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IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 3648/2014

ST MICROELECTRONICS PVT.LTD

..... Petitioner

Through Mr Ajay Vohra, Senior Advocate with
Mr Aditya Vohra, Advocate.

versus

**DEPUTY COMMISSIONER OF INCOME
TAX & ORS.**

..... Respondents

Through Mr Dileep Shivpuri, Senior Standing
Counsel and Mr Sanjay Kumar, Junior Standing
Counsel.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

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18.05.2016

Dr.S. Muralidhar, J.:

1. The challenge in this writ petition by ST Microelectronics Pvt. Ltd. is to:
 - (a) an assessment order dated 22nd April, 2013 passed by the Additional Commissioner of Income Tax ('ACIT') [Assessing Officer ('AO')] (Respondent No. 2) on 22nd April, 2013 under Section 143 (3) of the Income Tax Act, 1961 ('Act');
 - (b) the penalty order dated 26th June, 2013 passed under Section 271(1) (c) of the Act and

(c) a notice dated 22nd April, 2014 issued under Section 221(1) of the Act for the Assessment Year ('AY') 2009-10.

2. The facts in brief are that the Petitioner is engaged in the business of development of integrated circuit design, Computer Aided Design tools and computer software. The Petitioner was initially operating from the premises situated at 204-206, Tolstoy House, 15, Tolstoy Marg, New Delhi till 1st February, 2010. Thereafter the Petitioner shifted to D-28, South Extension, Part-I, New Delhi.

3. The Petitioner states that new address was updated in the PAN database which was duly recorded. All communications were thereafter received by the Petitioner from the Respondents at the new address. At page 72 of the paper book, the Petitioner has listed out all the communications received by it at the new address beginning with a notice dated 31st August, 2010 under Section 143(2) of the Act for AY 2009-10 and ending with a notice dated 22nd April, 2014 issued to it under Section 221 of the Act.

4. For the AY 2009-10, the Petitioner filed its return of income on 30th September, 2009 declaring income of Rs.36,95,90,380/-. The return was picked up for scrutiny and a notice under Section 143 (2) of the Act on 31st August, 2010 is issued by the Deputy Commissioner of Income Tax (DCIT) (Respondent No. 1) at the changed address of the Petitioner. A further notice under Section 143 (2) of the Act was issued on 18th February, 2011 to the Petitioner at its changed address. This included a questionnaire. The AO issued notices on 1st September, 2011 and 30th January, 2013 under Section

143 (2) of the Act to the Petitioner, again at the changed address.

5. The Transfer Pricing Officer ('TPO') passed an order on 28th January, 2013 proposing an adjustment of Rs.49,62,10,741/- to the income of the Petitioner for AY 2009-10. This order of the TPO was also despatched and received by the Petitioner at the changed address. A copy of the order of the TPO, which has been annexed to the petition, reflects the changed address of the Petitioner.

6. The AO then passed a draft assessment order dated 18th March, 2013 under Section 144C of the Act consistent with the addition proposed by the TPO. The AO made further addition on account of training expenses. The total income was thereafter assessed at Rs.87,92,52,013/-. This draft assessment order was also sent to the Petitioner at the changed address and was received by the Petitioner on 22nd March, 2013.

7. It is pointed out that under Section 144(C)(2) of the Act, the Assessee has an option of filing an appeal before the Commissioner of Income Tax (Appeals) ['CIT(A)'] against the additions as proposed in the draft order or file objections to the variation with the Disputes Resolution Panel ('DRP') as well as the AO. Under Section 144(C)(2) of the Act, the Assessee has a time period of 30 days from receipt of the draft assessment order to exercise the above options. Where the Assessee informs the AO of the acceptance of the variation as proposed or if no objections are received by the AO or the DRP within 30 days of the Assessee receiving the draft order, then under Section 144C (3), the AO has to complete the assessment on the basis of the

draft order. The time period within which the AO has to complete the assessment under Section 144C (3) is indicated as one month 'from the end of the month in which the period of filing the objections under sub section (2) expires.' If an acceptance is received from the Assessee then the final order must be passed within one month from the date on which such acceptance is received.

8. The point involved in this case concerns the passing of the final assessment order by the AO and whether, in fact, it was done within the time period stipulated under Section 144(C)(4) of the Act read with Section 144(C)(3) of the Act.

9. Adverting to the facts of the present case, the Petitioner opted to file an appeal before the CIT(A) and therefore was awaiting the passing of the final assessment order. In other words, the Assessee did not file an acceptance of the variations with the AO within 30 days of receiving the draft assessment order. Therefore, in terms of Section 144(C)(4) read with Section 144(C)(3) of the Act with the limitation for filing objections before the DRP having expired on 22nd April, 2013, the AO had to necessarily pass the final assessment order by 31st May, 2013.

10. The Petitioner's case is that it did not receive the final assessment order passed by the AO at the changed address.

11. In the meanwhile, on 19th June 2013, the DCIT issued a notice to the Petitioner under Section 221(1) of the Act seeking to impose penalty under

Section 221(1) and recover the demand for the AY 2008-09 and 2003-04. That notice did not mention any demand arising out of assessment order for AY 2009-10. This notice dated 19th June 2013 was received by the Petitioner at its changed address.

12. Subsequently, on 22nd April, 2014 the petitioner received a notice under Section 221(1) of the Act issued by the DCIT asking the Petitioner to show cause as to why the penalty should not be levied for non-payment of demand for AY 2009-10. There were no entries in the column titled “date of service of demand” and “due date of payment”. This notice dated 22nd April 2014 was also received at the changed address of the Petitioner.

13. On 28th April 2014, the Petitioner wrote to the DCIT pointing out that neither of the orders, i.e., the assessment order under Section 144 C (3) nor the penalty order under Section 271(1)(c) was received by the Petitioner. The Petitioner, accordingly, asked for copies of the said orders along with proof of despatch of the same to enable the Petitioner to verify the date of service of the said order and notice. It was thereafter that the DCIT provided the Petitioner with the final assessment order dated 22nd April, 2013 along the notice of demand under Section 156 of the Act of the same date. The petitioner was also provided with the penalty notice dated 5th June, 2013 under Section 271(1)(c) of the Act, the penalty order dated 26th June, 2013 under Section 271(1)(c) of the Act along with the notice of demand under Section 156 of the Act and the notice dated 26th March, 2014 under Section 221(1) of the Act.

14. In its letter dated 15th May 2014, the Petitioner pointed out to the DCIT that the aforementioned documents were issued only at the old address of the Petitioner even though the change of address was updated and within the knowledge of the department and the fact that after the change of this address every communication had been served on the Petitioner by the Department at the changed address. The Petitioner specifically requested the DCIT to furnish it with the following information:-

- “a) In respect of documents referred to in para 1.7 above:
 - i) Mode of dispatch of impugned notices and orders
 - ii) Date of dispatch of impugned notices and orders
 - iii) Proof of dispatch of impugned notices and orders
 - iv) Proof of service of impugned notices and orders
 - v) If the impugned notices and orders were not served, whether the envelope came back 'unserved'.
 - vi) If yes, kindly provide copy of the envelope
- b) Permission to inspect your files for assessment proceedings, penalty proceedings, recovery proceedings etc
- c) Copies of all records placed in your file including note sheet entry”

15. It is stated thereafter several attempts made by the Petitioner to inspect the file and obtain the information were unsuccessful. It is in these circumstances that the Petitioner has filed the present petition seeking the reliefs aforementioned.

16. On 29th May, 2014 while directing notice in the writ petition, the Court passed the following order in the application CM. No. 7411/2014:

“The petitioner’s grievance is that the respondents are seeking to enforce tax demands and penalty for AY 2009-

10. It is contended that the petitioner had given sufficient intimation to the respondent/revenue about the change of address and that the orders, alleged to have been made on the basis of the draft assessment orders, are without jurisdiction since no intimation was received, thus depriving the petitioner of the right to approach the CIT (A). Counsel contends that, likewise, the penalty order too was sought to be finalized under Section 271 without notice at the new address.

Respondents are directed to produce Assessing Officer's records on the next date of hearing. In the meanwhile, the demands which are the subject matter of the present petition are hereby stayed and shall not be enforced till next date of hearing."

17. Thereafter the matter has been listed before this Court on five dates, i.e., 9th September 2014, 13th January 2015, 8th April 2015, 11th August 2015 and 9th February 2016. During this entire period the Respondents, despite opportunities, did not file any counter affidavit and therefore the averments in the writ petition have remained un-rebutted. The Court was constrained, on the previous date, i.e., 9th February 2016 to close the opportunity of filing a reply and required the records to be kept ready for perusal by the Court.

18. At this stage, it is required to note that the Petitioner's specific case is that the final assessment order was not passed on the date mentioned therein, i.e., 22nd April, 2014 and was probably antedated in order to avoid the expiry of the period of limitation as stipulated under Section 144(C)(4) of the Act read with Section 144(C)(3) of the Act. The specific pleadings in this regard are to be found in paras in the following paragraphs 13, 16 & 18 of its

petition, the relevant portions of which read as under:

“13. Petitioner filed letter with the First Respondent clearly stating the above mentioned facts and pointing out that the above mentioned documents were all issued at the old address of the Petitioner company even when the entire communication with the Petitioner was from current address of the company. The said documents were never received by the Petitioner. The Petitioner also filed affidavit stating that the said documents were never received by the company. It was specifically pleaded that the Assessment order passed is verbatim copy of the draft assessment order and when the draft assessment order was issued at current address, it is difficult to believe as to how the final Assessment order is issued at old address. Under these circumstances it was pleaded that the Petitioner has reason to believe that final assessment order is not passed within the statutory limitation and further it was again requested that the following documents may be provided to the Petitioner:

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16. By way of present writ petition, petitioner seeks to challenge the validity and legality of the Assessment Order dated 22.04.2013 passed under section 143(3), the penalty order dated 26.06.2013 passed under section 271(1)(c) and notice issued under section 221 on the ground that the same has been passed beyond the period of limitation as prescribed in section 144C(4) of the Act interpolating dates and intentionally issuing it at the old address of the Petitioner company in order to cover up the limitation. The Respondents are not providing the proof of dispatch and service of the said orders and notices, in spite of asking for the same specifically. Thus the impugned orders and notice deserved to be quashed on this ground alone.

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18. Thus, the final assessment order had to be passed within one month from the end of the month in which the acceptance

of the draft order is received or within one month when the limitation for filing objections before DRP expired. In the present case no such assessment order was passed by the Respondents which is apparent from the fact that the impugned orders and notices which are issued at the old address of the Petitioner while all other communications were addressed to the current address of the Petitioner which clearly evidences that the said orders were not passed within the limitation prescribed and now have been interpolated to cover the deficiency by purportedly sending it to the old address. The Petitioner has specifically asked for the proof of dispatch of the service of the said impugned orders and notice but the Respondents not provided the same. There is a presumption against the Respondents that the said impugned orders and notice have been passed after expiry of prescribed period of limitation interpolating dates and intentionally sending it at the wrong address. It is a settled position of law that any order passed beyond the prescribed limitation would have to be quashed as being time barred. What has precipitated the matter in the present case is that the Respondents have interpolated the orders and have tried to cover up the expiry of the limitation by issuing an order while addressing it at the old address of the Petitioner. This gross misuse of administrative powers cannot be condoned and is not an appealable Act.”

19. The fact of the matter is that no counter affidavit has been filed to rebut any of the above averments, but even the record that has been produced does not reveal any proof of despatch of the assessment order soon after it was passed, i.e., on or after 22nd April, 2013. This is, as noted earlier, despite several opportunities given to the Respondent.

20. The only way to effectively rebut the above assertion of the Petitioner, particularly, in view of the absence of any other proof of despatch of the assessment order either on the same date or soon thereafter would have been

for the AO himself to have filed an affidavit verifying that he, in fact, passed the final assessment order on the date mentioned in the assessment order, i.e., 22nd April, 2013.

21. It requires also to be noticed at this stage that the entire assessment order contains the date only in one place and that date is written by hand. Interestingly, the notice issued to the Petitioner on the same date under Section 274 of the Act has the date typed. In the circumstances it was absolutely essential for the Respondents to have made the effort of demonstrating that the final assessment order was in fact passed on 22nd April, 2013. However, the Respondents have failed to do so and therefore strengthens the doubts as to whether, in fact, the final assessment order was passed on that date.

22. It also requires to be noticed that Mr Shivpuri, Senior standing Counsel for the Respondent, on instructions clarified that the said final assessment order, in fact, was not despatched to the Petitioner. That brings up another issue. It is not understood why the address shown in the final assessment is the old address of the Petitioner when in fact the Department already had with it the changed address. All notices and orders issued to the Petitioner from 31st August, 2010 were sent to the changed address. This further raises doubt as to whether the final assessment order was, in fact, passed on 22nd April 2013. Further, when the draft assessment order was sent to the changed address of the Petitioner, there was no reason why the final assessment order should mention the old address and not the changed address.

23. In the above circumstances, the inescapable conclusion is that the Department has failed to prove even on a preponderance of probabilities that the final assessment order was passed on the date written by hand therein i.e., 22nd April 2013.

24. Mr Shivpuri sought to urge that the requirement of the law as far as Section 144(C)(4) of the Act was only that the final assessment order should be passed within one month from the end of the month in which the period for filing of objections under Section 144(C) would expire and not that it should be despatched and delivered to the Assessee within that date. Mr Shivpuri, relies on the decisions in ***Commissioner of Income-tax, Kolkatta-X v. Subrata Roy* [2014] 45 taxmann.com 513 (Cal); Commissioner of Income-tax v Binani Industries Ltd. [2015] 59 taxmann.com 389 (Cal)** to support the proposition that the assessment order should be taken to have been finally passed on the date it is signed by the officer and not on the date of despatch or service of such order on the Assessee.

25. Mr Vohra does not dispute the general proposition that an assessment order should be taken to have been passed on the date of the assessment order and that the date will not get postponed to the date of its service on the Assessee. However, he urges that it is essential that the order must have been despatched for being served on the Assessee. He placed reliance on the decision of the Supreme Court in ***Collector of Central Excise, Madras v M.M. Rubber and Co., Tamil Nadu* AIR 1991 SC 2141.**

26. There is an important aspect that has been pointed out by the Supreme Court in ***Collector of Central Excise, Madras v M.M. Rubber and Co.*** (*supra*) regarding the officer who passed the order ceasing to have any authority to change it or vary it. This can be ensured only when such order leaves the hand of the officer making the order. In para 12 of the judgment after discussing the earlier case law the Supreme Court observed as under:

“It may be seen therefore, that, if an authority is authorised to exercise a power or do an act affecting the rights of parties, he shall exercise that power within the period of limitation prescribed therefore. The order or decision of such authority comes into force or, becomes operative or becomes an effective order or decision on and from the date when it is signed by him. The date of such order or decision is the date on which the order or decision was passed or made: that is to say when he ceases to have any authority to tear it off and draft a different order and when he ceases to have any locus penitentiae. Normally that happens when the order or decision is made public or notified in some form or when it can be said to have left his hand. The date of communication of the order to the party whose rights are affected is not the relevant date for purposes of determining whether the power has been exercised within the prescribed time.”

27. Significantly, in ***Commissioner of Income-tax v Binani Industries Ltd.*** (*supra*) in para 8 it was noted that once the assessment order including the demand notice was served on the Assessee therein on 13th April 2005 by hand there was no question of any entry in the despatch register.

28. In the instant case, when the Assessee sought to inspect the file to see whether there was any entry in the despatch register, he was not allowed such inspection. It now transpires that there was no such despatch register

available which would have shown the date of despatch of the final assessment order and proof of service of such assessment order. Therefore, going by the ratio of the decision of the Supreme Court in ***Collector of Central Excise, Madras v M.M. Rubber and Co. (supra)***, in the instant case it was incumbent on the Department to demonstrate that the AO who passed the assessment order ceased to have any control over such order and that it left his hand soon after it was passed. The Department having failed to do so, a presumption has to be drawn that the final assessment order was not passed within the time period specified under Section 144(C) (4) read with Section 144(C)(3) of the Act.

29. In that view of the matter, the impugned assessment order dated 22nd April, 2013 under Section 143(3) of the Act and the consequent penalty order dated 26th June, 2013 under Section 271(1)(c) of the Act and the notice dated 22nd April, 2014 under Section 221 of the Act are hereby quashed.

30. The writ petition is allowed in the above terms with no orders as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

MAY 18, 2016

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