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W.P.No.4584 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 14.08.2023	Pronounced on: 18.12.2023
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THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.4584 of 2020

and

W.M.P.Nos.5438 & 5439 of 2020, 25157 of 2022 & 20566 of 2023

M/s. Amec Foster Wheeler India Private Limited,
(Formerly known as Wheeler India Private Limited)
Represented by the authorized signatory,
Venkatrama Katipalla,
6th Floor, Zenith Building, Ascendas IT Park,
CSIR Road, Taramani, Chennai – 600 113.

.. Petitioner

Vs.

1.Deputy Commissioner of Income Tax,
Corporate Circle – 1(1),
Room No.611, 6th Floor, Wanaparthi Block,
Aayakar Bhawan, No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai – 600 034.

2.Principal Commissioner of Income Tax -1,
Aayakar Bhawan, No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai – 600 034.

.. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records on the file of the 1st respondent and quash the impugned order in letter No.ITBA/ASP/F/17/2019-20/1020200226(1) dated 11.11.2019 along with the notice bearing No.ITBA/AST/S/148/2018-19/1015582481(1)



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dated March 30, 2019 under Section 148 of the Income Tax Act, 1961
issued by the 1st respondent for the AY 2012-2013.

For Petitioner : Mr.N.V.Balaji

For Respondents : Mr.B.Ramana Kumar
Senior Panel Counsel

ORDER

The petitioner is aggrieved by the impugned notice dated 30.03.2019 issued under Section 148 of the Income Tax Act, 1961 to re-open the assessment under section 147 of the Income Tax Act, 1961 and the impugned order dated 11.11.2019 passed by the 1st respondent for the Assessment Year 2012-2013.

2.By the impugned order dated 11.11.2019, the 1st respondent has overruled the objection of the petitioner against re-opening of the assessment that was completed on 31.01.2017 for the Assessment Year 2012-2013 under Section 143(3) read with Section 144C of the Income Tax Act, 1961.



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3.Relevant portion of the impugned order dated 11.11.2019 passed by the 1st respondent for the Assessment Year 2012-2013 overruling the objection of the petitioner against re-opening of the assessment completed under Section 147 of the Income Tax Act, 1961 on 31.07.2017 reads as under:-

- “6.1.It is evident from the above facts that the assessee had not truly and fully disclosed material facts necessary for his assessment for the year under consideration thereby necessitating reopening u/s 147 of the Income Tax Act,1961.*
- 6.2.It is true that the assessee has filed a copy of annual report and audited Profit & Loss Account and Balance Sheet along with return of income where various information/materials were disclosed. However, the requisite full and true disclosure of all material facts necessary for assessment has not been made as noted above. It is pertinent to mention here that even though the assessee has produced books of accounts, annual report, audited Profit & Loss Account and balance sheet or other evidence as mentioned above, the requisite material facts as noted above in the reasons for reopening were embedded in such a manner that material evidence could not be discovered by the Assessing Officer and could have, been discovered with due diligence, accordingly attracting provisions of Explanation 1/of section 147 of the Income Tax Act, 1961.*
- 6.3.It is evident from the above discussion that in this case, the issues under consideration were never*



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examined by the Assessing Officer during the course of regular assessment. This fact is corroborated from the contents of notices issued by the Assessing Officer u/s 143(2)/142(1) of the Income Tax Act, 1961 and order sheet entries recorded during the 143(3) of the Income Tax Act, 1961 proceedings. It is important to highlight here that material facts relevant for the assessment on the issue(s) under consideration were not filed during the course of assessment proceeding and the same may be embedded in annual report, audited Profit & Loss Account and Balance Sheet and books of accounts in such a manner that it would require due diligence by the Assessing Officer to extract these information. For aforesaid reasons, it is not a case of change of opinion by the Assessing Officer.

- 6.4. In this case more than four years have lapsed from the end of assessment year under consideration. Hence, necessary sanction to issue Notice u/s 148 of the Income Tax Act, 1961 has been obtained separately from Principal Commissioner of Income Tax as per the provisions of section 151 of the Income Tax Act, 1961.*
- 7. The assessee has furnished objections on merits of the case which shall be duly considered during the course of assessment after giving sufficient opportunities to the assessee for being heard.*
- 8. In view of the above facts and discussions, it is very clear that the reassessment initiated by issue of Notice u/s 148 of the Income Tax Act, 1961 is valid in law and therefore, the objection raised by the assessee is hereby disposed off. It is also assured that the assessee shall be accorded with ample opportunity to discuss the case during the course of scrutiny proceedings and a judicious view shall be taken considering all of the facts or material/s brought on record."*



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4.The impugned order dated 11.11.2019 precedes a notice dated 30.03.2019 issued to the petitioner under Section 148 of the Income Tax Act, 1961, seeking to re-open the Assessment that was completed on 31.01.2017, under Section 143(3) read with Section 144C of the Income Tax Act, 1961, in response to the returns filed by the petitioner on 28.11.2012.

5.The reasons furnished to the petitioner vide communication dated 13.05.2019 for re-opening the Assessment are under the following different heads:-

- a.**Undue claim of Management Fees paid;**
- b.Transfer Pricing Issues;
- c.Buy back of Shares;
- d.**Reimbursement of software expenditure to group companies without and non-deduction of TDS on the payments;**
- e.Consultancy expenses and
- f.Depreciation on software license.

6.The reasons for re-opening the Assessment vide letter dated



13.05.2019 in so far as “Transfer Pricing Issues” are concerned reads as

under:-

“3.Transfer Pricing Issues:-

- 3.1. *During the survey u/s 133A of the Income Tax Act, it was noticed that the assessee is doing high end engineering services but has categorized itself as a low-end service provider. Several documents were impounded during the survey which gives crucial pointers to the functions carried out by the company in India.*
- 3.2. *On examination and analysis of such documents, I have formed reasons to believe that the company's functions, risks, assets need re-characterization as a high end engineering services provider as an entrepreneurial segment. The company definitely cannot be put on a cost-plus model. This has to be thoroughly examined under the transfer pricing provisions in the light of findings made during the survey proceedings. It has also come to the notice that the assessee company has got the Advance Pricing Agreement signed in a hurry after the survey but it is ascertained that the facts uncovered during the survey proceedings were not considered by the APA team in considering the overall margins for the company. Hence, the entire Transfer Pricing Model needs a fresh look based on the findings made during the survey proceedings in the case of the assessee company for the AY 2012-13.”*

7.As far as “Buy Back of Share” are concerned, the reason given in the said communication read as under:-

“4.Buy Back of Shares:-



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4.1. During the survey proceedings, it was also noticed that on buyback of shares by the assessee from M/s.PE Consultants Inc., the assessee has received undervalued shares during the FY 2011-12 relevant to AY 2012-13. While computing the value of shares, the valuer assumed only one year projections arbitrarily and carried out the Discounted Cash Flow method. As per ICAI guidelines on share valuation, minimum five years cash flows ought to have been considered by the valuer for valuation of shares.

4.2. It is noticed that “Buy Back of Shares” was made by the assessee company to the tune of Rs.33,06,88,545/- from M/s.P.E. Consultants Inc. @ Rs.675/- per share. It is noticed that the earlier year the share price was at Rs.454/- per share. The details on what basis this valuation of share are made need to be verified.”

8.The petitioner replied to the respondent vide reply dated 18.09.2019. The reply has culminated in the impugned order dated 11.11.2019 of the 1st respondent. The 1st respondent has thus over ruled the objection of the petitioner which has thus culminated in the impugned order dated 11.11.2019 which the petitioner has challenged in this Writ Petition.

9.Meanwhile, an order dated 01.11.2019 has been passed under Section 92CA of the Income Tax Act, 1961 for the Assessment Year



2011-2012. A Draft Assessment Order dated 28.12.2019 also has been passed under Section 143(3) read with Section 147 read with Section 144C(1) of the Income Tax Act, 1961 for the assessment year 2011-2012. The aforesaid Draft Assessment Order dated 28.12.2019 also proposes penalty under Section 271(C) of the Income Tax Act, 1961.

10. After the impugned order dated 11.11.2019 was passed by the 1st respondent, overruling the objection of the petitioner against re-opening the assessment, a reference was also made to the Transfer Pricing Officer (TPO) under Section 92CA of the Income Tax Act, 1961, for the second time on 27.12.2019 for the assessment year 2012-2013. The petitioner has also replied on 10.01.2020 to the Deputy Commissioner of Income Tax, Transfer Pricing Officer (TPO).

11. *Post facto*, after this Writ Petition was filed, the Income Tax Appellate Tribunal by its order dated 03.08.2022 in I.T.A.No.799/Chny/2017 has allowed the appeal of the petitioner on two of the issues namely the “**Management Fee**” paid by the petitioner to its group company and the “**Depreciation** - claimed on the software” without deducting tax at source. As far as “**Management Fee**” is



concerned, the Income Tax Appellate Tribunal in its order dated

03.08.2022 has held as under:-

“13. We have heard the rival contentions and had gone through the facts and circumstances of the case. We noted from the above facts that the Assessee during the impugned assessment year paid the management fee of Rs.1,90,50,727/- to its Associated Enterprise, i.e. FWL for availing various support services pursuant to the management service agreement with its Associated Enterprises. We noted that the Assessee has filed the details such as the invoice payments through banking channels and the names of the Directors, etc., who has rendered the services. The nature of services rendered by the Associated Enterprises “FWL” is broadly in four categories, i.e. Strategic Guidance, Technical Support, Systems and Software and Business and Administrative Support. We noted that the management fee paid by the Assessee which is about 2% of the overall cost which was included in the cost base while determining the ALP under the TNMM approach adopted at an entity level which was accepted by the Transfer Pricing Officer. The Assessee has produced all relevant evidences as noted above and the case-law cited by the learned CITDR in the case of M/s. Lite-on Mobile India Private Limited, Kancheepuram Vs. The Deputy Commissioner of Income Tax, Chennai (supra) where there was no evidence furnished and as to whether the Associated Enterprises has provided services or not? But the facts in the case are distinguishable and in the present case, the Assessee has produced invoices, details of key payment personnel in regard to strategic guidance, series of invoice copies showing third party charges such as Verizon charges in regard to technical software and systems support and also furnished IOCL bid documents in regard to the business and administrative support services. According to us,



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the Assessee in the present case is able to prove with evidences the services rendered by the Associated Enterprises for which the Assessee has paid management fee for availing various support services pursuant to the management service agreement entered with its Associated Enterprises. In view of the facts, we reverse the order of the lower authorities on this issue and allow the claim of deduction claimed by the Assessee on account of the management fee paid amounting to Rs.1,90,500,727/- to its Associated Enterprises. Thus, this issue in the Assessee's appeal is allowed."

12.As far as disallowance of expenditure incurred towards "Office Software" is concerned, the Tribunal held as under:-

"15. We have heard the rival contentions and had gone through the facts and circumstances of the case. The brief facts of the case are that the Assessee has purchased off-the-shelf software products which are in the nature of Microsoft Office [MS Office], IBM Lotus Notes, AVEVA, Auto CAD, etc. The claim of the Assessee is that the said expenditure merely represents the cost-to-cost reimbursement of the expenditure incurred on behalf of the Assessee. The Assessing Officer has held the nature of payment to be royalty and had disallowed the expenditure on account of the non-withholding of taxes under Section 40(a)(i) of the Act. The main issue is as regards to the treatment of payment for purchase of the off-the-shelf software products and as to whether the Associated Enterprises of the Assessee provides this directly to the Assessee or through another entity is not material. The Assessee has received certain software products and has made the payments for it is the most important fact. The same



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is taxable under the Income Tax Act, 1961 as well as the Double Taxation Avoidance Agreement [DTAA] between India and the United States, United Kingdom and Ireland. However, the transaction name given by the Assessee to the transaction is not material. The Dispute Resolution Panel [DRP] also confirmed the action of the Assessing Officer and disallowed the expenditure incurred towards the off-the-shelf software products by observing in paragraph No.2.6.3, as under:

“2.6.3 The Assessing Officer has discussed in detail the position under the Income Tax Act, 1961 as well as the provisions of the DTAA. The Panel has examined and found the same to be in order. The Panel finds that the decision of the Delhi High Court in the case of Ericsson A.B. was rendered in the context of sale of equipment where the software was embedded and therefore, it was not applicable to the facts of the present case. The decision of the Hon’ble Karnataka High Court in the case of Samsung Electronics Company Limited (cited supra) is with reference to the position as existed before the amendment and the facts being the same, the decision is squarely applicable in this case. Accordingly, the Assessing Officer’s decision is correct and the objections are not accepted.”

Aggrieved, the Assessee is in appeal before the Tribunal.

16. We noted that during the year 2011 – 2012 relevant to the Assessment Year, the Assessee



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debited an amount of Rs.7,79,78,139/- under computer software and maintenance. According to the Assessing Officer, the Assessee has to deduct Tax Deducted at Source [TDS] and under the Domestic Law the above payment is treated as “Royalty” and is taxable in India u/s.9(1) Explanation (vi)(b) of the Act and the Assessing Officer on the directions of the Dispute Resolution Panel had made the addition of this computer software and maintenance payment considering the same as “Royalty”.

17. The learned Counsel for the Assessee now argued that the expenditure incurred towards its share of software cost which are in the nature of off-the-shelf software products such as of Microsoft Office [MS Office], IBM Lotus Notes, AVEVA, Auto CAD, etc. It was contended that the above said expenses were negotiated and incurred at a group level with the third-party vendors by the overseas Associated Enterprises [AE] on behalf of all the group entities and the corresponding cost was recharged to the various entities on a cost-to-cost basis without any mark-up. He stated that this issue stands now covered by the decision of the Hon’ble Supreme Court in the case of Engineering Analysis Centre of Excellence Private Limited Vs. Commissioner of Income Tax reported in [2021] 125 Taxmann.com 42 (SC), wherein the Hon’ble Supreme Court has held that “the amount paid by resident Indian and end-user / distributors to non-resident computer software manufacturers / suppliers , as consideration for resale / use of computer software through EULAs / distribution agreement, is not payment of royalty for use of copyright in computer software, and thus, the same does not give rise to any income taxable in India.”

18. We noted that this issue is covered by the decision of the Hon’ble Supreme Court wherein it is held that the expenditure incurred towards the purchase of the off-the-shelf software products is



not in the nature of “Royalty” for use of copyright in the software and thus not liable for withholding of tax u/s.195 of the Act, we delete the disallowance and allow this issue of the Assessee.

19. In the result, the appeal of the Assessee in I.T.A No.799/Chny/2017 is allowed.”

13. Specifically the learned counsel for the petitioner would submit that there are no material available with the Department for re-opening of the assessment under Section 148 of the Income Tax Act, 1961 for the purpose of Section 147.

14. It is submitted that two of the issues namely the “Management Fess” paid to the group company and the issue arising out of reimbursement on software expenditure without deduction of TDS have been answered in favour by the Tribunal by its order dated 03.08.2022 in I.T.A.No.799/Chny/2017.

15. The learned counsel for the petitioner would submit that there has been no suppression or failure on the part of the petitioner to make true and full disclosure on any of the information that was required for assessment that was earlier completed on 31.01.2017 to warrant



re-opening of the Assessment.

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16.It is submitted that the notice dated 30.03.2019 seeking to re-open the Assessment completed on 31.01.2017 under Section 143(3) read with Section 144C of the Income Tax Act, 1961 was inspired from a change of opinion and without any tangible material unearthed during the search conducted at the premises of the petitioner's group company viz., i.e., Foster Wheeler Group of Companies.

17.It is submitted that re-opening of the assessment was nothing but a fishing expedition for gather fresh information without any material available for re-opening the Assessment.

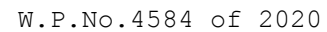
18.It is submitted that the petitioner had truly and fully disclosed all the information that were required at the time of Assessment and therefore there was no justification for issuing notice under Section 148 of the Income Tax Act, 1961.



19.As far as “Transfer Pricing” issues are concerned, it is submitted that there are no materials that were available for re-opening of the Assessment that was completed on 31.01.2017.As far as “Buyback of Shares” are concerned, the transaction was subject to detailed scrutiny during the course of original Assessment proceeding and no adjustment was made by the Transfer Pricing Officer or by the Assessing Officer.

20.It is submitted that the only reason that was given that the details of the basis on which share valuation was made was required to be verified again, which is impermissible for re-opening of the Assessment.

21.A reference was made to the communication dated 24.02.2016 of the petitioner addressed to the Deputy Commissioner of Income Tax, Chennai, wherein it has been specifically stated that during the Financial Year 2011-2012, the petitioner had purchased 5,33,433 equity shares from its shareholders at the rate of Rs.685/- per share amounting to Rs.36.54 crores which was strictly in accordance with the provisions of Section 77A of the Companies Act, 1956.



23. It is further submitted that in response to the notice dated 30.10.2015 during the original assessment, the petitioner by its reply dated 01.03.2016 had also drawn attention to Circular of CBDT dated 01.06.2013, wherein it was clarified that distribution on account of “buyback of share” prior to 01.06.2013 will not fall within the ambit of dividend for the purpose of Section 2(22) of the Income Tax Act, 1961 and that the “buyback of shares” will be taxable only in the hands of the seller as capital gains under Section 46A of the Income Tax Act, 1961 and that Section 2(22)(iv) of the Income Tax Act, 1961 specifically excludes “buyback of shares” from the ambit of dividends.



24.The learned counsel for the petitioner has also referred to share valuation certificate in Annexure-3 dated 03.03.2011. Therefore, there was no scope for re-opening of the Assessment on account of Buyback of Shares.

25.That apart, the learned counsel for the petitioner would submit that for the Assessment Year 2011-2012, the Deputy Commissioner of Income Tax has passed draft Assessment Order dated 28.12.2019 based on the valuation report dated 03.03.2011.

26.It is submitted that the shares were purchased at Rs.464/- per share for the period covered by Assessment Year 2011-2012 as against the market value of Rs.685/- per share. As far as, the period covered by Assessment Year 2012-13, the purchase was at Rs.685/- as per the valuation report dated 03.03.2011 which information was furnished by the petitioner during the course of the assessment.

27.As far as depreciation claimed on software license is concerned, it is submitted that there are no material available for re-opening of the Assessment.



28.As far as the other issues are also concerned, the reasons given for re-opening the assessment do not justify the re-opening of the assessment, as there was no suppression of information that was required for re-opening of the assessment.

29.Learned counsel for the petitioner relied upon the following cases:-

- i. ***Commissioner of Income-tax, Delhi-XI Vs. Batra Bhatta Company***, [2010] 321 ITR 526 (Delhi);
- ii. ***Commissioner of Income-tax, Chennai Vs. S&S Power Switchgear Ltd.***, [2018] 92 taxmann.com 429 (Madras);
- iii. ***Income-tax Officer Vs. Lakhmani Mewal Das***, [1976] 103 ITR 437 (SC);
- iv. ***Vipan Khanna Vs. Commissioner of Income-tax***, [2002] 255 ITR 220 (Punjab & Haryana);
- v. ***Principal Commissioner of Income-tax-5 Vs. Shodiman Investments (P.) Ltd.***, [2020] 422 ITR 337 (Bombay);
- vi. ***Principal Commissioner of Income-tax-5 Vs. Manziil Dineshkumar Shah***, [2018] 406 ITR 326 (Gujarat);
- vii. ***Commissioner of Income-tax-10 Vs. Reliance Energy Ltd.***, [2013] 214 Taxman 64 (Bombay);
- viii. ***Radhawami Salt Works Vs. Assistant Commissioner of Income-tax***, [2018] 400 ITR 249 (Gujarat);
- ix. ***Commissioner of Income-tax, Delhi Vs. Kelvinator of India Ltd.***, [2010] 320 ITR 561



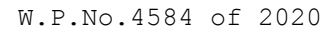
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- (SC);
- x. ***Commissioner of Income-tax Vs. Kelvinator of India Ltd., [2002] 256 ITR 1 (Delhi);***
 - xi. ***Fenner (India) Ltd., Vs. Deputy Commissioner of Income-tax, [1999] 107 Taxman 53 (Mad.);***
 - xii. ***Commissioner of Income-tax, Chennai Vs. Schwing Stetter India (P) Ltd., [2015] 378 ITR 380 (Madras);***
 - xiii. ***Commissioner of Income-tax Vs. Foramer France, [2003] 264 ITR 566 (SC);***
 - xiv. ***Commissioner of Income-tax, Coimbatore Vs. Elgi Finance Ltd., [2006] ITR 674 (Madras);***
 - xv. ***Marico Ltd., Vs. Assistant Commissioner of Income-tax-12, [2020] 425 ITR 177 (Bombay);***
 - xvi. ***Hemant Traders Vs. Income-tax officer, Ward No.22, [2015] 375 ITR 167 (Bombay);***
 - xvii. ***Shree Sidhnath enterprise Vs. Assistant Commissioner of Income-tax, [2016] 387 ITR 644 (Gujarat);***
 - xviii. ***Commissioner of Income-tax, Delhi-IV Vs. Gupta Abhushan (P.) Ltd., [2009] 312 ITR 166 (Delhi);***
 - xix. ***Commissioner of Income-tax Vs. Shardaben K.Modi, [2014] 365 ITR 169 (Gujarat);***
 - xx. ***M/s.Amec Foster Wheeler India Pvt. Ltd., Vs. The Dy. Commissioner of Income Tax, I.T.A.No.799/Chny/2017 and***
 - xxi. ***Paul Mathews & Sons Vs. Commissioner of Income-tax, [2003] 263 ITR 101 (Kerala).***

30.The learned Senior Standing Counsel for the respondents would submit that but for the survey at the petitioner's group company on



Department regarding the income as escaping assessment.

31.It is submitted that for re-opening of the assessment, it is sufficient to have information which are available pursuant to the survey and it is not necessary to furnish all the particulars while giving reasons.

32.It is submitted that, it is sufficient, if reasons are given for re-opening of the assessment, which has been done in this case while furnishing the reasons for re-opening of the assessment of the petitioner vide communication dated 13.05.2019.

33. It is therefore submitted that there is no merits in the present Writ Petition. It is therefore submitted that the Department should be given free hand to complete the assessment. It is further submitted that whatever the submissions that have been made by the learned counsel for the petitioner can be made by the petitioner before the Assessing Officer and prayed for dismissal of the Writ Petition.



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34.The learned Senior Standing Counsel for the respondent also drew attention of this Court to the first proviso to Section 147 of the Income Tax Act, 1961, as it stood during the material period as it stands.

35.It is submitted that mere production of documents *ipso facto* will not be sufficient.

36.I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondents.

37.It is well settled position of law that an Assessment cannot be re-opened for a mere change of opinion as per the decision of the Hon'ble Supreme Court in **Commissioner of Income-tax, Delhi Vs. Kelvinator of India Ltd.**, [2010] 320 ITR 561 (SC).

38.As per the decision of the Hon'ble Supreme Court in **Calcutta Discount Co. Ltd. Vs. ITO** (1961) 41 ITR 191 (SC), where is proper disclosure which is true and full disclosure, before assessment was



completed, assessment cannot be opened. The Court explained the scope of the expression 'true and full disclosure'. The said decision was rendered in the context of the provisions under the Income Tax Act, 1922.

39.The facts of the present case reveal that the petitioner had filed a Return of Income on 28.11.2012 for the Assessment Year 2012-2013.

40.The case was referred to the Transfer Pricing Officer(TPO). The reference ultimately culminated in an order dated 29.01.2016 of the Transfer Pricing Officer(TPO) under Section 92CA(1) of the Income Tax Act, 1961.

41.Thereafter, a Draft Assessment Order dated 31.03.2016 was passed by the 1st respondent for the Assessment Year 2012-2013. The petitioner had filed an objection before the Dispute Resolution Panel (DRP), Bangalore.

42.The Dispute Resolution Panel (DRP) disposed of the petitioner's objection on 25.11.2016. Pursuant to the aforesaid direction



of the Dispute Resolution Panel (DRP), an Assessment Order came to be passed on 31.01.2017 under Section 143(3) r/w Section 144C of the Income Tax Act, 1961.

43. Against the aforesaid Assessment Order, the petitioner had filed appeal before the Income Tax Appellate Tribunal in I.T.A.No.799/Chny/2017 which has now culminated in order dated 03.08.2022 during the pendency of this Writ Petition.

44. The facts on record indicate that a survey under Section 133A of the Income Tax Act, 1961 was conducted on 28.01.2017 by the Director of International Taxation, Chennai, in the group Company of the petitioner. During the course of survey, wherein it was gathered that a management fees for a sum of Rs.1,90,50,727/- was paid by the petitioner to its holding company **Foster Wheeler Energy Limited** (FWL), UK and claimed as deduction. The Transfer Pricing Officer (TPO) accepted Rs.1,78,26,153/-. Meanwhile, during the pendency of I.T.A.No.799/Chny/2017 before the Income Tax Appellate Tribunal, a survey under Section 133A of the Income Tax Act, 1961, is said to have



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been conducted on 21.08.2017 at the premises of the petitioner by the Director of International Taxation, Chennai.

45.The petitioner had made payments to its Group Companies which included its Parent Company. The details of the payments made during the previous year for the Assessment Year 2012-2013 are as under:-

Sl. No.	Name of Associated Enterprises	Details of International Transactions	Amount (Rs.)	Method Adopted by "A"
1	Foster Wheeler Energy Ltd., UK	Purchase of capital goods	16,09,549	CUP
2	Foster Wheeler (GB) Ltd (India Project Office UK, Foster Wheeler North West Shelf Ltd UK)	Sale of Capital Gods	24,04,110	-
3	Foster Wheeler Energy Ltd, UK, Foster Wheeler (GB) Ltd (India Project Office) UK,	Provision of Engineering Design Services	1141498808	TNMM CUP
4	Foster Wheeler Ltd, UK	Provision of Backoffice support services	10,27,82,299	
5		Payment of Consultancy Charges	179,62,077	
6	Foster Wheeler Energy Ltd, UK, Foster Wheeler Inc	Payment Management Charges	190,50,727	
7	Foster Wheeler	Reimbursement of other	847,30,426	



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	Energy Ltd., UK	Expenses paid		
8	Foster Wheeler Inc	Foster Wheeler Inc	523,62,857	
		Total	1,42,24,00,853	

46. In Paragraph 5 of an order dated 29.01.2016 of Transfer Pricing Officer, in respect of payments made to M/s. Foster Wheeler Limited, UK, vide Item No.4 & 5 it was stated that the petitioner had failed to demonstrate by way of any corroborative evidence the need for receipt of services from M/s. Foster Wheeler Limited, UK and the benefit the petitioner derived from the services of M/s. Foster Wheeler Limited, UK. Therefore, the Transfer Pricing Officer proposed to treat ALP (Arms Length Price) of the above transaction undertaken as nil and which warranted an upward transfer pricing adjustment. However, the order was confined only to transaction with M/s. Foster Wheeler Limited, UK alone. The observation of the Transfer Pricing Officer in order dated 29.01.2016 are as under:-

“Based on the examination of the submissions filed



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by the Assessee:-

- i. The Assessee has not demonstrated the need and benefits of the services received by the Assessee;
- ii. The assessee has also not shown any enduring benefits received from Aes;
- iii. Further there is no comparable Information is not available in the public domain;
- iv. The Assessee has not produced documentary evidences for receipt of services. These documents should be readily available with the Assessee from the time of preparation of TP documentation. A re-look at the provisions of section 92D(1) clearly states that, every person entering into an international transaction is required to keep and maintain such information and document, in respect thereof, as being prescribed under the Rules. Corresponding Rule 10D(1) of the Rules, requires maintenance of a record of the analysis performed to evaluate comparability as well as a record of the actual working carried out for determining the ALP. Rule 10D (4) of the Rules, requires that the Information and documentation to be maintained under rule 10D(1), should be contemporaneous as far as possible and should exist latest by the due date of filing of the Income-tax Return.

Considering the above factors, the ALP of transaction is determined to be NIL and upward transfer pricing adjustment is warranted in the instant case.

The value of adjustment = Rs.1,90,50,727/-.

47.The Transfer Pricing Officer's comments were however



confined only to adjustment of Rs.1,90,50,727/- being the payment of Consultancy charges to M/s.Foster Wheeler Limited, UK and not to others. As far as Management fees are concerned, fact remains that the issue has now been answered in favour of the petitioner by the Tribunal vide its order dated 03.08.2022 in its appeal against the Assessment Order dated 30.03.2017 in ITA.No.799/Chny/2017.

48.As far as the Transfer of Pricing issues are concerned, the reasons given for reopening assessment vide communication dated 13.05.2019 merely states Officer has reasons to believe that on examination and analysis of such documents, he has formed reasons to believe that the petitioner's company's functions, risks, assets need re-characterization as a high end engineering services provider as an entrepreneurial segment and that petitioner definitely cannot be put on a cost-plus model and has to be thoroughly examined under the Transfer Pricing provisions in the light of findings made during the Survey Proceedings.

49. It further states that the petitioner has got the Advance Pricing Agreement signed in a hurry after the survey but it is ascertained that the



facts discovered during the survey proceedings were not considered by the APA team in considering the overall margins for the company.

Hence, the entire Transfer Pricing Model needs a fresh look based on the findings made during the survey proceedings in the case of the assessee company for the Assessment Year 2012-13. Squarely it is a fishing expedition. Thus, it is clear that there are no material available as on date for re-opening the assessment.

50.As far as buy back of shares are concerned, the petitioner has paid a sum of Rs.675/- to buy its shares based on Share Valuation Certificate of the Chartered Accountant dated 03.03.2011. Same share was purchased by the petitioner during period covered by Assessment Year 2011-2012 at Rs.454/-.

51.The purchases were based on a Share Valuation Certificate dated 03.03.2011. The Share Valuation Certificate dated 03.03.2011 was furnished by the petitioner to Assessing Officer before the assessment was completed on 30.03.2017. Therefore, there is no case made out for reopening of the assessment.



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52.As far as Consultancy charges of Rs.5,86,48,533/- is concerned, as per the respondent, the petitioner had failed to fully and truly disclose the following materials:-

- i. *The payment of management fees without any justification to do so as well as various transfer pricing issues as discussed above have been identified during the survey proceedings conducted on the assessee company u/s 133A of the Income Tax Act 1961. Various incriminating documents have been impounded during the survey proceedings which have not been disclosed by the assessee to the Income Tax Authorities during the assessment proceedings;*
- ii. *Details of receipt of undervalued shares during the Assessment Year 2012-13 through the buyback route and the basis for such valuation were identified during the survey proceedings under Section 133A of the Income Tax Act, 1961 and the same has not been disclosed by the assessee during the scrutiny proceedings.*

53.The Transfer Pricing Officer's order indicates that the Consultancy Charges was confined to Rs.1,79,62,077/-. Whereas in the reasons furnished to the petitioner on 13.05.2019, there are indications that the petitioner had claimed Consultancy Charges of Rs.5,86,48,533/-.

54.In this connection, the petitioner has drawn attention to the



following letter dated 17.06.2015, 28.01.2016 and 04.02.2016.

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55.These communications have been received and acknowledged by the Assessing Officer. As far as payment of Consultancy Charges is concerned, the details were furnished in response to letter dated 28.01.2016 in Part III – Payment of consultancy charges.

56.Part III appended in response to letter dated 28.01.2016 before the Deputy Commissioner of Income Tax, TPO show that the TPO has not considered the same.

57.Thus, it cannot be said there was suppression of fact by the petitioner. There is a failure on the part of the TPO dated 29.01.2016 in not passing a detailed order. At that stage, failure of the TPO to consider the material properly will not clothe the Assessing Officer to reopen the assessment. Further, the reasons furnished on 13.05.2019 is also not clear what as to what has been discovered during survey.



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58.As far as depreciation of software is concerned, the reasons given for reopening the assessment itself admits that the petitioner has claimed depreciation at 60% in the annual account of the company as prepared. It reads as follows:-

“It is also seen from the Schedule 9 forming part of Balance Sheet as on 31.03.2012, opening WDV of Software Licence, being "Intangible Asset", is Rs. 14,01,83,207/- and additions during the year is Rs. 19,97,612/-. Though it was disclosed as Software Licence, in the Annual Accounts of the Company, it was termed as "Software" eligible for depreciation @ 60% in the Depreciation Schedule, prepared for Income-tax purpose as against the eligible rate of depreciation @ 25%. Since, assessee purchased only licence to use "Software" and not "Software" as such, as evident from its printed annual accounts audited and approved by the Directors, which was placed before the shareholders, assessee cannot shift its stand for Income-tax purpose alone. Similar view was held in Sony India (P) Ltd vs, Addl.CIT (ITAT, Del), 141 TTJ 432. Therefore, the excess depreciation (i.e. 35% of total WDV of intangible asset), requires to be withdrawn

59.Thus, there is no suppression or fact or failure to discharge truly or fully.

60.A reading of the reasons given by the respondents on

13.05.2019 indicates that although there are no material available with



the Department for re-opening the assessment that was completed on 31.01.2017. Six reasons given by the department in its communication dated 13.05.2019 pursuant to information gathered during Survey under Section 133A of the Income Tax Act, 1961 in the premises of the petitioner's group company on 21.08.2017. It cannot said that the petitioner was not truthful while furnishing information for finalizing the Assessment vide Assessment Order dated 31.01.2017.

61. Further, two of six reasons given for re-opening the Assessment have been now answered in favour of the petitioner by the Income Tax Appellate Tribunal by its order dated 03.08.2022 in I.T.A.No.799/Chny/2017.

62. Order dated 01.01.2016 passed by the Transfer Pricing Officer (TPO) under Section 92CA(3) of the Income Tax Act, 1961 for the assessment year indicate that all the information that were required by the petitioner were furnished by the petitioner.

63. I find no reasons available for reopening the assessment. Therefore, there is no merits in the impugned order. Therefore, impugned order is liable to be set aside. This Writ Petition therefore deserves to be



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allowed.

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64. This Writ Petition is therefore accordingly allowed.

Consequently, the connected Miscellaneous Petitions are closed. No costs.

18.12.2023

krk/rgm

Index : Yes / No

Internet : Yes / No

Neutral Citation : Yes / No

To

1. Deputy Commissioner of Income Tax,
Corporate Circle – 1(1),
Room No.611, 6th Floor, Wanaparthi Block,
Aayakar Bhawan, No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai – 600 034.

2. Principal Commissioner of Income Tax -1,
Aayakar Bhawan, No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai – 600 034.



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C.SARAVANAN, J.

krk/rgm

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18.12.2023