

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7867 OF 2023

MFE Formwork Technology SDN.BHD.,
Having its registered office at
Lot 4 & 6, Jalan Tun Perak 3, Perdana
Industrial Park, 42000 Port Klang
Selangor Darul Ehsan, Malaysia

...Petitioner

Versus

1. **Deputy Commissioner of Income Tax,**
International Tax Circle-3(2)(1)
having her office at Room No.1615,
16th Floor, Air India Building,
Nariman Point,
Mumbai-400 021.
2. **Principal Chief Commissioner of Income-
tax,**(International tax),
having his office at Room No.305, 3rd Fl.
E-2 Block, Civic Centre, Minto Road,
New Delhi, Delhi-110002.
3. **Union of India,**
through the Secretary, Department of
Revenue, Ministry of Finance,
2nd Floor, Aaykar Bhavan,
M K Marg, Mumbai – 400 020.

...Respondents

Mr. Percy Pardiwalla, Senior Advocate, with Mr. Harsh Kothari,
for Petitioner.

Mr. Subir Kumar, with Ms. Sruti Kalyanikar, for Respondents.

CORAM : K. R. SHRIRAM &
DR. NEELA GOKHALE, JJ.

DATED : 28th March 2024

JUDGMENT: (*Per Dr. Neela Gokhale, J.*)

1. Rule. Rule made returnable forthwith. By consent of the parties, the matter is taken up for final disposal.

2. Petitioner assails notices dated 27th March 2023, 30th March 2023, and 13th April 2023 all, issued under section 148A(b) of the Income Tax Act, 1961 (“**the Act**”), order dated 25th April 2023 passed under Section 148A(d) of the Act and notice dated 25th April 2023 issued under Section 148 of the Act to reopen the assessment for Assessment Year (“**AY**”) 2016–17. It is the case of Petitioner that the said notices and order are illegal, untenable, and contrary to the provisions of the Act.

3. Petitioner is a company incorporated in Malaysia, resident of Malaysia and also assessed to tax in Malaysia. Petitioner is engaged in the business of manufacturing and selling aluminum form work to its customers. It is an associated enterprise of an Indian company namely, MFE Formwork Technology India Private Ltd (“**MFE India**”). Petitioner entered into a marketing service agreement and a technical service agreement with MFE India. MFE India constitutes a Dependent Agent Permanent Establishment (“**DAPE**”) of Petitioner in India and determines profits that are attributable to its DAPE in India and accordingly offers the same to tax in India.

4. For AY 2016–17, Petitioner filed its original Return of Income (“**ROI**”) on 4th August 2016, declaring a total income of Rs. 3,72,58,690/-. Petitioner filed revised ROI on 30th November 2016 wherein the income remained unchanged but Petitioner revised its claim for credit of Tax Deducted at Source (“**TDS**”). The case of

Petitioner was selected for scrutiny assessment under Section 143(3) of the Act. The Assessing officer (“AO”) required Petitioner to provide details as sought in his notice dated 24th July 2018 issued under Section 142(1) of the Act and a descriptive note on the nature of activity conducted in India, computation of total income and tax computation, Form 3CEB, copy of tax residency certificate, explanation on high ratio of refund to TDS, etc.

5. Vide its reply dated 6th August 2018, Petitioner submitted the descriptive note on the activities carried out and other details required by the AO. During the course of assessment, the AO called for certain additional details from time to time, which also Petitioner provided by its detailed submission dated 26th September 2018. Upon consideration of all the relevant material provided by Petitioner as required by the AO, assessment order dated 21st December 2018 under Section 143(3) of the Act was passed accepting the income returned by Petitioner. Despite this, Petitioner was issued show cause notice dated 27th March 2023 under Section 148 A(b) of the Act calling upon Petitioner to show cause as to why notice under Section 148 of the Act should not be issued against it. The notice was accompanied by reasons to believe escapement of income. Another notice dated 30th March 2023, also under section 148A(b) of the Act, was issued once again calling upon Petitioner to similarly show cause. Petitioner brought to the notice of the AO regarding issuance of

duplicate notices for the same assessment year and informed the AO that Petitioner was responding to the latter show cause notice. A show cause notice dated 13th April 2023 also under Section 148A(b) of the Act was issued *Suo-moto* extending the time given to Petitioner to file its reply.

6. Petitioner, by letter dated 14th April 2023, filed its objections to the initiation of proceedings under Section 147 of the Act. The submissions of Petitioner were rejected by the impugned order dated 25th April 2023 passed under Section 148A(d) of the Act and notice dated 25th April 2023 under Section 148 of the Act was issued. Petitioner, by a letter dated 22nd May 2023, requested the AO to extend the time to file ROI in response in view of the amendment made in Section 148 of the Act by the Finance Act, 2023 extending time up to 31st July 2023. There was no response from the AO and Petitioner was compelled to file its ROI for AY 2016–17 on 25th May 2023. It is these notices and the order rejecting objections that are impugned in the present Petition.

7. Mr. Pardiwalla, learned Senior Counsel appearing for Petitioner, challenges the action of the AO primarily as untenable for lack of satisfaction of the prerequisite jurisdictional conditions. The additional contentions of Mr Pardiwalla are briefly encapsulated as under :

(a) The genesis of the information with the AO was an

order passed by Commissioner of Income Tax under Section 263 of the Act for AY 2017–18. The said order stood set aside by the Income Tax Appellate Tribunal (“**ITAT**”) upon an appeal preferred by Petitioner. Since the only information sought to be relied upon by the AO to allege escapement of income was the said order passed under Section 263 of the Act, which itself does not survive, notices and the order impugned cannot be sustained.

(b) Secondly, all material information including methodology for attribution of profit along with FAR analysis was fully disclosed and other details as required by the AO were provided by Petitioner and were within the knowledge of the AO at the time of passing of the original assessment order. There was thus, no tangible material to arrive at a conclusion that income had escaped assessment. This also amounts to reopening of assessment proceedings on the basis of a change of opinion which is also impermissible in law.

(c) As provided in the first proviso of Section 149(1) of the Act, no notice under Section 148 of the Act can be issued at any time for an assessment year beginning on or before 1st April 2021. If a notice under Section 148 of the Act could not have been issued at that time on account of being beyond the time limit specified under Section 149(1)(b) of the Act as it stood immediately before the commencement of the Finance Act, 2021, the only period to be excluded in the facts of the present case for computing the period of limitation is that provided in the fifth proviso to Section 149(1) of the Act. In any event, as per Section 149 (1)(b) of the Act, notice cannot be issued under Section 148 of the Act after a period of three years unless the AO had in his possession books of accounts or

other evidence, pointing to income chargeable to tax represented in the form of an asset or expenditure or entry in the books of account which has escaped assessment of Rs.50 Lakhs or more. Thus, the impugned notice dated 25th April 2023, being issued after a period of three years is bad in law.

(d) Petitioner, admittedly, only has a DAPE in India and as per various decisions of the Apex Court, once an agent has been remunerated on arm's length basis, no further profits can be attributed to Petitioner in India. In this context, the AO cannot be said to have any 'information' suggesting escapement of income.

(e) Lastly, the initiation of reassessment proceedings is nothing but fishing and roving inquiry. The AO has not conducted any independent inquiry and thus, the entire assessment proceeding deserves to be quashed.

8. Mr. Subir Kumar, learned counsel, stoutly defended the Revenue and submitted as under:

i. The Petition is not maintainable as it is premature. The timeline of the matter indicates that assessment under Section 148 of the Act is yet pending adjudication and thus, filing of Petition at this stage, is premature. As held by the Apex Court in ***Anshul Jain v. Principal Commissioner of Income Tax & Anr.***¹ if Petitioner has any grievance on merits, the same has to be agitated before the AO.

ii. Petitioner has multiple alternative remedies under the Act such as an appeal before the Appellate Authority under Section 246 of the Act or an alternative remedy to file a revision

¹ SLP No.14823 of 2022 dtd. 2nd June 2022
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petition before the Jurisdictional Commissioner of Income Tax, who has the power to adjudicate on the matter under Section 264 of the Act.

iii. There is no prejudice caused to Petitioner in absence of any recovery of demand issued to Petitioner as no reassessment order for AY 2016–17 is yet passed and thus, the Petition is premature.

iv. The procedure laid down and to be followed in such cases, have been strictly adhered to in the case of Petitioner. Information in the case of Petitioner was flagged on the portal of the Income Tax Department under CRIU/VRU cases. The information was categorized under head of ‘any information flagged in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the board from time to time.’ The risk management strategy of the Central Board for Direct Taxes (“**CBDT**”) for reopening cases is under a separate, centralized team that has developed and runs the insight E-portal to implement the risk management strategy of the CBDT. The information about Petitioner was flagged on the insight portal with necessary details regarding the quantum of income having escaped assessment. The explanation to Section 148 (1)(i) of the Act clearly mandated reopening of assessment in respect of any information flagged as per the risk management strategy. The flagging of information on the insight portal being under the supervision of the CBDT is hence ‘valid information’ under the amended provisions of the Act. In these circumstances, the AO is well within his rights to arrive at a satisfaction that the case of Petitioner is fit for reopening of assessment on the ground that income has escaped assessment.

v. According to the AO, his satisfaction is discretionary, and sufficiency of satisfaction is not a matter of judicial interpretation at the stage of issuance of notice under Section 148 of the Act.

vi. Even on merits Petitioner has no case.

Findings and conclusions

9. At the outset, we will deal with the contention of Mr. Pardiwalla relating to the gist of information available with the AO prompting him to issue the impugned notice dated 30th March 2023 giving reasons for reopening assessment. The reasons for reopening indicated in the notice is an order passed under Section 263 of the Act for AY 2017–18. Petitioner had been attributing 24% of its Global profit to itself on the FAR analysis carried out by it. The order dated 25th March 2022 passed by the Commissioner of Income Tax (International)-3, Mumbai (“CIT”) under Section 263 of the Act held that Petitioner should have attributed 35% of its Global profit to itself based on the FAR analysis carried out by the Department. As per the AO, this issue is present even in AY 2015-16 and AY 2016-17. However, aggrieved by the said order passed by the CIT, Petitioner had preferred an appeal before the Income Tax Appellate Tribunal (“ITAT”), Mumbai for AY 2017-18 being Appeal No.890/Mum/2022. The ITAT allowed the appeal and set aside the order passed by the CIT. We have considered the notice impugned as well as the order

passed by the ITAT. The relevant portion of the notice dated 30th March 2023 impugned herein reads as under:

“5. In this regard information received from the INSIGHT Portal as un11 ptder: Information to be shared in the case of MFE Formwork Technology SDN BHD post order u/s 263 for A.Y. 2017-18 (PAN AAGCM4280M)”

Gist of Information:

Assessee has been attributing 24% of its Global Profit to itself based on the FAR analysis carried out by the assessee. As per the order u/s 263 of the IT Act, 1961 dated 25.03.2022 Assessee should have attributed 35% of its Global Profit to itself based on the FAR analysis carried out by the Department. This issue is present even in AY 2015-16 and AY 2016-17 for which this information is being shared, since it is an urgent Time barring Matter.

Details of the issue as per the order u/s 263 of the IT Act, 1961 dated 25.03.2022.

From Page 27 of aforesaid show cause notice

"Thus, since the assessee has been claiming every year high ratio of refund to TDS and showing Profit of just 24% of the Global Profit in India by applying FAR analysis submitted by the assessee itself, it becomes necessary to look into the FAR analysis of each year in light of the findings surfaced in order u/s 263 of the IT Act dated 25.03.2022 passed for A.Y. 2017-18. As per the provisions of the I.T. Act, re-opening for A.Y. 2015-16 & AY 2016-17 can be initiated up to 31.03.2022, this information needs to be shared and reflected in Insight portal for further necessary action at the AO's end."

6. In view of the above information following facts emerge:

a) the weight given to each activity is arbitrary and has no parameter to determine the extent and weight of activity involved in the global transactional process in the TP report of the assessee. The attribution of profit @35% as determined in the order u/s 263 would be appropriate in this case.

b) It is also clear that the assessee had adopted a dual taxpayer and part of the profit attributable to operations in India was held taxable in the hands of DAPE. This fact was relevant in determining the ALP for the Associated Enterprise i.e. MFE India. It is seen that the compensation made to AE are not at ALP. The difference/adjustment has to be taxable in the hands of DAPE.

c) The method of computation of taxable profits in India is incorrect as the marketing fees paid to AE is after attribution of Gross Profit in India instead of being deducted before attribution of Profits in India. From Page 28 of aforesaid show cause notice

7. XXXXXXXX

8. Therefore, based on the above observations which originate from the material/information available on record with this office, income to the tune of Rs. 11,98,30,019/- has escaped assessment for the year under consideration.

9. You are hereby requested to furnish your reply explanation along with supporting documents/evidence on or before 14.04.2023, whichever is earlier. The explanation/reply furnished by you in response to this Show Cause Notice, will be considered at the time of passing of order u/s 148A(d) of the Act in your case."

The relevant portion of the ITAT order is extracted as under-

"5. When this appeal came up for hearing. It was noticed that admittedly the form of permanent establishment is a dependent agent permanent establishment (DAPE), and there also does not seem to be any controversy about the position that the assessee has paid an arm's length remuneration for the services rendered by the agent constituting the DAPE, ie, MFE India, as there is no ALP adjustment in respect of the payment made by the assessee to the MFE, Yet, there is a dispute about the FAR analysis, but that is because the assessee has proceeded on the dual taxpayer approach, recognizing the distinction between the dependent agent and the dependent agency permanent establishment. While a similar approach was approved and adopted by a coordinate bench in the case of DDIT Vs Set Satellite Pte Ltd [(2007)106 (TD 175 (Mum))], wherein, speaking through one of us, the Coordinate bench upheld the dual taxpayer approach, but then the said decision did not find favour with the Hon'ble High jurisdictional Court which has reversed the said decision of the coordinate bench. We are thus alive to the fact that in the light of Hon'ble Jurisdictional High Court judgment in the case of Set Satellite Singapore Pte Ltd Vs DCIT [(2008) 307 ITR 205 (Bom)], so far as profit attribution of a DAPE is concerned, the prevailing legal position is that as long as an agent is paid an arm's length remuneration for the services rendered, nothing survives for taxation in the hands of the dependent agency permanent establishment. Viewed thus, the existence of a dependent agency permanent establishment is wholly tax neutral, and there are a large number of decisions of the coordinate benches, following Hon'ble jurisdictional High Court's judgment in the case of Set Satellite (supra), holding so. The question that we put to the parties was whether an order can be said to be prejudicial to the interest of the revenue even when the income is

determined on the basis of the correct legal position of the single taxpayer approach, which has the approval of the Hon'ble jurisdictional High Court as also a series of subsequent decisions of the coordinate benches, is less than the income determined by the Assessing Officer in the order being subjected to the revision proceedings. When the above proposition was so put to the parties, learned counsel for the assessee submitted that when the very existence of DAPE, in the light of the above legal position, is tax neutral, the attribution of profits in the dual taxpayer approach and the FAR analysis for that purpose is wholly academic, from the point of view of the revision proceedings, inasmuch as the profit computation under the dual taxpayer approach cannot be said to be prejudicial to the interest of the revenue when tax liability computed, in accordance with the law laid down by the Hon'ble, jurisdictional High Court, is NIL.....

6. ~~XXXXXXXXXX~~

7. ~~XXXXXXXXXX~~

8. ~~XXXXXXXXXX~~

9. *In view of the above discussions, as also bearing in the entirety of the matter, we are of the considered view that unless the order sought to be revised cannot be said to be prejudicial to the interest of the revenue, its being erroneous, even if that be so, cannot be said to reason enough to invoke Section 263 of the Act, and the order cannot be said to be prejudicial to the interests of the revenue unless there is a categorical finding that the dependent agent has not been paid arm's length remuneration for the functions performed. Assets employed and risks assumed by the dependent agent. The order being prejudicial to the interest of the revenue, in as much as the payment to the dependent agent not being at an arm's length, is a sine qua non for holding that the order is prejudicial to the interest of the revenue. This exercise has clearly not been done on the facts of this case. For this short reason alone, we must set aside the impugned revision order."*

10. It is also an admitted position that pursuant to the order passed by the ITAT, the AO also passed the Order giving effect to the ITAT order under Section 143(3) read with Section 254 of the Act on 14th September 2022 thereby nullifying the demand raised. Mr. Pardiwalla further draws our attention to the admitted position that like AY 2017-18, revision proceedings for AY 2018-19 and AY 2019-20 were initiated and an order under Section 263 of the Act was passed on 7th

June 2022 and the ITAT following its order for AY 2017-18 has quashed and set aside the revision orders by the CIT concerned.

11. No notice can be issued under Section 148 of the Act unless there is 'information' with the AO that income chargeable to tax has escaped assessment. The only information forming the origin of reason to believe escapement of income from assessment is contents of the order passed by the CIT. In the light of the aforesaid admitted position, as on date the order passed by the CIT does not survive, as being set aside by the ITAT, the very basis of the AO to reopen assessment and assume jurisdiction is misplaced and unjustifiable.

12. Another contention advanced by Mr. Pardiwalla is that the attempt to reopen assessment is based on a 'change of opinion' of the AO which is impermissible under tax jurisprudence. We have already noted the contents of the notice dated 30th March 2023 as aforesaid.

The concluding paragraph 8 of the same notice reads thus:

"8. Therefore, based on the above observations which originate from the material/information available on record with this office, income to the tune of Rs.11,98,30,019/- has escaped assessment for the year under consideration."

13. The AO, by his letter dated 24th July 2018, had, during the original assessment proceeding sought information from Petitioner as well as a detailed descriptive note. The AO specified the details and documents that he required Petitioner to provide. Accordingly, Petitioner provided all the details as sought vide its reply dated 6th

August 2018, which followed another letter by the AO seeking further information. Petitioner by its letter dated 26th September 2018 furnished further information as additionally sought by the AO. Thus, it is evident that Petitioner had disclosed completely and fully all relevant information to the satisfaction of the AO and the assessment order was passed. Be that as it may, the impugned notice is, in any case, based on the contents and findings of the CIT (International) Mumbai in his revision order, which order is already set aside by the ITAT. That the order passed by ITAT is subjected to a challenge before this Court does not aid the Department since there is no order passed by this Court staying the effect of the order. On the contrary, the AO himself has given effect to the ITAT order and passed an Order Giving Effect (“**OGE**”) to the ITAT order. In this view of the matter, the impugned notice is nothing but a ‘change of opinion’ by the AO and as held in *Aroni Commercials Limited v. Deputy Commissioner of Income Tax-2(1)*,² a reopening based upon change of opinion is impermissible in law.

14. As regards Mr. Subir Kumar’s submissions that Petitioner has multiple alternative remedies under the Act and if the fresh assessment order is passed, Petitioner has an opportunity of challenging the same before the Appellate Authority under the Act, none of them we are inclined to accept. In addition to various preliminary submissions as stated in paragraph 8 above, Mr. Subir

² (2014) 44 taxmann.com 304 (Bombay).
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Kumar tried to draw us into examining the merits of the reassessment proceedings. We hasten to make it clear that in our writ jurisdiction under Article 226 of the Constitution of India, we refrain from allowing ourselves to be drawn in the submissions advanced relating to the merits of the matter, especially when we are satisfied that the AO issued the impugned notices and the order without satisfying the jurisdictional pre-conditions. As such the AO has gone beyond his jurisdiction to reopen assessment based upon information comprising only of an order which no more survives in view of the same already set aside by the ITAT.

15. We agree with the submissions of Mr. Pardiwalla that if ‘change of opinion’ concept is given a go by, that will result in giving arbitrary powers to the AO to reopen assessments. It would in effect sanctify powers to review which he does not possess. This Court in its decision in the matter of ***Siemens Financial Services Private Limited Vs. Deputy Commissioner of Income Tax & Ors.***³ has held as follows:

“36 We would agree with the submissions of Mr. Pardiwalla that if change of opinion concept is given a go by, that would result in giving arbitrary powers to the Assessing Officer to reopen the assessments. It would in effect be giving power to review which he does not possess. The Assessing Officer has only power to reassess not to review. If the concept of change of opinion is removed as contended on behalf of the Revenue, then in the garb of re-opening the assessment, review would take place. The concept of change of opinion is an in-built test to check abuse of power by the Assessing Officer.

As held in Dr. Mathew Cherian (supra), whether under old or new regime of reassessment, it is settled position that the issues decided categorically should not be revisited in the guise of reassessment. That would include issues where query have been

3. (2023) 457 ITR 647 (BOM)
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raised during the assessment and query have been answered and accepted by the Assessing Officer while passing the assessment order. As held in Aroni Commercial (supra) even if assessment order has not specifically dealt with that issue, once the query is raised it is deemed to have been considered and the explanation accepted by the Assessing officer. It is not necessary that an assessment order should contain reference and/or discussion to disclose his satisfaction in respect of the query raised. The Division Bench of this court in Aroni Commercial Ltd. (supra) held it is not necessary that the assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. Paragraph 14 of Aroni Commercial Ltd. (supra) read as under:

“14. We are of the view that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. If an Assessing Officer has to record the consideration bestowed by him on all issues raised by him during the assessment proceeding even where he is satisfied then it would be impossible for the Assessing Officer to complete all the assessments which are required to be scrutinized by him under Section 143(3) of the Act. Moreover, one must not forget that the manner in which an assessment order is to be drafted is the sole domain of the Assessing Officer and it is not open to an assessee to insist that the assessment order must record all the questions raised and the satisfaction in respect thereof of the Assessing Officer. The only requirement is that the Assessing Officer ought to have considered the objection now raised in the grounds for issuing notice under Section 148 of the Act, during the original assessment proceedings. There can be no doubt in the present facts as evidenced by a letter dated 8 September 2012 the very issue of taxability of sale of shares under the head capital gain or the head profits and gains from business was a subject matter of consideration by the Assessing Officer during the original assessment proceedings leading to an order dated 12 October 2010. It would therefore, follow that the reopening of the assessment by impugned notice dated 28 March 2013 is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceeding leading to the order dated 12 October 2010. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.” (emphasis supplied)

16. In view of the foregoing discussion, we have no hesitation in holding that the notices dated 27th March 2023, 30th March 2023, and 13th April 2023, issued under Section 148A(b) of the Act, order dated

25th April 2023 passed under Section 148A(d) of the Act and notice dated 25th April 2023 issued under Section 148 of the Act to reopen the assessment for AY 2016–17 cannot be sustained. In the circumstances, we make the Rule absolute in terms of prayer clause (a) of the petition which reads thus:

“a. that this Hon’ble Court be pleased to issue a writ of certiorari or any other writ, order or direction in that nature of certiorari under Article 226 of the Constitution of India calling for the records of the case leading to the issue of the impugned first show cause notice, the impugned second show cause notice, the impugned third show cause notice, passing of the impugned order and the issue of the impugned notice issued under Section 148 of the Act and after going through the same and examining the question of legality thereof quash, cancel and set aside the impugned first show cause notice dated 27th March 2023 (Exhibit G), the impugned second show cause notice dated 30th March 2023 (Exhibit H), the impugned third show cause notice dated 13th April 2023 (Exhibit J), the impugned order dated 25th April 2023 (Exhibit L) and the impugned notice dated 25th April 2023 issued under section 148 of the Act (Exhibit M) for the assessment year 2016-17;”

17. There will be no order as to costs.

(DR. NEELA GOKHALE, J.)

(K. R. SHRIRAM, J.)