S.R.JOSHI

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2864 OF 2024

Unilever Industries Pvt. Ltd.,
B D Sawant Marg,
Chakala, Andheri East,
Mumbai - 400 099. … Petitioner

Versus

1 Assistant Commissioner of Income-tax, Circle 1(3)(1), Room No. 540, 5th Floor, Aayakar Bhavan, Maharshi Karve Road, Mumbai – 400020.
2 Assistant Commissioner of Income-tax, Transfer Pricing 4(2)(1), Room No. 529, Air India Building, Nariman Point, Mumbai 400021.
3 Assessment Unit, National Faceless Assessment Centre, Delhi.
4 Union of India Through the Secretary, Ministry of Finance, Government of India, North Block, New Delhi -110001. …Respondents

Adv. Paras S. Savla and Mr. Harsh R. Shah, for the Petitioner.
Dr. Dhanalakshmi S. Krishna Iyer i/b. Mr. Suresh Kumar, for the Respondents.

CORAM:	G. S. KULKARNI & FIRDOSH P. POONIWALLA, JJ.
RESERVED ON :	24th OCTOBER, 2024
PRONOUNCED ON:	12th FEBRUARY, 2025.

JUDGEMENT:- (Per FIRDOSH P. POONIWALLA,J.)

This Writ Petition has been filed under Article 226 of the Constitution of India, praying for the following final reliefs:-

> *(a) that this Hon'ble Court be pleased to issue a Writ of Certiorari or any other appropriate writ, order or direction in the nature of certiorari under Article 226 of the Constitution of India calling for records of the Petitioner's case pertaining to Assessment Year 17 -18, after examining the validity, legality and propriety thereof, quash and set aside the letter dated 31.03.24 issued by the Respondent No.1 titled "Order Giving Effect to Advance Pricing Agreement" for A Y 17-18 ('Exhibit – Q');*
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> *(b) that this Hon'ble Court be pleased to issue a Writ of Mandamus or any other appropriate writ, order or direction in the nature of Mandamus under Article 226 of the Constitution of India calling for records of the Petitioner's case pertaining to Assessment Year 17-18, and after examining the validity, legality and propriety thereof, quash direct the Respondent No.1 to forthwith issue the refund for A Y 17-18 in accordance with the modified return of income ('Exhibit - H') along with applicable interest."*

2 In the present case, the Petitioner filed its Return of Income for Assessment Year 2017-18 on 30th November, 2017, declaring a total income of Rs. 181,90,84,190. It was selected for a scrutiny assessment vide notice dated 26th September, 2018 issued under Section 143(2) of the Income Tax Act, 1961 ("the Act").

3 As per the provisions of Section 144B of the Act, the assessment proceedings were carried out in a faceless manner, i.e., by Respondent No.3.

4 During the assessment proceedings, a reference was made to the Transfer Pricing Officer ('TPO') on 20th September, 2020 to determine the Arm's Length Price ("ALP") of the international transactions entered into by the Petitioner. The transfer pricing proceedings culminated in an Order

dated 30th January, 2021, under Section 92CA(3) of the Act, wherein the TPO proposed a transfer pricing adjustment of Rs. 210,98,59,309.

5 In terms of Sections 144B and 144C of the Act, Respondent No. 3 issued a draft assessment order dated 26th August, 2021, proposing the following additions to the Petitioner's returned income:

(i) transfer pricing addition of Rs. 210,98,59,309;

(ii) disallowance in respect of ESOP expenses of Rs. 8,99,44,000; and

(iii) disallowance under Section 14A of the Act of Rs.18,93,373.

6 Aggrieved by the draft assessment order, the Petitioner informed Respondent No. 1 and Respondent No.3, through letter dated 22nd September, 2021, that objections would be filed with the Dispute Resolution Panel ("DRP"), and accordingly requested them to not pass the final assessment order before receipt of directions from the DRP as per the provisions of Section 144C of the Act.

7 The Petitioner filed its objections with the DRP on 23rd September, 2021.

8 While the Petitioner's objections were pending disposal before the DRP, the Petitioner entered into an Advance Pricing Agreement with the Central Board of Direct Taxes on 28th March, 2022. The said Advance Pricing Agreement ("APA"), *inter-alia,* determined the ALP of the Petitioner's international transactions for Assessment Year 2017-18. Since the Petitioner's assessment proceedings for Assessment Year 2017-18 were ongoing, the Petitioner informed the DRP about the said APA.

9 The DRP provided its directions on 30th May, 2022 to the Petitioner's objections against the draft assessment order for Assessment Year

2017-18. Concerning the APA, the DRP observed that that APA is binding on the Assessee as well as the AO as per the provisions of Section 92CC(5) of the Act. Further, the DRP observed that the AO is required to complete the assessment proceedings in accordance with the APA as prescribed by Section 92CD of the Act. Section 92CD(1) requires an Assessee to file a modified return of income in accordance with and limited to the APA, within three months from the end of the month in which the APA was entered into. When assessment or reassessment proceedings are pending as on the date of filing the modified return of income, Section 92CD(4) empowers the AO to complete the assessment or reassessment proceedings in accordance with the APA taking into consideration the modified return so furnished. The DRP held that for Assessment Year 2017-18, the assessment proceedings had not concluded as only a draft assessment order was passed. Accordingly, the DRP directed the AO and the TPO to give effect to the APA in accordance with provisions of Section 92CD of the Act, subject to the Petitioner filing a modified return of income within the time lines prescribed by Section 92CD(1) of the Act.

10 Concerning the merits of the transfer pricing additions, the DRP followed their orders of earlier assessment years in the Petitioner's case. Concerning the disallowance of ESOP expenses, the DRP upheld the disallowance, following their orders of earlier assessment years in the Petitioner's case. Concerning the Section 14A disallowance, the DRP upheld the disallowance, following their orders of earlier assessment years in the Petitioner's case. Lastly, the DRP directed the AO and the TPO to give effect to their directions as per provisions of Section 144C(13) of the Act.

11 Thereafter, the Petitioner filed a letter dated 8th June, 2022 with Respondent No.2 on 9th June, 2022 explaining that, based on the directions dated 30th May, 2022 of the DRP, concerning the merits of the transfer pricing adjustments, the entire transfer pricing adjustment was liable to be deleted.

12 The Petitioner had filed its modified return of income for Assessment Year 2017-18, in accordance with the APA, on 24th June, 2022, claiming a refund of Rs. 20,50,47,420. Further, as required by Rule 10A of the Income-tax Rules, 1962, the Petitioner filed an 'Annual Compliance Report' in Form 3CEF, *inter-alia* for Assessment Year 2017-18 on 24th June, 2022 with the Principal Chief Commissioner of Income-tax, International Tax – Delhi. Also, out of abundant caution, prior to filing of modified return of income for Assessment Year 2017-18, the Petitioner, on 23rd June, 2022, filed a letter with Respondent No. 1 and the DRP requesting withdrawal of the transfer pricing grounds of objections.

13 Nearly after six months, the Petitioner received a notice dated 17th January, 2023 from Respondent No.2, in terms of Rule 10 of the Income-tax Rules, 1962, to provide all relevant documents in support of the Petitioner's claim in the' Annual Compliance Report' *inter-alia* for Assessment Year 2017-18. The Petitioner provided its response on 1st February, 2023 vide submission dated 25th January, 2023. The Petitioner received another notice dated 20th March, 2023 from Respondent No.2 to provide all relevant documents. Respondent No.2 issued the Annual Compliance Report on 23rd March, 2023, accepting income declared by the Petitioner in the modified return of income in terms of the APA.

14 On 28th March, 2023, the Petitioner received a letter from Respondent No.1 directing the Petitioner to provide a revised working of computation of income pursuant to APA/ Compliance Report of Respondent No.2, by 12.30 pm on 29th March, 2024, which was a holiday on account of Good Friday. The Petitioner protested against the lack of adequate time to respond, however filed its submission with Respondent No.1 on 29th March, 2024.

15 It is the case of the Petitioner that Respondent No.1 issued a letter dated 31st March, 2024 purportedly in terms of Section 92CD of the Act. Respondent No.1 enhanced the Petitioner's income declared in the modified return of income by (i) the disallowance of ESOP expenses and (ii) the disallowance under Section 14A of the Act, in pursuance of directions of the DRP dated 30th May, 2022. Respondent No. 1 also directed that credit of taxes paid by the Petitioner ought to be given after verification and that interest ought to be charged in accordance with Section 234A, Section 234B, Section 234C and Section 234D of the Act.

16 The Petitioner, vide letter dated 24th April, 2024, explained to Respondent No.1 that no final assessment order was served for Assessment Year 2017-18 in pursuance of the directions of the DRP. The Petitioner stated that the disallowance of ESOP expenses and disallowance as per Section 14A of the Act were untenable in law. Accordingly, the Petitioner requested Respondent No. 1 to issue the Income and Tax Liability Form (ITNS) in accordance with the modified return since there was no other proceeding pending disposal.

17 The main ground of challenge of the Petitioner is that the said letter dated 31st March, 2024 purporting to give effect to the APA and the directions of the DRP is barred by limitation. It is the case of the Petitioner that, as of the date when the Petitioner filed its modified return of income for Assessment Year 2017- 18, i.e., on 24th June, 2022, the assessment proceedings were pending. This is because, Respondent No.1 had not passed the final assessment order as of that date. Hence, in accordance with the provisions of Section 92CD(4) of the Act, Respondent No.1 was required to complete the assessment proceedings in accordance with the APA taking into account the modified return of income. To complete this exercise and the assessment proceedings, an extension of twelve months is provided by Section 92CD(5)

(b) of the Act. It is the case of the Petitioner that, in the facts of the present case, the final assessment order in pursuance of the directions dated 30th May, 2022 of the DRP was required to be passed by 30th June, 2022, however, in accordance with the extension allowed by Section 92CD(5)(b) of the Act, the final assessment order ought to have been passed by 30th June, 2023. The Petitioner submitted that since the letter dated 31st March, 2024 is passed beyond this date, it is barred by limitation and is accordingly liable to be quashed.

18 The Petitioner has also relied upon the judgement of this Court in ***Vodafone India Services (P) Ltd., v/s. Union of India***[1]

19 We are not inclined to go into the merits of the matter for the reasons stated herein below.

20 In our view, what the Petitioner refers to as a letter dated 31st March, 2024 (Exh. 'Q' to the Petition) is not a letter but an Order passed under Section 92CD(3)of the Act. Against the said Order, an Appeal is provided under Section 246A(bb) of the Act. Section 246A(bb) of the Act clearly provides for an Appeal to the Commissioner (Appeals) against the Order made under sub-section (3) of Section 92CD of the Act.

21 In these circumstances, since the efficacious alternate remedy of an Appeal is available to the Petitioner under Section 246A (bb) of the Act, we are not inclined to entertain this Petition and we are inclined to relegate the Petition to the alternate remedy of an Appeal.

22 However, it has been pointed out to us that, subsequent to the filing of this Petition, an Order has been passed under Section 154 r/w Section 92CD of the Act. The said Order shows that, even as per the Revenue, a sum

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1 [2013] 39 taxmann.com 201

of Rs.23,77,74,400/- is refundable to the Petitioner. Even though we are dismissing this Petition on the ground of an alternate remedy available to the Petitioner, we are of the view that this admitted amount of Rs.23,77,74,400/- should be paid to the Petitioner along with interest.

23 For the aforesaid reasons, we pass the following orders:-

(i) The Writ Petition is dismissed;

(ii) The Petitioner is at liberty to file an Appeal under Section 246A(bb) of the Act against the Order dated 31st March, 2024;

(iii) Respondents are directed to refund to the Petitioner an amount of Rs.23,77,74,400/- as per the Order dated 18th June, 2024 passed under Section 154 r/w Section 92CD of the Act along with applicable interest until the date of payment; and

(iv) In the facts and circumstances of the case, there will be no order as to costs.

(FIRDOSH P. POONIWALLA, J.) **(G. S. KULKARNI , J.)**