(2012) 09 BOM CK 0007

In the Bombay High Court

Case No : Writ Petition No. 1324 of 2012

Piramal Healthcare Ltd. APPELLANT

Vs

Addl. CIT RESPONDENT

Date of Decision : 04-09-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Income Tax Act, 1961 — Section 133(6), 143, 143(3), 144C, 153

Citation : (2012) 09 BOM CK 0007

Hon'ble Judges : S.J. Vazifdar, J;M.S. Sanklecha, J

Bench : Division Bench

Advocate : J.D. Mistri, Niraj Sheth and Atul Jasani, for the Appellant; D.J. Khambatta and Abhay Ahuja, for the Respondent

Judgement

1. Respondent No. 2 is the Union of India. The petitioner inter-alia seeks a writ of certiorari quashing an assessment order dated 29.2.2012 passed u/s 143(3) of the Income Tax Act, 1961 in so far as it varies a draft assessment order dated 29.12.2011 passed u/s 143(3) read with section 144C and makes additions and disallowances not made in the draft assessment order, a notice of demand dated 29.2.2012 issued u/s 156 pursuant to the impugned assessment order and an order dated 19.3.2012 rejecting the petitioners request for a stay of recovery proceedings. Although this Writ Petition is maintainable, we are of the view that the petitioner ought, in the facts of this case, to pursue its alternate remedy which it has already availed of by filing an appeal before the Commissioner of Income Tax (Appeals), albeit without prejudice to this petition. We have, therefore, expressed no opinion on the merits of the matter.

2. The petitioners case admittedly falls within the provisions of section 144C of the Act, which at the material time, read as under:

144C(1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.

(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order:

(a) file his acceptance of the variations to the Assessing Officer, or

(b) file his objections, if any, to such variation with, -

(i) the Dispute Resolution Panel and

(ii) the Assessing Officer.

(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if -

(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or

(b) no objections are received within the period specified in sub-section (2).

(4) The Assessing Officer shall, notwithstanding anything contained in section 153, pass the assessment order under sub-section (3) within one month from the end of the month in which, -

(a) the acceptance is received; or

(b) the period of filing of objections under sub-section (2) expires.

(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:

(a) draft order;

(b) objections filed by the assessee;

(c) evidence furnished by the assessee;

(d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;

(e) records relating to the draft order;

(f) evidence collected by, or caused to be collected by, it,

(g) result of any enquiry made by, or caused to be collected by it.

(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),-

(a) make such further enquiry, as it thinks fit; or

(b) cause any further enquiry to be made by any income tax authority and report the result of the same to it.

(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Office shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153, the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

(14) The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious of the objections filed under sub-section (2) by the eligible assessee.

(15) For the purposes of this section, -

(a) ''Dispute Resolution Panel'' mean a collegium comprising of three CIT constituted by the Board for this purpose;

(b) ''eligible assessee'' means.-

(i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and

(ii) any foreign company.

3. The proceedings in which the impugned orders have been passed relate to the assessment year 2008-2009.

In respect of the AY 2007-2008, the petitioner had inter-alia claimed a deduction u/s 80-IC of the Act in an amount of Rs. 114,53,66,695 in respect of the profits of its units situated at Baddi. The case was taken up for scrutiny and after a detailed enquiry, respondent No. 1 passed an assessment order dated 18.12.2003 u/s 143(3) and allowed the deduction as claimed by the petitioner in its return of income.

4. On 29.9.2008, the petitioner filed its return of income for the AY 2008-2009 in which it inter-alia claimed a deduction u/s 80-IC of Rs. 247,10,42,003. The return was selected for scrutiny. The AO sought various particulars which according to the petitioner it furnished. The details in this regard are not relevant. Suffice it to note that by a Letter dated 28.11.2011, the petitioner had in response to a query from the department stated that there was no inter unit transfer, whereas in fact machinery of the value of Rs. 5.5 crores was transferred to the Baddi unit. The respondents allege that this was a false statement. The petitioner contends that it was an inadvertent error and that the same was clarified by a Letter dated 29.12.2011. The petitioner contends that there was no intention to mislead or to conceal any facts, and that the transfer of the said machinery has no bearing on the deduction sought u/s 80-IC of the Act. As we are in any event, not inclined to entertain this writ petition, we do not intend expressing any opinion on the rival contentions between the parties including on this aspect.

5. On 29.11.2012, respondent no. 1 passed a draft assessment order u/s 144C. He made additions of Rs. 13.16 crores pursuant to his decision to allocate to the Baddi unit interest expenditure of Rs. 5.25 crores and expenditure for research and development of Rs. 8.38 crores.

The learned Advocate General relied upon the fact that the draft assessment order stated that respondent No. 1 had sent notices to various parties and that their replies thereto were awaited.

6. Mr. Mistri, the learned Senior Counsel appearing on behalf of the petitioner however, relies upon the fact that the order dated 29.12.2011 is a draft assessment order u/s 144C. He submitted that as the petitioner did not file any objection to the draft assessment order within thirty days from the date of the receipt thereof by the petitioner, respondent No. 1 was required to pass a final assessment order on the basis of the draft assessment order within one month from the end of the month in which the period of filing the objection expired.

7. Subsequently, respondent No. 1 received responses from various parties to whom the summons had been sent u/s 133(6). The respondents confronted the petitioner with the same. The petitioner allegedly without prejudice to its rights responded to the queries.

Respondent no. 1 had also requested the petitioner to make a final submission taking into consideration the replies received by respondent No. 1 from the third parties. The petitioner without prejudice to its rights, filed the response.

8. Ultimately respondent No. 1 passed the final assessment order u/s 143(3) on 29.2.2012 which is impugned in this petition. In this order, respondent No. 1 made further disallowances. Firstly, the deduction u/s 80-IC has been denied completely whereas in the draft assessment order, it was allowed in principal and only the quantum was varied. Secondly, an addition of Rs. 2,69,91,416 was made on the ground that the petitioner could not reconcile the difference between the third parties balance in its books and as per their books. The merits of these further disallowances are not relevant to this petition.

9. Mr. Mistri submitted that once a draft order is made and served upon the assessee, the AO has no jurisdiction to make any additions thereto. He submitted that the same cannot be done even by issuing a further or a fresh draft assessment order. In other words, according to him, the draft assessment order once served upon the assessee is final in all respects as far as the department is concerned and even if the draft assessment order is set-aside for any reason, a fresh draft assessment order cannot be passed.

10. Mr. Mistris next contention was that by passing the impugned assessment order, respondent No. 1 had denied the petitioner an opportunity of availing the provisions of section 144C with respect to the additions that were not made in the draft order. u/s 144C, an eligible assessee is entitled to file his objection before the AO and the Dispute Resolution Panel (DRP) to any variation that is made in the draft assessment order. The procedure then takes an entirely different route involving a determination by the DRP. The rights and contentions of the parties in respect of the decision of the DRP are also governed by section 144C and are at variance with those under the normal procedure for the assessment u/s 143. An assessee could easily be denied the benefit of section 144C, if material changes are made to the draft assessment order and the assessee is denied any right to deal with the same under the provisions of section 144C. In a given case, the assessee may not file objections to a draft assessment order even though he does not agree with the variation made for a variety of reasons including for the reason that the tax effect on account thereof is minimal. If thereafter the AO is entitled to make further substantial and material variations and is permitted to pass a final assessment order, without affording the assessee any opportunity of dealing with the same u/s 144C, it may render the provisions of section 144C nugatory in such cases.

11. By not entertaining this Writ Petition, we do not for a moment suggest that Mr. Mistris submissions are without substance. These indeed are important issues which will undoubtedly require a decision of the Court at some stage in a given matter or even in the present case at another stage in appropriate proceedings. They certainly are points and aspects that require serious consideration by the authorities and this Court.

12. Despite the same, we do not intend exercising jurisdiction under Article 226 for this matter involves several points, some of which require a detailed consideration on disputed questions of fact including as to whether the petitioner

had made false statements as indicated earlier. It would serve no purpose and would indeed be cumbersome to have these issues decided in different proceedings.

13. There also arises the issue raised by the learned Advocate General to the effect that the petitioner had abandoned the right to proceed u/s 144C and had chosen instead to proceed to a regular assessment. Whether such a course is permissible in view of section 144C or not is another matter. If it is permissible, it may well involve a further disputed question viz. whether the petitioner had in fact done so viz. chosen to proceed to a regular assessment and not u/s 144C.

14. We, therefore, do not consider it appropriate to deal with these questions in this writ petition. The petitioner has filed an appeal u/s 246A. The learned Advocate General makes a statement that according to the respondents, the Commissioner of Income Tax (Appeals) has jurisdiction to decide all the questions that have been raised in the petitioners appeal. The learned Advocate General stated that the CIT(A) would be entitled inter-alia to quash the impugned assessment order and to pass all consequential orders including as to the effect thereof. In other words, if the CIT(A) upholds the petitioners contention that a fresh draft assessment order cannot be passed, the CIT(A) can always so hold. If on the other hand, it is held that upon the impugned assessment order being quashed, a fresh draft assessment order can be issued and the matter be proceeded with u/s 144C, he would be entitled to issue necessary orders and directions in that regard as well.

15. We make it clear that if for any reason, it is found otherwise, the petitioner would not be barred from filing a fresh writ petition or any other appropriate proceedings.

16. Mr. Mistri submitted that it is possible that his submission may be rejected and it may be held that an Assessing Officer has the power to pass an assessment order with variations prejudicial to the assessee even in respect of aspects not stated in the draft assessment order. In that event, he submitted it would be open to the petitioner to contend that the provisions of section 144-C are violative of Article 14 of the Constitution of India as it would lead to an unfair discrimination between assessees who are served with draft variation orders containing all the variations and assessees who are served with draft variation orders which contain only some variations and further variations are subsequently taken into consideration in the final assessment order without following the procedure u/s 144-C. The latter would be deprived the benefit of section 144-C without any justification qua the additional variations.

17. We are not inclined to preclude the petitioner from raising this point in this petition merely because it has not been raised thus far and there is no prayer in this regard. That is a mere technicality which may easily be overcome by an amendment. We are, however, not inclined to admit this Writ Petition on this hypothetical basis. In the event of it being so held, it will be open to the

petitioner to file a petition challenging the validity of Section 144-C. The petition is not entertained as the point is purely hypothetical and premature.

18. Mr. Mistri further contended that the notice of demand dated 15.3.2012 is bad in law and liable to be quashed on the ground that it is in violation of the provisions of section 220. He submitted that there was no justification in curtailing the statutory period of thirty days in exercise of powers under the proviso to section 220(1).

Even assuming that there is any merit in this submission, it would not survive as we intend taking care of this grievance in the order by granting the petitioner sufficient time. Indeed, it is now in any event, over six months since the notice was issued.

19. We must clarify that we did not permit either the learned Advocate General or Mr. Mistri to address us on the merits to any extent including on the question of the petitioners conduct. The learned Advocate General wanted to rely inter-alia upon the petitioners conduct in support of his submission that in view thereof alone, the writ petition ought to be rejected.

20. The main issues which arise in the present matter and before the authorities under the Act are of considerable importance. Indeed the matter warrants expedition before the authorities. We are however, reluctant to burden the CIT(A) with a time frame. We would leave it to the CIT(A) to use his discretion and judgment in this regard keeping in mind, of course the exigencies of his board and the nature of the other matters before him. It is desirable that the appeal is disposed of within six months from today. In the event of the CIT(A) finding that the interim application itself is likely to take considerable time, it would be open to him to hear the appeal itself finally instead of first hearing the interim application.

21. The learned Advocate General made a statement today, before the order was pronounced, that subject to the petitioner also agreeing, the respondents are agreeable to an order in invitum setting aside the draft assessment order dated 21st December, 2011, as well as the final assessment order dated 21st February, 2012, with a direction to the Assessing Officer to pass a fresh draft assessment order and to thereafter follow the procedure u/s 144-C. The Advocate General further states that the Department will not challenge any order of the DRP in that event. The petitioner is, however, not willing to agree to this course in view of the rights which the petitioner contends have vested in it by virtue of what is transpired. The Advocate Generals statement, therefore, does not require any further consideration and needless to add, will also, therefore, not prejudice the respondents in any manner. In the circumstances, the writ petition is dismissed only on the ground that this is not a fit case to exercise jurisdiction under Article 226. Needless to add that the rights and contentions of the parties are kept open in any proceedings that have been adopted and that may be adopted hereafter. In the event of the petitioner filing an application for interim reliefs within three

weeks from today, the impugned notice of demand shall not be implemented till the same is decided and for a period of four weeks after the service of a copy of the order upon the petitioners or its Authorized Representative. The CIT(A) is, however, at liberty to hear the appeal itself, if he so thinks it fit. The Writ Petition is, accordingly, disposed of. There shall be no order as to costs.