

(2019) 09 DEL CK 0441

In the Delhi High Court

Case No : Civil Writ Petition No. 10387 Of 2019

P.D.R Solutions Fzc

APPELLANT

Vs

Dispute Resolution Panel- 2, New Delhi & Anr

RESPONDENT

Date of Decision : 24-09-2019

Acts Referred:

Constitution Of India, 1950 — Article 226

Income Tax Act, 1961 — Section 9(1)(vi), 144C, 144C(ii), 144C(5), 144(5), 144C(6), 144C(10), 144(7), 253(1)(d), 260A

Citation : (2020) 1 AD(Delhi) 445

Hon'ble Judges : Vipin Sanghi, J; Sanjeev Narula, J

Bench : Division Bench

Advocate : Kamal Sawhney, Prashant Meharchandani, Divyansh Singh, Zoheb Hossain

Final Decision : Allowed

Judgement

Sanjeev Narula, J

C.M. No. 42833/2019 (exemption)

1. Exemption allowed, subject to all just exceptions.

2. The application stands disposed of.

W.P.(C) 10387/2019 & CM APPL. 42832/2019

3. The present petition has been filed challenging the directions of the Dispute Resolution Panel, (DRP) dated 25th July 2019 (hereinafter 'the impugned order').

Brief Facts:

4. Petitioner company is a tax resident of UAE, and is engaged in the business of web presence, sale of domain names to global customers through its B2B brands "Logic Boxes", "Reseller club" and B2C brand "Big Rock". The business also comprises of providing web hosting services whereby server spaces are given on

lease/hire to clients.

5. For AY 2016-17, Respondent No. 2 [Assistant Commissioner of Income Tax, Circle Int. Tax. 2(2)(2)] passed a draft assessment order, dated 31st December 2018, under Section 144C of the Income Tax Act, 1961 (hereinafter 'the Act'), holding that the Petitioner's income arising from Domain Name Registration Services and Web Hosting Services is taxable under the provisions of the Income Tax Act, 1961 and also under the India- UAE, Double Taxation Avoidance Agreement("DTAA"). The Petitioner, being aggrieved by the said order filed its objections before the DRP, inter alia objecting that its income arising out of domain name registration services and web hosting services are not taxable under the India-UAE, DTAA.

6. The DRP, after evaluating the draft assessment order and the decisions relied upon therein passed the following order:

" 3.2 We have considered the factual and legal arguments of the assessee. On perusal of the draft assessment order, it is gathered that the AO has primarily relied upon the order of the Ld. ITAT, Delhi in the case of GoDaddy.com LLC (ITA No.No.1878/Del/2017 (A.Y 2013-14) and ITA. No. 7123/ DELI 2017 (A. Y 2014-15). On perusal of these orders dated 03.04.2018 and 24.07.2018 respectively, Panel is of the view that the facts of the present case is squarely covered with the facts of the case of GoDaddy.com LLC (supra). It would be appropriate to quote the relevant part of the order of the Ld. ITAT covering the issue of 'Domain Name Registration Services being treated as royalty' as under:

... (Excerpts from Godaddy.com decision reproduced)

3.3 Respectfully relying upon the decision of the Ld ITAT in the case of GoDaddy.com LLC (supra), Panel upholds the action of the AO to treat the receipts on account of 'Domain Name Registration Charges' as 'Royalty' u/ s 9(1) (vi) of the Act. Ground of objection is therefore, dismissed.

...

4.5 In view of the above discussion, Panel holds that the webhosting services are interlinked with the 'Domain Registration' and are ancillary and subsidiary to the application or enjoyment of the right for which a payment is received as Royalty. Since the payment received for registration of Domain Name is considered as 'Royalty', the payments received for 'Web Hosting Services' are also considered as 'Royalty? u/ s 9(1)(vi) of the Act. Ground of objection is, therefore, dismissed."

(emphasis supplied)

7. Learned Counsel for the Petitioner contends that despite noting the objection of the Petitioner that AO has erred in proposing the income from domain name registration services to be treated as Royalty, under the India-UAE DTAA, DRP has not adjudicated upon the same. The DRP, without any application of mind, followed the decision of Income Tax Appellate Tribunal (hereinafter "ITAT"), Delhi

in GoDaddy.com LLC (ITA No.No.1878/Del/2017 (A.Y 2013-14) and I.T.A No. 7123/DEL/2017 (A.Y 2014-15), not appreciating that the taxability in GoDaddy.com (supra) was decided under the provisions of the Act and not under any DTAA. The DRP did not adjudicate Petitioner's categorical objections on the taxability under the India-UAE DTAA, which violates the principles of natural justice. Per contra, learned counsel for the Revenue, at the outset raises a preliminary objection as to the maintainability of the present petition. He argues that since there is an alternate efficacious remedy available to the Petitioner under Section 253(1)(d) of the Act, whereby the assessment order passed by AO in pursuance of the DRP directions can be challenged in appeal before the ITAT, the Petitioner cannot be allowed to file the present petition. He also contends that no assessee can be aggrieved merely by the directions of the DRP, since it does not culminate into an order until the AO incorporates it and passes an assessment order. He further contends that the assessee had the option to either approach the DRP against the draft assessment order, or file an appeal before the CIT(A). The Petitioner having elected to subject himself to jurisdiction of the DRP under Section 144C(5) of the Act, against which no right of appeal has been provided under the Act, it cannot prefer a writ petition to assail the said order. Reliance has also been placed on the judgment of the Supreme Court in Mumbai International Airport Ltd. v. Golden Chariot Airport, (2010) 10 SCALE 69.

8. We have heard the learned counsels for the parties at length and given due consideration to their contentions.

9. The main thrust of Respondent's argument pertains to objection of maintainability of the present writ petition on the ground of alternative efficacious remedy being available under the scheme of the Act. This objection relating to the maintainability of the petition, urged by the Revenue is twofold. Firstly, relying upon the judgment of the Supreme

Court in Authorized Officer, State Bank of Travencore v. Mathew K.C., 2018 3 SCC 85, Revenue contends that this Court should not exercise its jurisdiction under Article 226 of the Constitution of India, since an effective alternate remedy is available to the Petitioner under the statute. Elaborating on this contention, Mr. Zoheb Hossain learned counsel for the Revenue contends that the Doctrine of Election would squarely apply to the facts of the present case. Petitioner-assessee having chosen one of the two available remedies in law, cannot seek to bypass the statutory mechanism by approaching this Court by way of a writ petition. The consequences of the Writ Petition being allowed would lead to opening of flood gates and would encourage others to bye-pass the statutory mechanism of seeking remedy. It would lead to an unhealthy practice of converting the Writ Court into a second round of appeal, before the assessee approaches the ITAT and then finally before this Court under Section 260A of the Act. He contends that Supreme Court had repeatedly emphasized the need to follow the statutory procedure for appeals, instead of filing Writ Petitions. He contends that the dispute resolution panel was set up for speedy disposal of

cases to facilitate expeditious resolution of disputes. The directions of DRP, while deciding the issues are final viz-a-viz the Revenue, as it does not have a right to appeal against the directions passed for a particular assessment year. He submits that in the given case, since the directions of the DRP are suitable to the Petitioner, it cannot be allowed to assail the same by way of a Writ Petition. Secondly, Mr. Hossain objects to the maintainability of the Writ Petition on the ground that it is pre-mature. He contends that the directions issued by DRP have to be implemented by the Assessing Officer only by passing an assessment order, and then it will ripen into an order that is open to challenge in terms of the provisions of the Act. In support of this submission, he relied upon the judgment of the Madras High Court in Hyundai Motors India Ltd. v. Secretary, Income Tax Department, (2017) SCC Online Madras 32229.

10. The exercise of the discretionary jurisdiction under Article 226 has been a subject matter of several decisions of the Supreme Court and also of this Court. The Courts have repeatedly held that no limitation can be placed on the powers of the High Court in exercise of its writ jurisdiction. The power of the High Court under Article 226 of the Constitution of India cannot be circumscribed by strict legal principles. At the same time, there is no gainsaying that this discretionary jurisdiction is not absolute. This necessarily means that the Courts have to exercise the power under Article 226 judiciously, in the facts of a case and in accordance with law. Normally, a writ petition under Article 226 is not entertained, if alternate statutory remedy is available. The Supreme Court in CIT v. Chhabil Das Aggarwal (2014) 1 SCC 603, held as under:

"15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case [AIR 1964 SC 1419] , Titaghur Paper Mills case [Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 : 1983 SCC (Tax) 131] and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

11. Thus, though the jurisdiction is inherently broad, the Courts have carved out certain restrictions. These restrictions are self imposed and discretionary in nature and the principles governing them, have been set out in numerous cases. One of the exceptions which is well recognised is that if there is an adequate efficacious alternate remedy available to the Petitioner, the Court should

ordinarily not entertain the petition unless there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226 of the Constitution of India. This is to ensure that the jurisdiction of the High Court does not become an appellate mechanism for the adjudication of the disputes. [See: *Whirlpool Corp v Registrar of Trade Marks*, (1998) 8 SCC 1, *Harbanslal Sahnia v. Indian Oil Corp. Ltd.*, (2003) 2 SCC 107; *M.P Ste Agro Industrs Development Corp. Ltd. V Jahan Khan*, (2007) 10 SCC 88; *Sanjana M. Wig v. Hindustan Petroleum Corp. Ltd*, (2005) 8 SCC 242; *Maharashtra Chess Association v. Union of India*, 2019(10) SCALE 67].

12. The instant case impugns the directions issued by the first Respondent - DRP under Section 144C(5) of the Act. Under the statutory scheme, as provided under Section 144C, the Assessing Officer is required to forward the draft of the proposed order of assessment to the eligible assessee if he proposes to make any variation in the income or loss returned which is prejudicial to the interest of such assessee. The assessee may file its objections, if any, against such variation within 30 days to the Dispute Resolution Panel and the Assessing Officer as provided under Section 144C(ii) of the Act. Sub-Section (5) of Section 144 provides that the Dispute Resolution Panel shall issue such directions as it thinks fit for the guidance of the Assessing Officer to enable him to complete the assessment. This, however is subject to consideration of the attributes provided under Sub-Section (6) of Section 144C. Sub-Section (7) of Section 144 further provides that the Dispute Resolution Panel may, before issuing any directions referred to in Sub-Section (5), make such further enquiries as it thinks fit or cause further enquiry to be made by the Income Tax Authority and report the result of the same to it. Sub-Section (10) of Section 144C contemplates that every direction issued by the Dispute Resolution Panel shall be binding upon the Assessing Officer. Thus, the statutory scheme provided, clearly contemplates that Dispute Resolution Panel has an obligation to examine the dispute raised by the assessee to draft assessment order, by taking into consideration all the material and contentions furnished by the assessee. The DRP is required to evaluate and analyse in an objective manner, the records, material and evidence furnished by the assessee or collected by him, or as a result of any enquiry made by him. This is certainly not an empty formality and requires application of mind and due consideration of the materials furnished by the assessee.

13. Whether the Dispute Resolution Panel has indeed considered the material can only be discerned by evaluating its reasoning and the findings. If it appears that the DRP has considered the relevant materials, a decision which the assessee labels as "wrong" would not be amenable to Writ Jurisdiction and such wrongs can and should be corrected by resorting to the statutory mechanism of appeal. However, if the decision of the DRP betrays non-consideration of relevant material, the only inference one can draw is that the Dispute Resolution Panel has failed to exercise its jurisdiction and it reflects non-application of mind. If such a situation emerges, then in our considered view, such an order would be amenable to the writ jurisdiction of the High Court, since it would be a case of

failure of the statutory authority to exercise its jurisdiction.

14. We are not suggesting that every order, where there is a non-application of mind, would become amenable to challenge under Article 226 of the Constitution of India. However, if there is a fundamental error relating to the exercise of jurisdiction which is glaring and noticeable, it would fall within the exceptions that the Courts have carved out for entertaining such a petition. Thus, there is no quarrel with the legal proposition advanced by the Revenue. Each case has to turn on its own facts, and we cannot at the threshold refuse to entertain the petition merely on the ground that since Petitioner has elected to avail its remedy by filing objections before the Dispute Resolution Panel, the directions are not amenable to writ jurisdiction of this Court under Article 226 of the Constitution of India. Pertinently, the alternate efficacious remedy that has been cited by the revenue is by way of an appeal before ITAT, which is not available as yet, because no assessment order has yet been passed by the Assessing officer. The only submission of the Petitioner is that the DRP has not even taken into consideration Petitioner's plea that it is a tax resident of UAE, and under the India - UAE DTAA, the Assessing Officer could not have proposed to treat the income from domain name Registration as Royalty. If this plea of the Petitioner is not even looked at/ examined by the DRP, it would tantamount to a jurisdictional error. To relegate the Petitioner to the appellate remedies, where he would have to join the queue, in order to obtain an order of remand to DRP, would be unjustified. Significantly, no prejudice would be caused to the Revenue, as the Petitioner is only seeking correction of a jurisdictional error. Thus, if the Petitioner was to succeed in the present petition, it would only result in an order remitting the matter to DRP to decide afresh; in which eventuality, DRP would be entitled to deal with the objections in accordance with law.

15. Having noted the above, the next question that falls for consideration is whether the writ petition raises an issue that would invite the exercise of jurisdiction by the Court at this stage.

16. There is no dispute that Respondent No. 2 passed a draft assessment order dated 31st December 2018 under Section 144C of the Act holding that the Petitioner's income arising from domain name Registration Services and Web Hosting Services is taxable under the provisions of the Income Tax Act 1961 and also under the India-UAE DTAA. The Petitioner approached Respondent No. 1 and filed the objections by invoking the jurisdiction under Section 144C of the Act against the aforesaid draft assessment order. Petitioner categorically objected in Form 35A that its income arising out of domain name registration services and web hosting services is not taxable under the India-UAE DTAA. The arguments noted by Respondent No. 1 on 25th July 2019, specifically records the objection raised by the Petitioner with respect to non-taxability of Income under India-UAE DTAA in the following words:-

"2. The AO/ TPO have proposed certain adjustments in the income of the assessee. The assessee is before this Panel objecting to the same. Objection wise

directions of the Panel are as below:

3. Ground No. 1

Addition on account of income from Domain Name Registration Services bring treated as royalty

1. On the facts and circumstances of the case and in law, the Assessing Officer {AOJ} erred in proposing that income from Domain Name Registration services are taxable as 'Royalty' under Section 9(1)(vi) of the Income Tax Act, 1961 ('Act' and under the India- UAE Treaty ('tax treaty'). The AO based her conclusion on the contention that assessee is the owner of the domain name and is imparting right to use in respect of a domain name thus erroneously considering it as a 'Trademark'.

2. The assessee prays that income from domain name registration services is erroneously taxed as Royalty under the tax treaty and the AO 's conclusions in this regard are invalid, unwarranted and accordingly we pray that the addition of INR 76,64,37, 723 proposed by the learned AO be reversed."

17. A perusal of the aforementioned objections recorded by Respondent No.1 under 144C (5) of the Act, leaves no room for any doubt that despite categorical recording noted above, the same has not been adjudicated upon. The DRP has, instead, blindly followed the decision of GoDaddy.com LLC (supra), and held that the Web Hosting Services are interlinked with domain registration and are ancillary and subsidiary to the application or enjoyment of the right for which payment is received as royalty. Since the payment so received is considered as royalty, the payments received for "Web Hosting Services" are also considered as Royalty under Section 9(1)(vi) of the Income Tax Act, 1961. It is starkly noticeable that the main contention, or to say the basic argument, raised by the Petitioner with respect to the non-taxability of its income under India-UAE DTAA has not been noticed or discussed, much less adjudicated upon.

18. The case of the Petitioner is essentially that the definition of Royalty under the Act is wider than that provided in the Treaty. Petitioner's contention is that under the Act "transfer of rights in property similar to trademark" is also covered, whereas under the Treaty, only the "transfer of right to use trademark" is covered and not "similar rights or rights in property similar to trademark". This Court, at this stage, is not expressing any view on the merits of the aforesaid objection as it is for Respondent No. 1 to consider, evaluate and analyse the same, while exercising the power under Section 144C of the Act. However, we cannot gloss over the fact that this elementary argument of the Petitioner has not been dealt with at all in the impugned directions. Further, it also cannot escape our attention that the decision of ITAT Delhi in GoDaddy.com LLC (supra) - which forms the basis of the impugned directions, has a distinguishing feature, which is also noted in the impugned directions in para 3.2. In the case of GoDaddy.com LLC (supra), the assessee took a stand that it is not a tax resident of USA, and therefore, it was not claiming any benefit under the provisions of

India-US Tax Treaty. Accordingly, the Tribunal was called upon to decide whether the receipt by the assessee on account of domain registration fee could be termed as "Royalty" as per Section 9(1)(vi) of the Income Tax Act, 1961. This is apparent from the discussion in para 8 of the decision, which has been reproduced in the impugned directions, and reads as under:-

"8. We have carefully considered the arguments of both the sides and perused relevant material placed before us. The limited question before us is whether the domain registration fee received by the assessee can be termed as royalty. At the outset, we clarify that the appellant himself has mentioned that since it is not a tax resident of USA, therefore, it is not claiming any benefit? under the provisions of India-US tax treaty. Accordingly, we have to examine within the meaning of Income-tax Act, more particularly, Section 9(1)(vi) to examine whether the receipt by the assessee on account of domain registration fee can be termed as royalty. Section 9(1)(vi) of the Income-tax Act reads as under:-

119. (1) The following incomes shall be deemed to accrue or arise in India:-

(vi) income by way of royalty payable by -

(a) the Government; or

(b) a person who is a non-resident, except where the royalty is payable in respect of any right, property or information 12 IT A-1878/Del/2017 used or services utilised for the purposes of a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India; or

(c) a person who is a non-resident, where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or profession carried on by such person in India or for the purposes of making or earning any income from any source in India: Provided that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum consideration for the transfer outside India of, or the imparting of information outside India in respect of, any data, documentation, drawing or specification relating to any patent, inventions, model, design, secret formula or process or trade mark or similar property, if such income is payable in pursuance of an agreement made before the 1st day of April 1976 and the agreement is approved by the Central Government:

[Provided further that nothing contained in this clause shall apply in relation to so much of the income by way of royalty as consists of lump sum payment made by a person, who is a resident, for the transfer of all or any rights (including the granting of a licence) in respect of computer software supplied by a non-resident manufacturer along with a computer or computer-based equipment under any scheme approved under the Policy on Computer Software Export, Software Development and Training, 1986 of the Government of India)."

19. Respondent No. 1 has evidently not taken note of the aforesaid aspect and

has relied upon the decision of the ITAT, in GoDaddy.com LLC (supra) to uphold the action of AO to treat the receipts on account of domain name registration charges as royalty under Section 9(1)(vi) of the Act. Whether or not, the said distinction would have a bearing on the ultimate decision is one thing, but the DRP should have noticed the same and dealt with it. It could not have completely ignored it or glossed over it. Even if first Respondent were to come to the conclusion that the aforesaid decision of the ITAT was applicable to the Petitioner, it was surely necessary for the panel to give its reasons for coming to that conclusion. The factual position as noted in para 8 of the decision in GoDaddy.com LLC (supra) reproduced above is inextricably connected to the Petitioner's main plank of objection viz. non-taxability under the provisions of the Treaty. Therefore, it was not expected of the first Respondent to irrationally apply the decision of GoDaddy.com LLC (supra) to give its finding and directions regarding the taxability of the receipts in the hands of the Petitioner, without discussing petitioner's submissions against its applicability. A perusal of the impugned direction also shows that apart from copying the reasoning given in GoDaddy.com LLC (supra), the first Respondent has merely endorsed and followed the said reasoning without giving any indication as to how the same has been held to be applicable to the Petitioner while dealing with its foremost objection regarding the provisions of the Treaty. There is also no discussion regarding the sustainability of the Petitioner's objection or as to how the findings rendered by the Assessing Officer in the draft order on the said issue has to be accepted. The conclusion has been summarized in para 3.3 of the impugned directions as under:-

"3.3 Respectfully relying upon the decision of the Ld ITAT in the case of Go Daddy.com LLC (supra), Panel upholds the action of the AO to treat the receipts on account of 'Domain Name Registration Charges' as 'Royalty' u/s 9(1)(vi) of the Act. Ground of objection is therefore, dismissed."

20. The first Respondent ought to have considered the objection raised by the Petitioner and discussed the same on the basis of the material placed, before giving its conclusion. Having examined the impugned directions in light of objections raised by the Petitioner, we have no hesitation in holding that the first Respondent has completely failed to exercise its jurisdiction and has rendered the entire process of the dispute resolution as per the scheme of the Act farcical.

21. Accordingly, the writ petition is allowed and the impugned order is set aside. Consequently, the matter is remitted back to the first respondent for considering the objections raised by the petitioner in detail, and for passing a fresh order on merits and in accordance with law by giving reasons and findings. It is made clear, once again that this Court is not expressing any view on the merits of the claim/objections made by the Petitioner, or the findings rendered by the Transfer Pricing Officer, as it is for the first respondent to consider and decide these aspects. The first respondent shall pass such order after hearing the petitioner within a period of eight weeks from the date of receipt of a copy of this order. In

case the Petitioner is still aggrieved, it shall be open to it to avail of its remedies. No costs. Consequently, the pending application is also disposed of.