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(2021) 08 TEL CK 0070

In the Telangana High Court

Case No : Writ Petition No. 15743 Of 2021

Dongfang Electric Corporation Ltd — APPELLANT

Vs

Designated Authority — RESPONDENT

Date of Decision : 27-08-2021

Acts Referred:

Income Tax Act, 1961 — Section 144C, 144C(1), 147, 246A
Direct Tax Vivad se Vishwas Act, 2020 — Section 2(1)(a), 2(1)(a)(iii), 2(1)(a)(iv), 10, 11

Citation : (2021) 08 TEL CK 0070

Hon'ble Judges : M.S.Ramachandra Rao, J;T. Vinod Kumar, J

Bench : Division Bench

Advocate : C V Narasimham, K Mamata

Final Decision : Allowed

Judgement

1. In this Writ Petition, the petitioner has assailed the order dt.30.04.2021 passed by the 1st respondent rejecting the petitioner's application dt.30.03.2021 filed under the Direct Tax Vivad Se Vishwas Act, 2020 (hereinafter referred to as, 'the DTVSV Act') as contrary to Circular No.9/2020 dt.22.04.2020 issued by the 3rd respondent.

2. It is the contention of the petitioner that, it is a Company formed under the Laws of China and is engaged in the business of power equipment manufacturing for worldwide power projects for thermal, hydro, nuclear, wind, gas turbine and combined cycle power plants; that it had supplied Boiler Turbine Generator and provided certain related services for power project located in India of Sembcorp Energy India Limited; that the income received for such services was taxable in India; and that the 2nd respondent issued a draft assessment order dt.30.12.2019 under Section 147 read with Section 144C(1) of the Income Tax Act, 1961 (hereinafter referred to as, 'the Act'), to which it was required to file objections, if any, before the Dispute Resolution Panel (for short 'DRP') within 30 days.

3. The petitioner would further contend that as the petitioner did not choose to file objections to the draft assessment order within a period of 30 days as provided under the Act, i.e. by 29.01.2020, the 2nd respondent passed the Final order confirming the proposals contained therein on 10.02.2020.

4. It is also the contention of the petitioner that against the Final order passed by the 2nd respondent, the petitioner could file an appeal to the Commissioner (Appeals) under Section 246A of the Act; and that the time limit for filing such appeal was available till 11.03.2020.

5. As in the meantime, the Ministry of Finance, Government of India, had introduced DTVSV Scheme with the object of settling tax disputes arising under the Act, the petitioner did not file an appeal against the Final order of assessment dt.10.02.2020, as the scheme provided for settling tax disputes that have arisen before the 'specified date' mentioned as 31.01.2020.

6. It is also contended that the Central Board of Direct Taxes (CBDT), the 3rd respondent in exercise of powers conferred under Section 10 and 11 of the DTVSV Act, issued clarification in the form of Frequently Asked Questions (FAQs), vide Circular No.9/2020.In answer to Question No.16, the 3rd respondent had clarified that in a situation where draft assessment order has been issued u/s. 147 of the Act, before the 'specified date' and the assessee decides not to file the objections with the DRP u/s. 144C of the Act and is waiting for final order to be passed by the AO, the assessee would be considered as 'appellant' and would be eligible to settle his dispute under the DTVSV Act. By the said answer it is also stated that in such a situation the 'disputed tax' would be computed based on the draft order.

7. It is contended that based on the above said clarification issued by the 3rd respondent, the petitioner is eligible to avail the benefit of the scheme. Though the date for filing declaration under the DTVSV Act was prescribed initially as 31.03.2020, the same was extended periodically from time to time up to 31.03.2021; and that the petitioner had opted to settle the dispute relating to determination of total income computed as Rs. 3,04,16,901/- with a tax liability including Surcharge, Education Cess and Secondary and Higher Education Cess in a sum of Rs. 1,27,82,398/-by filing declaration under the DTVSV Act on 30.03.2021.

8. The petitioner would contend that the 1st respondent, by the impugned order dt. 30.04.2021 rejected the application/ declaration filed in Form 1 and 2, stating that the clarification issued by the 3rd respondent in the form of FAQs, in particular Question No.16 of Circular No.9/2020 dt.22.04.2020, is not applicable, since, the assessee did not file appeal against the final order before the CIT (A) implying that the assessee was not waiting on the specified date for final order of AO so as to file appeal.

9. Learned Counsel for the petitioner, by taking us through the provisions of the DTVSV Act and the Circular No. 9/2020, would contend that filing of appeal

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against the order of assessment is not mandatory to avail the scheme; and since, the object of the DTVSV Act was to settle the long pending tax disputes, the 3rd respondent by the Circular issued has expanded the scope of applicability by including the cases where draft assessment order was passed, but no final order has been passed before the specified date. Thus, the petitioner contends that having regard to the scheme of the DTVSV Act, the `rejection of the petitioner's declaration by the 1st respondent is contrary to law and vitiated.

10. A counter affidavit on behalf of the 1st respondents is filed.

11. The respondents would contend that as the petitioner did not choose to file objections to the draft assessment order dt.30.12.2019, within 30 days, it has to be presumed that the petitioner has accepted the proposals as made in the draft assessment order; and that the petitioner cannot be considered as an 'appellant' as defined under Section 2(1)(a) of the DTVSV Act, as the petitioner did not dispute to the additions proposed in the draft assessment order. Thus, as no dispute exists as on the 'specified date', a sine qua non for availing the scheme, the petitioner is not entitled to avail the benefit under the DTVSV Act.

12. The respondents would further contended that as the petitioner did not file an appeal before filing of declaration on 31.03.2021 or even before the date rejection of declaration on 30.04.2021, and such appeal having been filed only on 19.07.2021, the tax payable under Act as per the Final order dt.10.02.2020 for the Asst. Year 2012-13 cannot be considered as 'disputed tax' in respect of which the benefit of scheme can be availed by petitioner.

13. The learned Senior Standing Counsel, justifying the action of the 1st respondent in rejecting the declaration filed by the petitioner, would further contend that the clarification issued by the 3rd respondent vide Question No.16, by Notification No.9/2020 would have to be read in its entirety, whereby an appellant in declaration form No.1 would be required to indicate in the appropriate schedule that time to file appeal before the DRP has not expired. By referring to the said prescription in the declaration, it is contended that since, the time for filing objections before the DRP had expired on 29.01.2020, i.e. before the 'specified date' under the DTVSV Act, and the petitioner having not filed objections to the draft assessment order, there is no dispute 'existing'. Thus, the impugned order passed by the 1st respondent rejecting the declaration filed by the petitioner is in accordance with the provisions of the DTVSV Act.

14. Learned Senior Standing Counsel would also contend that as the DTVSV Bill had received the assent of the President only on 17.03.2020, the petitioner could not have anticipated of the said enactment when Draft Assessment Order dt. 30.12.2019 was issued, by not filing objections and similarly, not filing appeal u/s. 246A of the Act against the final order dt. 10.02.2020 within the time prescribed. Thus, the claim of the petitioner is not bonafide.

15. We have noted the submissions of the parties.

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16. This Court, had an occasion to consider the scheme of the DTVSV Act, in W.P. No. 12038 of 2021. By order dt.28.06.2021 passed in the said Writ Petition, this Court, having regard to object behind the said enactment, concluded that the DTVSV Act is a beneficial piece of legislation and the same has to be interpreted in a manner which would achieve the object for which it was enacted.

17. Before adverting to the respective contentions, it is to be noted that the Direct Tax Vivad Se Vishwas Bill (Bill No. 29 of 2020) was introduced in Lok Sabha by the Hon'ble Finance Minister, Government of India, on 05.02.2020 as part of Budget Proposals for the year 2020-21. The said Bill was passed by Lok Sabha on 04.03.2020 and by the Rajya Sabha on 14.03.2020. Thereafter, it had received the assent of the President on 17.03.2020 and had thus, become an Act of Parliament from the said date.

18. However, while the Bill was under consideration before the Lok Sabha, having regard to queries received from the stakeholders seeking clarifications in respect of various provisions contained in the Scheme, the 3rd respondent / CBDT had issued Circular No.7/2020 dt.04.03.2020 providing clarification on various queries received in the form of answers to frequently asked questions (FAQs). When an objection was sought to be raised by some of the members of the Lok Sabha with regard to the CBDT issuing the circular even before the Bill was passed by both the Houses of Parliament and becoming an Act, the Hon'ble Finance Minister had clarified, that the said circular issued by the CBDT is only in the nature of guidance to enable the stakeholders to get an understanding to avail the benefit of the scheme and that the said clarification provided is subject to the Bill getting approved and passed by the Parliament and receiving the assent of the Hon'ble President of India.

19. Having regard to the object of the scheme as noted by this Court in the above said decision, we proceed to deal with the issue involved in the present writ petition.

20. The main issue under challenge relates to the eligibility of the petitioner to avail the benefit of the Scheme.

21. Section 2(1)(a) of the DTVSV Act, defines 'appellant' and covers five categories of persons specified therein. By Section 2(1)(a)(iii) of the DTVSV Act, one of the category of 'appellant' is defined as -'a person, who has filed his objections before the Dispute Resolution Panel under 144C of the Income-tax Act, 1961 and the Dispute Resolution Panel has not issued any direction on or before the 'specified date' would be considered as an eligible appellant'.

22. In the present case, the petitioner was issued with a draft assessment order dt. 30.12.2019 by the 2nd respondent. Since, the petitioner is a foreign company, it was required to file objections if any before the DRP within a period of 30 days from the date of the receipt of the draft order. However, the petitioner did not file objections thereagainst within the time prescribed available up to 29.01.2020.

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23. Placing reliance on definition as given in Section 2(1)(a)(iii) of the DTVSV Act, respondents would contend that only when a person files objections before the DRP under Section 144C and DRP has not issued any direction on or before the 'Specified date', such a person would be eligible for being considered as 'appellant' and not others. As petitioner, did not file objections before DRP within the time prescribed, and such time having lapsed before the 'specified date' viz., 31.01.2020, the petitioner cannot be considered as 'appellant' under the DTVSV Act.

24. We are unable to accept the said contention of the respondents.

25. The DTVSV Act being a beneficial legislation and intended to give quietus to the vexatious litigation, the 3rd respondent by construing the provisions liberally has expanded the scope of 'appellant' as stated in the form of answer to Question No.16 in FAQs by way a clarification issued vide Circular No. 9/2020 dt. 22.04.2020. The question and answer as clarified by the above circular reads as under :

"16. Are cases pending before DRP covered? What if the assessee has not filed objections with DRP and the AO has not yet passed the final order?

Answer: Yes, a person who has filed his objections before the DRP under Section 144C of the Act and the DRP has not issued any direction on or before the specified date as well as a person in whose case the DRP has issued directions but the AO has not passed the final assessment order on or before the specified date, is eligible under Vivad se Vishwas.

It is further clarified that there could be a situation where the AO has passed a draft assessment order before the specified date. Assessee decides not to file objections with the DRP and is waiting for final order to be passed by the AO against which he can file appeal with Commissioner (Appeals). In this situation even if the final assessment order is not passed on or before the specified date, the assessee would be considered as the appellant and would be eligible to settle the dispute under Vivad se Vishwas. Disputed tax in such cases would be computed based on the draft order. In the declaration in Form No.1, the declarant in this situation should indicate in the appropriate schedule that time to file objections with DRP has not expired."

26. A close reading of the above answer would indicate that - i) by the first part, it covers category of persons as specified in Section 2(1)(a)(iii) and (iv) of the DTVSV Act, as 'appellant'. ii) By the second part of the answer, by stating 'It is further clarified', the DTVSV Act seeks to consider the assesses who are issued with a draft assessment order by the AO before the Specified date and the assessee decides not to file objections with the DRP and is waiting for final order to be passed by the AO confirming the proposals in the Draft order, which 'can' be appealed before the Commissioner(Appeals) under Section 246A of the Act, as also 'appellant'. This expansion of definition of 'appellant' by the 3rd respondent, would make the cases like petitioner eligible for being considered as

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'appellant' under the DTVSV Act.

27. Further, it is to be noted that even though the petitioner received the Draft Assessment Order on 30.12.2019 and had time to file objections till 29.01.2020, since it decided not to file objections to the additions proposed, it cannot be said that the petitioner cannot question the final order passed by the AO by filing an appeal. In a given situation, if an assessee has any apprehension that the objections filed by it would not receive due consideration, it can choose not to file objections, and allow the authority to pass final order, against which it can file an appeal and canvass the grounds advantageously.

28. The right to file an appeal available to an assessee under Section 246A of the Act is not circumscribed by his non-filing of objections to the draft assessment order. Therefore, it is always open for an assessee to choose not to file objections to the draft assessment order, and question the final order by filing an appeal before the appellate forum provided under the Act.

29. As a matter of fact, the DTVSV Act, recognizes such right conferred on an assessee. In the second part of the answer to question no.16, the 3rd respondent had cautiously used the words by stating 'against which he can file appeal before the Commissioner(Appeals)'.

30. It is also to be seen that even the DTVSV Act does not make filing of an appeal mandatory, in order to be eligible to file a declaration to avail the benefit of the scheme. The language used in the DTVSV Act as clarified by Circular No.9/2020 (which is pari materia similar to the language used in Notification No.7/2020), makes it clear that in the event of passing of final order by the AO against which an assessee 'can' file an appeal with the Commissioner, the assessee is eligible to avail the benefit of the Scheme. The use of the word 'can' denotes 'possibility'. In the given circumstances, if there a 'possibility' of filing an appeal, which invariably exists against the final order passed by an AO, the same would suffice, and it is not necessary that an appeal is actually filed.

31. Thus, where a person has possibility to file an appeal against final order, such person would be considered as 'appellant' eligible to avail the benefit under the DTVSV Act.

32. Further, it is also to be seen that in the facts of the present case, since, the time limit for filing objections to the draft assessment order had expired on 29.01.2020, the assessing officer was free to pass final order confirming the proposals made in the draft assessment order from the following day itself, as the Act only mandates that an order should be passed within 30 days from the date of filing objections to the draft assessment order.

33. If the assessing officer had passed a final order on 30.01.2020, determining the total income and the tax due thereon, the same would have become the 'disputed tax' under the DTVSV Act, making the petitioner eligible to avail the benefit of scheme. Merely because the assessing authority took 12 more days

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time only to confirm the proposal made in the draft assessment order by passing the Final order, in our considered view would not in any way scuttle the right of the petitioner to avail the benefit of the scheme by filing a declaration under the Act.

34. It is also to be seen that by extending the benefit only to an assessee who has filed objections to the draft assessment order and denying it to one who chooses not to file objections to the draft assessment order for various reasons, would result in creating separate class of assesses, artificially. Such artificial creation of class of assesses is not permitted in law, and allowing the benefit only to those class of assesses who filed objections, even though not worth considering, would amount to discrimination.

35. Thus, the contention of the respondents that since the petitioner did not file objections to the draft assessment order, the tax shown as due in the said draft order would amount to an admitted tax and cannot be considered as a disputed tax, is without any substance and does not merit consideration.

36. Similarly, the other contention of the respondents that as the petitioner did not file appeal u/s. 246A of the Act, against the Final order dt. 10.02.2020, implying that the petitioner was not waiting for final order as on 'specified date' is devoid of any merit.

37. The respondents also sought to contend that, the petitioner could not have thought of the DTVSV Act being enacted with effect from 17.03.2020, so as not to file appeal against the order of assessment for which the time limit had expired on 11.03.2020.

38. The said submission of the respondents has no basis to stand. As noted above, the Bill relating to Direct Tax Vivad Se Vishwas Scheme was very much in public domain having been presented by the Hon'ble Finance Minister before the Lok Sabha on 05.02.2020 itself, while the Final order came to be passed by the 2nd respondent on 10.02.2020.

39. Though, the Bill did not receive the assent of the Hon'ble President of India, before the expiry of the due date for filing appeal, having been approved by one House of the Parliament, namely Lok Sabha, on 04.03.2020, getting approved in the other House of the Parliament, namely, Rajya Sabha, and receiving the assent of the President was only a matter of time and admittedly did happen too.

40. Further, it is also to be noted that the Bill as presented and approved by one House of the Parliament had laid down the terms of eligibility clearly. It is not in dispute that there has been no change as to the applicability, 'specified date', 'appellant' or 'disputed tax' as stated in the Bill presented in Lok Sabha on 05.02.2020, and the DTVSV Act as enacted on 17.03.2020.

41. Thus, the contention of the respondents that the petitioner could not have anticipated of the enactment of DTVSV Act between January, 2020 to March, 2020, during which period the time specified for filing objections, filing appeal

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against the Final order has lapsed, is without substance and is liable to be rejected.

42. The other contention of the respondents is that the eligibility or otherwise of the petitioner to avail benefit under the scheme would have to be determined by considering the clarification issued in Question No.16, in its entirety i.e. including the last part of the said clarification which reads as, 'In the declaration in Form No.1, the declarant in this situation should indicate in the appropriate schedule that time to file objections with the DRP has not expired'.

43. Laying emphasis on the above part of the clarification, it is contended that since, the time to file objections with the DRP had expired on 29.01.2020, the petitioner - assessee would be ineligible to avail the benefit.

44. We are unable to accept the said contention advanced by the respondents.

45. Firstly, it is to be noted that the declaration form is one which is designed under the rules framed under the DTVSV Act.

46. Secondly, based on the clauses contained in the declaration form, the eligibility/applicability of the DTVSV Act cannot be put to test.

47. Thirdly, the interpretation sought to be placed by reading the said sentence in isolation runs contrary to the earlier part of the clarification, wherein it is mentioned that 'assessee decides not to file objections with the DRP and is waiting for final order to be passed by AO, against which, he can file appeal with the Commissioner (Appeals)'.

48. Once, an assessee decides not to file an appeal, it is irrelevant whether time for filing objection has expired or not. If the time for filing objections has expired, the consequences would be that the proposals made in the draft assessment order would be confirmed. Therefore, the proposals made in the draft assessment order would only get converted into Final order, which can be appealed against.

49. On the other hand, if time to file objections has not yet expired, the assessee can decide for settling the dispute under the scheme. Either ways, the benefit of the applicability of the DTVSV Act cannot be denied solely on the basis of the filing of objections or not. Thus, the acceptance of the said contention advanced by the respondent would make the clarification issued by the 3rd respondent vide answer to question No.16 of FAQs, otiose and redundant.

50. Further, as noted in the opening remarks, the DTVSV Act being a beneficial piece of legislation, resort should be made to liberal interpretation rather than literal interpretation, which would render the entire scheme inoperable.

51. Thus, considered from any angle and in view of the conclusions arrived at as above, the petitioner is entitled to succeed in this Writ Petition.

52. Accordingly, the writ petition is allowed; the impugned proceeding of the 1st

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respondent dt.30.04.2021 is hereby set aside; the 1st respondent is directed to accept the declaration in Form No.1 filed by the petitioner on 30.03.2021, process the same in accordance with the DTVSV Act of 2020; issue Form No. 3; and permit the petitioner to make the payment of disputed tax in a sum of Rs.1,27,82,398/- as declared in the declaration Form No.1, before the due date as notified.

53. Pending miscellaneous petitions, if any, shall stand closed. No order as to costs.

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