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

\+ **W.P.(C) 6052/2017**

Date of decision: 13th November, 2017

PARADIGM GEOPHYSICAL PTY. LTD. ..... Petitioner
Through Mr. Piyush Kaushik, Advocate

versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION)-3, NEW DELHI ..... Respondent
Through Mr. Sanjay Kumar, Standing Counsel

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MS. JUSTICE PRATHIBA M. SINGH

SANJIV KHANNA, J.(ORAL)

Counter affidavit has not been filed despite two opportunities granted on 19th July, 2017 and 12th September, 2017. We were inclined to grant further opportunity to file counter affidavit subject to imposition of costs, but learned counsel for respondents had stated that the writ petition raises legal issues and he is ready and would address the argument.

2. Accordingly, with the consent of the counsel, we have taken up the writ petition for final hearing and disposal.

3. The Petitioner is a non-resident company and a tax resident of Australia.

4. The petitioner in India is engaged in the business of providing and developing software enabled solutions to the oil and gas industry and annual

maintenance services in relation to the solutions supplied by it.

5. For the Assessment Year 2012-13, the petitioner had filed return declaring total income of 1,97,16,140/-, *inter alia,* applying provisions of 44BB of Income Tax Act, 1961 (`*the Act'*).

6. Assessing Officer (AO for short) issued notice for scrutiny assessment and thereafter issued draft assessment order dated 5th March, 2015, proposing to tax the receipts as Royalty/ Fee from Technical Services. No objections were filed and consequently the final assessment order dated 11th May, 2015 was passed by the AO u/s 144C(3)(b)/143(3) confirming the addition/ adjustment proposed in the draft Assessment Order. Total Income of petitioner for the Assessment Years was computed by applying Section 44DA of the Act at Rs. 4,92,90,360/- as against Rs.1,97,16,140/- offered to tax by the petitioner by applying provisions of 44BB of the Act.

7. As the petitioner had not filed any objections under Section 144C(2), recourse to sub section 4 of Section 144C was not required. In other words, no directions were passed by the Dispute Resolution Panel (`DRP') in respect of the draft Assessment Order.

8. The petitioner did not file any appeal against the final assessment order dated 11th May, 2015 passed by the AO, making the aforestated addition.

9. On 1st February, 2016, the petitioner filed a Revision Petition under Section 264 of the Act before the Jurisdictional Commissioner of Income Tax (International Taxation)-3, New Delhi ('Commissioner' for short). The ground raised was that the AO had wrongly denied and not applied Section 44BB and had incorrectly invoked and applied Section 44DA of the Act.

The petitioner placed reliance on ***ONGC vs. CIT (2015) 376 ITR 306 (SC)*** and CBDT Circular no. 1862 on the applicability of section 44BB of the Act.

10. The Commissioner raised certain queries on 20th January, 2017. In response, the petitioner clarified that for the Assessment Year 2012-13 they had not availed of remedy by way of appeal against the assessment order and had invoked alternate statutory remedy by way of Revision under Section 264 of the Act. Copy of the additional submissions filed by petitioner on 20th January, 2017 before the Commissioner, has been enclosed as Annexure P4.

11. The Commissioner, vide the impugned order dated 6th March, 2017 has declined to interference with the final assessment order *primarily* on the ground that a similar issue had arisen for consideration in other Assessment Years in which the alternate remedy of appeal was availed by the petitioner. For the Assessment Years 2011-12 and 2013-14, the petitioner had filed appeals before the appellate authority but no appeal was preferred for the Assessment Year 2012-13, the year in question. Hence the Revision Petition under section 264 of the Act for the Assessment Year 2012 – 13 was not maintainable. Paragraphs 6 to 8 of the impugned order are reproduced hereunder:-

> *"6. The application of the assessee, the related contracts and all other material facts provided by the applicant have been carefully examined and considered w.r.t. the relevant assessment records. It is noted· that the assessments in the case of the assessee for the A.Ys. 2011-12, 2012-13, 2013-14 and 2014-15 were framed u/s. 143(3) of the Act. In all the given assessments, the income of the assessee 'was taxed as Royalty and FTS. The income was*

brought to tax u/s. 44DA of the Act and not u/s. 44BB. The assessee filed appeals· against the assessment orders for the A. Y. 2011-12,2013-14 and 2014-15 but did not file any appeal for the assessment year 2012-13, for which the present application u/s. 264 has been filed instead.

7. It is further noted that the assessee's appeal for the assessment year 2011-12 has already been disposed of by the CIT(A)-2, Noida vide order dated 03.03.2016. While disposing of the assessee's appeal, the CIT(A) has upheld the action of the AO in treating the income earned by the assessee as income from Royalty and FTS, under the provisions of the Income Tax Act as well under the relevant DTAA. All the arguments advanced by' the assessee in the present application u/s 264, were also raised before the CIT(A), which have been duly considered and commented upon by the CIT(A) in his order supra. The assessee's appeals for the assessment years 2013- 14 and 2014-15 are still pending with the CIT(A).

8. A perusal of the relevant assessment records reveals that the assessment in the year under consideration has been framed by the AO in accordance with the relevant · provisions of law. There is not found to be any wrong application of legal provisions, or violation of procedure in the assessment proceedings and the final assessment order that could cause prejudice to the assessee. The assessee has chosen not to file an appeal against the given assessment order before the· CIT(A) for the reasons best known to it, even when the issues involved in the assessment are absolutely identical to those involved in the immediately preceding year as well as in the immediately succeeding assessment years for which the assessee is in appeal The assessee seems to have taken recourse to the provisions of section 264 of the Act as an alternative to the legal remedy available to the assessee through normal appellate channel. There is thus a clear attempt on the part of the assessee to use section 264 as a back-door entry to file its appeal on the given issues."

(emphasis supplied)

The Commissioner's reasoning and observation was that the petitioner, for some unexplained reasons, deliberately did not file an appeal against the assessment order for Assessment Year 2012-13, though it had filed appeals for other years. He held that this was an attempt to invoke Section 264 of the Act as a backdoor entry to file an appeal. Hence, the Revision petition should be dismissed.

12. Having heard the counsels for the petitioner and respondents, we find that the impugned reasoning cannot be sustained for it is contrary to the legislative mandate of Section 264 of the Act and the revisionary power conferred on the Commissioner. Section 264 of the Act empowers the jurisdictional Commissioner to revise any order (other than an order to which Section 263 applies) passed by an authority subordinate to him, on his own motion or on an application by the Assessee for revision. The Commissioner is empowered to call for the record of any proceeding under the Act in which such an order has been passed and may make such inquiry or cause such inquiry to be made and pass such order thereon, not being an order prejudicial to the Assessee and subject to the provisions of this Act, as he thinks fit. Statutory power has been conferred on the Commissioner to examine and correct any order passed by a subordinate authority.

13. There are restrictions and constraints on exercise of power under Section 264 vide sub-Section 4, which is reproduced below:-

> *"**Section 264.***
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> *(1) to (3) xxx*
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> *(4) The Commissioner shall not revise any order under this section in the following cases—*

(a) where an appeal against the order lies to the Deputy Commissioner (Appeals) or to the Commissioner (Appeals) or to the Appellate Tribunal but has not been made and the time within which such appeal may be made has not expired, or, in the case of an appeal to the Commissioner (Appeals) or] to the Appellate Tribunal, the assessee has not waived his right of appeal; or

(b) where the order is pending on an appeal before the Deputy Commissioner (Appeals); or

(c) where the order has been made the subject of an appeal to the Commissioner (Appeals) or to the Appellate Tribunal."

In terms of Sub-section 4 to Section 264, jurisdiction to revise an order cannot be exercised under clauses (b) and (c) when the order is pending in an appeal before the Deputy Commissioner (Appeals), or when the order has been made the subject of an appeal to the Commissioner (Appeals) or to the Tribunal. Revision is also not maintainable under clause (a) to sub-section 4, when an appeal against the order lies to the Deputy Commissioner (Appeals) or Commissioner (Appeals) or to the Income Tax Appellate Tribunal ("Tribunal") but such appeal has not been filed and the time within which such appeal may be filed has also not expired. Further, for clause (a) the assessee should not have waived his right to appeal. Three conditions; non-filing of appeal, time to file appeal had not expired and non waiver of right to appeal are cumulative.

14. Thus, a Revision Petition u/s 264 of the Act can be filed against any order (including an assessment order) passed by a subordinate officer, which is otherwise appealable before Commissioner (Appeals) under section 246A of the Act or under section 253 of the Act before the Tribunal, where such appeal has not been filed and limitation period for invoking remedy has

expired and the assessee has waived his right to appeal. The statutory bar is that Revision Petition cannot be entertained when an appeal has been filed before Commissioner (Appeals) or before the Tribunal in respect of such order or if no such appeal has been filed, the time limit for filing such appeal has not expired. Right to file an appeal should be waived for a revision petition to be maintainable. The objective and purpose is to ensure that the Assessee does not assail the same order before two forums and that it can elect between either filing an appeal or a revision. The Assessee cannot avail of both remedies against the same order for the same Assessment Year. If the time period for filing the appeal has not expired, the revision cannot be entertained – only to ensure that after filing of Revision, the assessee does not thereafter file an appeal. Even thereafter, the requirement is that the assessee should have waived his right to appeal.

15. It is not the case of the respondents or the reason given by the Commissioner that time for preferring appeal had not expired. It is the admitted case that time for filing appeal against the assessment order for AY 2012-13 had expired. The assessee had waived his right to file appeal. Clause (a) is therefore not attracted. Clause (b) to Section 264(4) of the Act is also not attracted in the present case and it is not the case of the Revenue that the petitioner has filed an appeal for 2012-13 before Dy. Commissioner (Appeals). The petitioner has also not filed any appeal against the said order before the Commissioner (Appeals) or the Tribunal to attract the negative stipulation in clause (c) to Section 264 (4) of the Act. The present case therefore, does not fall under clauses (a) to (c) of Section 264 (4) of the Act.

16. Under the Act, i.e., Income Tax Act, each Assessment Year is

separate and the assessee files the return for each year and assessment order is passed. Strict principles of *res judicata* do not apply, though principle of consistency is applied. Commissioner cannot refuse to entertain a revision petition filed by the assessee under Section 264 of the Act if it is maintainable on the ground that a similar issue has arisen for consideration in another year and is pending adjudication in appeal or another forum. Negative stipulations are clearly not attracted. When a statutory right is conferred on an assessee, the same imposes an obligation on the authority. New and extraneous conditions, not mandated and stipulated, expressly or by implication, cannot be imposed to deny recourse to a remedy and right of the assessee to have his claim examined on merits.

17. The Jurisdictional Commissioner no doubt is an administrative authority to the subordinate officers including assessing officer, nevertheless the Act has conferred revisionary power on the said Commissioner. He cannot refuse to exercise the said power because the assessing officer was his subordinate and under his administrative control. The Commissioner while exercising power under Section 264 of the Act exercises quasi judicial powers and he must pass a speaking and a reasoned order. He cannot abdicate his authority on the ground that a similar issue has arisen and is subject matter of appellate proceedings in other years. This would be clearly contrary to the provisions of Section 264 of the Act.

18. The impugned order no doubt reflects and states that the contention of the petitioner was incorrect and merits rejection but it does not assign and give any reason for the said conclusion. The impugned order cannot be sustained as it does not examine the contention on merits while recording the decision. The

Commissioner must give and assign reasons for taking a particular view, even if he accepts the findings and reasons recorded by the assessing officer and does not agree with the contention raised by the assessee. This court is, therefore, deprived and is unable to fathom the reasons and ground which were in the mind of the Commissioner. The order of the Commissioner should have contained reasons for the conclusions arrived at and ought to have dealt with the issue on merits as required under Section 264 of the Act.

19. Learned counsel for the petitioner has submitted that the petitioner had filed an appeal for AY 2011-12 on this issue and vide order dated 28th April, 2017, the Tribunal has ruled in favour of the Assessee. In the succeeding AY 2013-14, Commissioner (Appeals) has ruled in its favour.

20. In view of the above, the writ petition is allowed and the impugned order dated 6th March, 2017 is set aside and quashed. The matter is remanded to the Commissioner to decide the Revision Petition afresh and in accordance with law.

21. We clarify that we have not expressed any view on merits. In case, the Revision Petition is dismissed, it will be open for the petitioner to challenge the same in accordance with law. No costs.

SANJIV KHANNA, J

PRATHIBA M. SINGH, J

NOVEMBER 13, 2017

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