes the judgment of the Hon'ble Supreme Court in the case of *Hotel Blue Moon* (supra) pointing out that, that judgment had interpreted the scheme of search assessment under Chapter XIV B, which specifically refers to the conduct of an assessment in line with the procedure under Section 143 of the Act. There is no such mandate in the present situation involving re-assessment, she argues.

7. That apart and as regards the decisions of the High Court that support the proposition that a notice under Section 143(2) is mandatory for framing of a re-assessment, she points out that in those cases notices had been issued beyond the period of 6 months and it was in those circumstances that the Court had decided adverse to the revenue. In the present case, no notice has been issued at all and hence, the question of a notice having been issued beyond the prescribed timeline does not arise.

8. I may straightaway state that this is a distinction without a difference, since the consequence of a notice issued beyond 6 months and one not issued at all, even beyond the period of 6 months, is one and the same. To put it simply, if no notice is issued within 6 months, the revenue must face the consequences of this, irrespective of whether a notice has been issued belatedly or no notice has been issued at all.



9. She relies on a decision of this Court in the case of *B.Kubendran v. Deputy Commissioner of Income Tax, Central Circle 2(1), Chennai* (434 ITR 161) rendered in the context of the new scheme of block assessment under Sections 153A and 153C of the Act. Therein, this Court has noted a distinction between the erstwhile scheme of block assessment under Chapter XIV B and the presently prevailing scheme of block assessment, concluding that the new scheme does not require the issuance of a notice under Section 143(2) to kick start the assessment.

10. The framing of a regular assessment/re-assessment is triggered by the issue of a statutory notice under Section 143(2) of the Act, which constitutes a pre-condition for the assumption of jurisdiction by the assessing officer concerned. However, in the case of a search assessment, the assumption of jurisdiction is conveyed with the issuance of a notice under Section 153A, in the case of a searched entity, and recording of a satisfaction note and issuance of notice under Section 153C, in the case of a third party. A notice under Section 143(2) is thus redundant and unnecessary to the scheme of assessments under section 153A or C.

11. The question arising in this matter is no longer *res integra*, having been considered and answered by this Court in *Sapthagiri Finance & Investments* (supra), wherein the Division Bench at paragraph 13, holds as follows:



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13. As far as the present case is concerned, the provisions of Section 148 also uses the expression "so far as may be apply accordingly as if such return were a return required to be furnished under Section 139". Thus, understanding this provisions in the background of the decision of the Apex Court, on the facts available, we are of the view that in completing the assessment under Section 148 of the Act, compliance of the procedure laid down under Sections 142 and 143(2) is mandatory. On the admitted fact that beyond notice under Section 142(1), there was no notice issued under Section 143(2), and in the light of the fact that the very basis of the reassessment was the failure on the part of the assessee in not disclosing the capital gains arising on the transfer of property for assessment and that admittedly the assessee had requested the officer to accept the original return as a return filed in response to Section 148 of the Act, we hold that there was total failure on the part of the Revenue from complying with the procedure laid down under Section 143(2) of the Act, which is mandatory one as held by the Apex Court.

12. Then again, in the case of *Alstom T & D India Ltd.*(supra), at paragraph 5, the above conclusion is reiterated as follows:

5. The facts as stated above are not in dispute. As rightly pointed out by the learned counsel for the assessee, even in the matter of finalisation of the assessment under Section 148 of the Act, compliance of the procedure laid down under sections 142 and 143(2) is mandatory vide order dated 17.7.2012 in *Sapthagiri Finance & Investments v. ITO* [2012] 210 Taxman 78 (Mag.)/25 taxmann.com 341 (Mad.). Referring to the Apex Court in the decision in *Asstt. CIT v. Hotel Blue Moon* [2010] 321 ITR 362/188 Taxman 113 holding that completion of the assessment proceedings under Section 143(3) read with 147 without issue of notice under Section 143(2) was bad in law, this Court held that when there was failure on the part of the Revenue from complying with the procedure laid down under Section 143(2) of the Act, the assessment had to fail.



13. In the above case, the Court records at paragraph 6 that no notice was issued under Section 143(2) of the Act, which is a position analogous to that in the present matter.

14. The Delhi High Court in *Shri Jai Shiv Shankar Traders (P) Ltd.* (supra) has answered this issue along identical lines as in the above decisions, stating at paragraph 19 as follows:

19. The resultant position is that as far as the present case is concerned the failure by the AO to issue a notice to the Assessee under Section 143(2) of the Act subsequent to 16th December 2010 when the Assessee made a statement before the AO to the effect that the original return filed should be treated as a return pursuant to a notice under Section 148 of the Act, is fatal to the order of re-assessment.

15. The decision of the Apex Court in *Sapthagiri Finance & Investments* (supra) and various decisions of the Delhi, Bombay, Rajasthan, Kerala, Karnataka, Calcutta, Gauhati, Chattisgarh and Allahabad High Courts, to similar effect, have also been noticed. So too in the case of *Silver Line* (supra) by the same Bench of the Delhi High Court that passed the order in the case of *Shri Jai Shiv Shankar Traders (P) Ltd.* (supra).

16. This view has been reiterated by another Bench of the Delhi High Court in *Alpine Electronics Asia Pte. Ltd.* (supra), wherein at paragraph 24, the Bench states as follows:

24. Section 143(2) is applicable to proceedings under Sections 147/148 of the Act. Proviso to Section 148 of the Act protects and grants liberty to the Revenue to serve notice under Section 143(2) of the Act before passing of the assessment order for returns furnished



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on or before 1st October, 2005. In respect of returns filed pursuant to notice under Section 148 of the Act after 1st October, 2005, it is mandatory to serve notice under Section 143(2) of the Act, within the stipulated time limit.

17. The decision of the Delhi High Court to identical effect in the case of *Indus Towers Limited* (supra) was carried in appeal before the Hon'ble Supreme Court, and by order dated 21.01.2019 in SLP Diary No.34285 of 2018, the Special Leave Petitions were dismissed.

18. Revenue also places reliance on a decision of the Delhi High Court, in the case of *Commissioner of Income tax – II, New Delhi vs Madhya Bharath Energy Corporation* (I.T.A. No.950 of 2008), dated 11.07.2011. However this decision is of no avail to the revenue. The appeal filed by the Commissioner of Income Tax had raised several issues. When the matter had come up for admission under Section 260A of the Act on 17.02.2011, the Bench had declined to admit the question relating to whether issuance of notice under Section 143(2) within the time frame of 6 months was mandatory. Hence, the order of the Income Tax Appellate Tribunal in favour of the assessee stood confirmed even at that stage.

19. However, it appears that when the Tax Case (Appeal) was finally disposed on 11.07.2011, which is the order the revenue relies upon, the Division Bench had proceeded to decide the question on merits, and in favour of the revenue, not noting that that question had not been admitted at the first instance.



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20. A review application had come to be filed by the assessee (Review Petition No.441 of 2011) and by order dated 17.08.2011, the Delhi High Court rectified the error noticing that that question had not been admitted in the first place and hence there had been a mistake apparent on record by the subsequent Bench considering that question on merits, even sans admission.

21. Thus, this point also stands clarified and with that, there is complete uniformity in the conclusion of Courts on the issue as to whether non-issue of notice under Section 143(2) would vitiate the assessment, answering the issue in the affirmative.

22. CBDT Instruction No.3 of 2003 elucidates upon and explains the provisions relating to Transfer Pricing, as contained in Sections 92 and 92F of the Act that had come into force, with effect from assessment year 2002-03 onwards.

23. The Circular reinforces the position that it is sine qua non for the Assessing Officer to assume jurisdiction prior to taking any steps in the matter of assessment, including reference of the matter to the TPO. The jurisdiction assumed by an officer in terms of Section 120 of the Act is activated by issuance of notice under Section 143(2), and as a consequence, failure to issue the statutory notice will lead to the inevitable result of the Officer not having assumed jurisdiction, for all practical purposes.



24. As a last ditch effort, learned standing counsel would point out that the impugned order rejecting the objections to assumption of jurisdiction came to be passed only on 23.07.2021 and thus, the period when the matter was pending before the Assessing Officer for compliance of the procedure set out by the Hon'ble Supreme Court in the case of *GKN Driveshafts* (supra), should stand excluded in computing the period of 6 months required to issue notice under Section 143(2) of the Act.

25. This argument is misconceived for more than one reason. Firstly, the statutory period of six months cannot be altered except in the situations contemplated under Explanation to Section 153. The Explanation takes note of events that might intervene in the course of assessment proceedings, and excluded the time taken for those events to run their course, in computation of limitation. These are the only situations where statutory limitation under Section 153 may be expanded.

26. The procedure set out by the Hon'ble Supreme Court has, no doubt, to be adhered to strictly, within the statutory timelines as provided for completion of limitation. In this case, return of income was filed by the petitioner in response to notice under Section 148 on 07.01.2020 and on 08.01.2020 reasons were sought.

27. On 10.01.2020, reasons had been supplied and on 04.03.2020, the petitioner filed its objections. These objections have been disposed only on 23.07.2021, after a period of one year and four months. There was nothing that



prevented the assessing officer to have called for objections, assigning a time limit to the assessee to file the same, and disposed the objections expeditiously.

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The procedure set out in the case of *GKN Drive shafts (India) Ltd* (supra) nowhere envisages modification/expansion of the statutory limitations under the Act.

28. In light of the detailed discussion as above as well as the legal position that has been settled in several judgments discussed in the preceding paragraphs, impugned notice under Section 148 dated 12.12.2019, order dated 23.07.2021 and reference to TPO on 24.11.2020 stand vitiated by non-issue of notice under Section 143(2) of the Act and the same are quashed.

29. These Writ Petitions are allowed. No costs. Connected Miscellaneous Petitions are closed.

16.11.2022

Index : Yes
Speaking Order
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To

1. Deputy Commissioner of Income-tax,
International Taxation Circle-1(1),
BSNL Building, 4th Floor,
No.16, Greams Road, Chennai-600 006.



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2. Deputy Commissioner of Income-tax,
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DR.ANITA SUMANTH, J.

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