



2024:DHC:9574-DB



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 28.11.2024*

+ **W.P.(C) 7814/2024 and CM APPL. 32383/2024**

HUAWEI TELECOMMUNICATIONS INDIA COMPANY
PRIVATE LIMITED

.....Petitioner

Through: Mr. Kamal Sawhney, Mr. Nikhil
Agarwal, Mr. Puru Mehira and Mr.
Nishank Vashistha, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX,
CENTRAL CIRCLE 2, DELHI

.....Respondent

Through: Mr. Indruj Singh Rai, SSC, Mr.
Sanjeev Menon, JSC, Mr. Rahul
Singh, JSC, Ms. Anmol Jagga and Mr.
Prithviraj Dey, Advs.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

VIBHU BAKHRU, J. (ORAL)

1. The petitioner has filed the present petition, *inter alia*, praying as under:

- “a) Issue a writ of mandamus and/or any other writ, order or direction in the nature of mandamus declaring that the assessment proceedings for AY 2013-14 have become time barred, and returned position is liable to be accepted;
- b) For such further and other reliefs, as this Hon'ble Court may deem fit and proper in the nature and circumstances



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of the case;

c) Award the costs of this Petition in favour of the Petitioner and against Respondent.”

2. According to the petitioner, the assessments for assessment year (AY) 2013-14 are time barred and therefore, the income tax return furnished by the petitioner is required to be accepted.

3. The petitioner is a company registered under the Companies Act, 1956 and is a subsidiary of Huawei Technologies Coopertief U.A (Netherlands). The petitioner states that it is engaged in the business of distribution of telecom equipment and provision of technical services such as installation, commissioning, integration and other services relating to the telecom industry.

4. The petitioner filed its original return of income on 29.11.2013 for AY 2013-14 declaring a loss of ₹311,04,30,235/-. Subsequently, it filed its revised return on 30.03.2015 declaring a loss of ₹310,39,86,024/- and claimed refund of ₹61,69,79,100/-.

5. The return was picked up for scrutiny and a notice under Section 143(2) of the Income Tax Act, 1961 (hereafter *the Act*) was issued. The assessment proceedings culminated in an assessment order dated 03.10.2017. The Assessing Officer (AO) made the following additions as set out in the petition:

- “(i) Transfer pricing adjustments to the tune of INR 1,97,84,000/-;
- (ii) Disallowance under Section 36(1)(va) for failure to deposit the employee contribution of PF within due date – INR 88,62,908/-;



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- (iii) Disallowance of advertisement expenses – INR 6,89,16,793/-;
- (iv) Disallowance for provision for customer claims under Section 37 or 40(a)(ia) – INR 12,86,11,894/-;
- (v) Disallowance under Section 37 for advances written off – INR 61,60,172/-.”

6. The petitioner states that ₹61,69,79,100/- was refunded to the petitioner.

7. The petitioner filed an appeal against the final assessment order dated 03.10.2017 before the learned Income Tax Appellate Tribunal (ITAT).

8. The learned ITAT allowed the appeal and passed an order dated 24.02.2021 remanding the issue of transfer pricing to the Transfer Pricing Officer (TPO) for a fresh determination. The additions made on account of the disallowance of advertisement expenses was deleted. The disallowance of customer claims, and advances written off were also deleted, *albeit* subject to verification. The findings of the learned ITAT are summarized by the petitioner in paragraph no. 7 of the petition in a tabular form. The same is reproduced below:

Issue	Findings in the ITAT order dated 24.02.2021
Transfer pricing issue	Matter remanded to TPO for fresh assessment by examining all the evidences brought on record by the Petitioner by providing an opportunity of being heard to the Petitioner. Relevant portion is reproduced below: <i>“25. So, in the given circumstances, we are of the considered view that this issue is liable to be remitted</i>



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	<i>back to the TPO to decide afresh by examining all the evidences brought on record by the taxpayer and to decide the issue in the light of the decisions discussed in the preceding paras and by following the rule of consistency as in the earlier years i.e. in AY 2004-05 onwards, TPO himself has accepted availing of technical services at arm's length price as determined by the assessee. Needless to say that TPO is to decide the issue afresh by providing an opportunity of being heard to the taxpayer.</i>
Disallowance for capital expenditure of advertisement expenses	Additions were deleted by ITAT. Relevant portion reproduced below: <i>“35. So in view of the matter and following the decisions rendered by the Hon'ble Supreme Court and Hon'ble High Court discussed in the preceding paras, we are of the considered view that disallowance of 30% of the advertisement expenses by the AO and confirming the same by the ld. DRP is not sustainable for the reasons inter alia that commercial expediency of any expenditure incurred by the taxpayer has to be examined with businessman standpoint and not with the perspective of tax authority; that advertisement expenses are revenue in nature; that merely because of the fact that advertisement expenditure incurred by the taxpayer has benefited the third party, the same cannot be disallowed; and that disallowance of any expenditure on ad hoc basis is not permissible in law, hence ordered to be deleted. Consequently, grounds no.3 to 3.4 of ITA No.7509/DEL/2017 & 7510/DEL/2017 for AYs 2012-13 & 2013-14 respectively are determined in favour of the taxpayer.”</i>
Disallowance for provision for customer claims under Section 37 or 40(a)(ia)	Additions were deleted subject to verification of data available on record by the AO. Relevant portion reproduced below:



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	<i>“42. Evidence brought on record by the taxpayer shows that aforesaid conditions have been fulfilled and as such, provision made qua the amount provided by the taxpayer pertaining to actual delays and defaults occurred in terms of the contract entered into between the taxpayer and its customers is to be considered as “ascertained liability”. So, AO/DRP have erred in making disallowance on account of provision for customer claims. So, it is ordered to be deleted subject to verification of data brought on record by the taxpayer as discussed in the preceding paras. Consequently, grounds no.4 to 4.3 of ITA No.7509/DEL/2017 & 7510/DEL/2017 for Assessment Years 2012-13 & 2013-14 respectively are determined in favour of the taxpayer.”</i>
Disallowance under Section 37 for advances written off	Additions were deleted and matter was remanded to AO to decide afresh after verifying facts and providing an opportunity of being heard to the assessee. Relevant portion reproduced below: <i>“47. The taxpayer has given complete detail of advances given at page 30 of the convenience paper book in tabulated form. So, in view of the matter, we are of the considered view that let this issue go back to AO to verify the facts if these advances were given for business purposes and decide afresh in the light of findings returned hereinbefore by providing opportunity of being heard to the taxpayer. Consequently, grounds no.5 TO 5.3 of ITA No.7509/DEL/2017 & 7510/DEL/2017 for Assessment Years 2012-13 & 2013-14 respectively are determined in favour of the taxpayer for statistical purposes.”</i>

9. It is the petitioner’s case that no order has been passed pursuant to the



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remand by the learned ITAT and consequently, the statutory time (as stipulated under Section 153 of the Act) for the TPO or the AO to pass an order has since expired.

10. In the circumstances, the petitioner furnished a letter dated 04.04.2024 informing the AO that since no order has been passed pursuant to the order passed by the learned ITAT, the proceedings are time barred.

11. Notice in the present petition was issued on 28.05.2024 and the Revenue was granted two weeks' time to file a counter affidavit. However, no such affidavit was filed controverting the assertions made by the petitioner. On 12.11.2024, a final opportunity was granted to the Revenue to file a counter affidavit traversing the facts before the next date of hearing, which was scheduled today. However, the counter affidavit has not been filed. The facts as stated in the present petition are, thus, not contested.

12. It is relevant to refer to Sub-section (3) and Sub-section (5) of Section 153 of the Act. The same are set out below:

“153.(3) Notwithstanding anything contained in sub-sections (1), (1A) and (2), an order of fresh assessment or fresh order under section 92CA, as the case may be, in pursuance of an order under section 250 or section 254 or section 263 or section 264, setting aside or cancelling an assessment, or an order under section 92CA, as the case may be, may be made at any time before the expiry of nine months from the end of the financial year in which the order under section 250 or section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be:



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Provided that where the order under section 250 or section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be, on or after the 1st day of April, 2019, the provisions of this sub-section shall have effect, as if for the words “nine months”, the words “twelve months” had been substituted.

(5) Where effect to an order under section 250 or section 254 or section 260 or section 262 or section 263 or section 264 is to be given by the Assessing Officer or the Transfer Pricing Officer, as the case may be, wholly or partly, otherwise than by making a fresh assessment or reassessment or fresh order under section 92CA, as the case may be, such effect shall be given within a period of three months from the end of the month in which order under section 250 or section 254 or section 260 or section 262 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be, the order under section 263 or section 264 is passed by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, as the case may be:

Provided that where it is not possible for the Assessing Officer or the Transfer Pricing Officer, as the case may be, to give effect to such order within the aforesaid period, for reasons beyond his control, the Principal Commissioner or Commissioner on receipt of such request in writing from the Assessing Officer or the Transfer Pricing Officer, as the case may be, if satisfied, may allow an additional period of six months to give effect to the order:

Provided further that where an order under section 250 or



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section 254 or section 260 or section 262 or section 263 or section 264 requires verification of any issue by way of submission of any document by the assessee or any other person or where an opportunity of being heard is to be provided to the assessee, the order giving effect to the said order under section 250 or section 254 or section 260 or section 262 or section 263 or section 264 shall be made within the time specified in sub-section (3).”

13. Undisputedly, the learned ITAT had pronounced the order in open court on 24.02.2021 as is expressly stated in the said order. The order also indicates that the Revenue was duly represented by the departmental representative (Sh. Surender Pal, CIT). Thus, the timeline for passing an order under Section 153(5) of the Act commenced from 24.02.2021.

14. There is no controversy regarding the date on which the said order was received.

15. In *Commissioner of Income-tax-7 v. Odeon Builders (P.) Ltd.:* *Neutral Citation No. 2017:DHC:1720-DB*, a Full Bench of this court considered the question as to when the period of limitation to file an appeal under Section 260A of the Act against an order passed by the learned ITAT would commence. This Court had also taken note of the decision in the case of *CIT v. Sudhir Choudhrie: (2005) 278 ITR 490*. In that case this court had directed the learned ITAT to pronounce judgment and orders “*in open hearing and upon enlisting them for a given date*”.

16. After the decision of this court in *CIT v. Sudhir Choudhrie (supra)*, Rule 34 of the Income Tax Appellate Rules, 1963 were amended to read as under:

“Order to be pronounced, signed and dated



34. (1) The order of the Bench shall be in writing and shall be signed and dated by the Members constituting it.

(2) The Members constituting the Bench or, in the event of their absence by retirement or otherwise, the Vice-President, Senior Vice-President or the President may mark an order as fit for publication.

(3) Where a case is referred under sub-section (4) of section 255, the order of the Member or Members to whom it is referred shall be signed and dated by him or them, as the case may be.

(4) The Bench shall pronounce its orders in the Court.

(5) The pronouncement may be in any of the following manners :—

- (a) The Bench may pronounce the order immediately upon the conclusion of the hearing.
- (b) In case where the order is not pronounced immediately on the conclusion of the hearing, the Bench shall give a date for pronouncement.
- (c) In a case where no date of pronouncement is given by the Bench, every endeavour shall be made by the Bench to pronounce the order within 60 days from the date on which the hearing of the case was concluded but, where it is not practicable so to do on the ground of exceptional and extraordinary circumstances of the case, the Bench shall fix a future day for pronouncement of the order, and such date shall not ordinarily be a day beyond a further period of 30 days and due notice of the day so fixed shall be given on the notice board.

(6) The order of the Bench shall ordinarily be pronounced by the Members who heard the appeal. However, if the said Members or any of them is or are not available for



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pronouncement for any reason, then the order will be pronounced by such Member or Members as may be nominated by the President, Senior Vice- President, Vice-President, or Senior Member, as the case may be.

(7) In the case where the order is ready in every respect and can be made available to the parties, the Bench may advance the date of pronouncement and put this information on the notice board and the order shall be pronounced accordingly.

(8) In a case where the order cannot be pronounced on the date given, the date of pronouncement may be deferred, subject to sub- rule (5)(c) above, to a further date and information thereof shall be given on the notice board.”

17. In ***Commissioner of Income-tax-7 v. Odeon Builders (P.) Ltd. (supra)***, a Full Bench of this court had noted the directions issued by the court in ***CIT v. Sudhir Choudhrie (supra)*** as well as the amendment to Rule 34 of the Income Tax Appellate Tribunal Rules, 1963 (hereafter *the ITAT Rules*) made following the said judgment and had observed as under:

“40. The context in which the interpretive exercise is to be undertaken is that of the statute of limitation. Usually, the commencement of limitation is that point when there is ‘knowledge’ of an order or judgment. In the context of Section 260A(2)(a), the question that should be asked is: “when was the Department/Revenue aware of the order” and not “when was that particular CIT or Pr CIT having jurisdiction have knowledge of the order”. Once a responsible officer or representative of the Department such as its DR or the CIT (Judicial) is aware of the order, then from that point it is a purely internal administrative arrangement as to how the said officer obtains and further communicates the order to the officer who has to take a decision on filing the appeal. Of course, the time taken to obtain a copy of the order by such DR



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or CIT (Judicial) would be excluded. However, the period of limitation will not cease to run only because the ‘concerned’ officer has not yet received the order.

41. The counsel for the Revenue point out that the requirement that the ITAT should pronounce orders was not a statutory one but was brought about by a decision of this Court. Whilst this is correct, Rule 34 of the ITAT Rules equally provides the statutory underpinning of this principle. The fact that the jurisdictional CIT was not present at the time of pronouncement of the order of the ITAT will make no difference. The first officer of the Department who receives the certified copy should be taken to have “received” it on behalf of all the officers of the Department. How such officer who first receives the copy ensures that it reaches the particular officer who has to take a decision on filing an appeal is for the Department to figure out. That internal issue of the Department cannot possibly extend the time for filing of the appeal beyond 120 days as provided under Section 260A (2) (a) of the Act.

43. Viewed differently, the contextual interpretation of the expression ‘receive’ would be when the parties notified of the pronouncement are represented at that time in the open court. When pronounced, both parties are said to receive it. The agency which they choose for transmission to the official or executive component to authorise an appeal is not the concern of the judicial system.

44. Another context would be the absence of arbitrariness and discrimination in the manner of treatment of the parties to the litigation. Section 260 A (2) (a) applies to both, the Assessee



as well as the Revenue. When it is the Assessee who is aggrieved, limitation for filing the appeal will begin to run once the Assessee through its AR receives a copy of the order of the ITAT. Where the AR is present at the pronouncement, or even when such AR chooses not to remain present for pronouncement, the Assessee should be taken to be aware of the order from that moment. From then on, barring the time taken by such AR to obtain a copy of the order, the limitation for filing an appeal would begin to run. Assuming that the Assessee is a large company, and a decision as to filing an appeal can only be taken by, say, its Managing Director (MD), an argument that the limitation does not begin till the order has reached the desk of the MD of that company will not be countenanced. Therefore, what applies to an Assessee should equally apply to the Revenue particularly since the legislature has not couched the language in a manner that brings out any difference in the treatment of both the parties to the appeal.”

18. We also consider it relevant to set out the relevant extract of the said decision of the Full Bench of this Court in regard to the first two questions that were referred for consideration. The same are set out below:

“Q: (i) What is the correct interpretation to be placed on the expression “received by the Assessee or the Principal Chief Commissioner or the Chief Commissioner or Principal Commissioner” in Section 260A (2) (a) of the Act? Does it mean ‘received’ by any of the named officers including the CIT (Judicial)?

Ans: The word ‘received’ occurring in Section 260A (2) (a) would mean received by any of the named officers of the Department, including CIT (Judicial). The provision at present names four particular officers i.e. the Principal Commissioner, Commissioner, Principal Chief Commissioner, and the Chief Commissioner of Income Tax. These are the only designations



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of the officers who could receive a copy of the order. In the absence of a qualifying prefix “concerned”, the receipt of a copy of the order of the ITAT by any of those officers in the Department including the CIT (Judicial) will trigger the period of limitation.

Q: (ii) Does limitation begin to run for the purposes of Section 260A (2) (a) only when a certified copy of the order of the ITAT is received by the ‘concerned’ CIT within whose jurisdiction the case of the Assessee falls notwithstanding that it may have been received by any other CIT, including the CIT (Judicial) prior thereto? Is it open to the Court to read the word ‘concerned’ into Section 260 A (2) (a) of the Act as a prefix to any of the officers of the Department named therein?

Ans: In Section 260A (2) of the Act, the words CIT, Pr CIT or Chief CIT are not prefixed or qualified by the word ‘concerned’. There is no warrant for the Court to read into the provision such a qualifying word. The Court rejects the contention of the Revenue that limitation for the purposes of Section 260A (2) (a) begins to run only when a certified copy of the order of the ITAT is received by the ‘concerned’ CIT within whose jurisdiction the case of the Assessee falls notwithstanding that it may have been received by any other CIT, including the CIT (Judicial) prior thereto.”

19. In view of the above settled position, there can be no dispute regarding the date of receipt of the order passed by the learned ITAT. Concededly, further proceedings by the TPO or by the AO pursuant to the remand by the learned ITAT are now barred as the time stipulated for passing an order under Section 153 of the Act has since expired. Consequently, the petitioner’s return is required to be considered as accepted.



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20. The petition is allowed in the aforesaid terms. The pending application is also disposed of.

VIBHU BAKHRU, J

SWARANA KANTA SHARMA, J

NOVEMBER 28, 2024
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Click here to check corrigendum, if any