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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P. (C) 686/2017 & CM 29390/2019

GENPACT INDIA PRIVATE LIMITED

..... Petitioner

Through: Mr S. Ganesh, Senior Advocate with
Mr Rishi Agrawala, Mr Karan Luthra
and Ms Aarushi Tiku, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX & ANR. Respondents

Through: Mr Zoheb Hossain, Senior Standing
Counsel for Revenue/R-1 with Mr
Deepak Garg, Additional CIT, Range-
10.

Mr Dev P. Bhardwaj, Central Govt.
Standing Counsel for R-2 with Ms
Anubha Bhardwaj, Advocate.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE TALWANT SINGH

ORDER

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19.08.2019

Dr. S. Muralidhar, J.:

1. Aggrieved by one portion of the assessment order concerning the alleged liability of the Petitioner (hereafter the 'Assessee') under Sections 115-QA and 115-QB of the Income Tax Act, 1961 ('Act') in the impugned assessment order dated 31st December, 2016 passed by the Assessing Officer ('AO') (Respondent No. 1), the Assessee has approached this Court with the present petition under Article 226 of the Constitution of India. Along with the petition, an application being CM No.3141/2017 was filed seeking

interim directions to restrain the Respondents from enforcing the demand in terms of the impugned order.

2. By the impugned assessment order, *inter alia*, a demand was sought to be created under Section 115-QA of the Act in relation to the Assessee buying back 10 lakhs equity shares out of opening share capital of 25,68,700 shares from M/s. Genpact India Investment, Mauritius ('GII') in two phases in May and October, 2013. The case of the Revenue was that the scheme adopted to buyback such shares was a colourable device to evade 'buyback distribution tax liability' under the Act. The case of the Assessee on the other hand was that the buyback of shares was pursuant to a scheme of arrangement under Section 391 of the Companies Act, 1956 ('CA') approved by the High Court of Delhi. This would, therefore, not be a 'buyback' under Section 77-A CA for the purposes of Section 115QA of the Act, as it stood at the relevant time.

3. At the outset, it requires to be noticed that the impugned order of assessment was passed under Section 143 (3) of the Act for the Assessment Year ('AY') 2014-15. The said impugned assessment order deals with certain other issues, apart from the issue concerning the demand under Section 115 QA of the Act. As regards the other issues, the Assessee preferred a statutory appeal under Section 246-A of the Act before the Commissioner of Income Tax (Appeals) ['CIT (A)']. The Court is informed that the Assessee succeeded in the said appeal and against the order of the CIT (A), the Revenue has filed an appeal, which is stated to be pending before the Income Tax Appellate Tribunal ('ITAT').

4. As far as the present petition is concerned, when it was first listed for hearing on 25th January 2017, while directing notice to be issued in the present petition, this Court in the application for interim relief being CM No.3141/2017 passed the following order:

“CM No.3141/2017

6. Issue notice. Mr. Asheesh Jain, Advocate accepts notice for respondent No.1 while Mr. Dev P. Bhardwaj, Advocate accepts for respondent No. 2.

7. The applicant/petitioner claims an interim order to suspend the demand made by the Income Tax Authorities to the tune of Rs.812 crores by their order dated 31.12.2016. It is contended on behalf of the petitioner that the demand is premised upon the Assessment Officer's (AO) determination that the levy under Section 115QA of the Finance Act, 2013 [(as existing prior to its amendment) hereinafter to be referred as 'the Act'] applied. It is pointed out that the levy - by virtue of Section 115QA (1) and (2) of the Act is confined to, what is defined as 'buy-back' under Explanation (i) to Section 115QA (1). Elaborating on this, it is argued that non obstante clause, which changed the definition as well as the charging provision under, Section 115QA, confines the levy only to transactions that are covered by it. The solitary nature of the transactions covered is the buy-back in terms of Section 11A of the Companies Act, 1956. It was submitted that in all other instances where buy-back arrangements are resorted to in accordance law, such as for approval of a scheme of compromise and arrangement under Section 391 of the Companies Act, the levy would not apply.

8. Learned counsel relied upon the order of this Court in GENPACT India (CP No. 349/2013, decided on 10.09.2013) where an identical argument was urged by the Regional Director of the Income Tax, who contended that the buy-back was contrary to law as it was meant to circumvent the provisions of Section 11A of the Companies Act. This Court had, it is pointed out, overruled the submission. Likewise, the

applicant relied upon the judgment of *Capgemini India (P) Ltd* (Co. Scheme Petition No 434 of 2014, decided by the Bombay High Court on 28.04.2015).

9. Learned counsel for the Revenue, appearing on advance notice, has opposed the petition on the ground of the interim relief arguing that an alternative remedy under Section 250 is available. It is submitted that though the levy, is a special one, forms part of the Income Tax Act and, therefore, the AO's order is appealable. It is argued on the merits that the restrictive nature of Section 77A, which places fetters upon the company, is sought to be circumvented, by the petitioner, through buy-back arrangements. This clearly is not permissible because the nature of the buyback far exceeds the stipulations, that has been ever applied to the petitioner had it proceeded under Section 77A of the Companies Act. In these circumstances, being a devise, the Revenue was entitled to ignore it and subject the transactions to levy.

10. Prima facie, in this Court's opinion, the non-obstante clause in Section 115QA of the Act restricts the nature of the levy to the transactions defined by the provision itself. The transactions defined are those covered by Section 11A of the Companies Act. Significantly, the Parliamentary intent to cover all manners of share acquisition by the Company of its own shares, is evident from a subsequent amendment to Section 115QA of the Act, when it explained the meaning of 'buy-back' in the First Explanation by not alluding merely to Section 11A of the Companies Act but all other provisions of law. That this provision was not given retrospective effect, in this Court's opinion, further strengthens the petitioner's submissions.

11. In view of these prima facie reasons, the Court is of the opinion that the impugned demand to the tune it seeks to recover levy under Section 115QA of the Act should not be enforced till the next date of hearing. It is so directed.

12. List on 28.03.2017.

13. A copy of this order be given *dasti* to the parties.”

5. In response to the notice in the present petition, a counter affidavit dated 30th June, 2017 was filed by the Respondent, in which a preliminary objection was raised regarding the maintainability of the petition. It was submitted that an alternative efficacious remedy was available to the Assessee under the Act against the impugned order. On 30th August, 2017, an adjournment was sought on behalf of the Respondents stating that the Additional Solicitor General of India (‘ASG’) had been engaged and that he was in some difficulty. While directing the case to be listed on 25th October, 2017 at 2.15 pm for hearing, this Court made the interim order dated 25th January, 2017 absolute during the pendency of the petition.

6. Thereafter, the petition kept getting adjourned for one reason or the other and could not be taken up for hearing. Even on 22nd May, 2019 and 3rd July, 2019, adjournments were sought by the Respondent stating that the ASG, who had to appear on their behalf was in some difficulty.

7. In the rejoinder filed to the counter affidavit on the issue of maintainability of the petition, it is contended by the Assessee that since the Court had already heard the matter at some length on two occasions, and thereafter “entertained the writ petition”, it is clear that the Court intended to decide the matter on merits. It is further submitted that the matter raises a “pure question of law” regarding the interpretation of Section 115QA of the Act and that this Court should decide the said question as it will impact a number of other Assessees as well.

8. In the meanwhile, the Revenue filed CM No. 29390/2019 praying that this Court should pass an order on the maintainability of the writ petition and dismiss it on the ground of the availability of an alternative remedy.

9. Mr S. Ganesh, learned Senior Counsel appearing for the Assessee, first submitted that there was no alternative remedy available to the Assessee as far as the demand created under Section 115 QA of the Act was concerned. According to him although this portion of the demand formed part of the impugned assessment order under Section 143 (3) of the Act, it was actually simply 'added' (or as he put it 'stapled') to the assessment order. He insisted that that is how the order creating the demand under Section 115 QA of the Act should be viewed.

10. To substantiate the above plea, Mr. Ganesh referred to Section 2 (45) of the Act which defines 'total income' to mean the total amount of income referred to under Section 5 of the Act, computed in the manner laid down in this Act and Section 143 (3) of the Act which again refers to the assessment order being passed in respect of the 'total income' of the Assessee. It is contended that while Section 246-A of the Act talks of appeal of an assessment order under Section 143 (3) of the Act being an appealable one, as far as the impugned assessment order is concerned, the portion concerning the alleged liability of the Petitioner under Section 115-QA of the Act, is in fact a separate demand not relatable to the main assessment order for forming part of it. Referring to Section 115-QA of the Act, Mr. Ganesh insists that the amount chargeable thereunder is in addition to the total income and, therefore, that portion of the impugned assessment order

should be treated as a separate order against which no appeal was provided for under the Act.

11. Mr Ganesh also referred to the decisions in ***Paradip Port Trust v Sales Tax Officer 1998 (4) SCC 90***; ***Whirlpool Corporation v. Registrar of Trade Marks [1998] 8 SCC 1***; ***Siemens Ltd v State of Maharashtra (2006) 12 SCC 33***; ***Aircel Ltd. v Commercial Tax Officer (2016) 70 taxman 274 (SC)*** and the decision of the Gujarat High Court in ***Vishwanath Engineers v Assistant Commissioner of Income Tax (2013) 352 ITR 549 (Guj)*** to urge that the mere existence of an efficacious alternative remedy under the Act would not preclude this Court from entertaining the present writ petition which according to him involved a short question of interpretation of Section 115-QA of the Act.

12. On merits, Mr Ganesh submitted that the demand was sought to be created under Section 115-QA of the Act in relation to the Assessee buying back 10 lakhs equity shares out of the share capital of 25,68,700 shares from M/s Genpact India Investment, Mauritius ('GII') in two phases in May and October, 2013 but it was not a buy back under Section 77 A of the CA. The buyback was pursuant to a scheme of arrangement under Section 391 of the CA which was approved by the High Court of Delhi. He referred to the fact that prior to its amendment with effect from 1st June, 2016, Explanation 1 to Section 115-QA clarified that for the purposes of the said section buyback meant purchase by a company of its own shares in accordance with the provisions of Section 77-A of the CA. The amendment to Explanation 1 by the Finance Act 2016, substituted the words 'Section 77-A of the Companies

Act, 1956' with the words "any law for the time being in force relating to companies." This amendment was expressly made effective only from 1st June, 2016. Accordingly, it is submitted that the entire demand created under Section 115-QA of the Act in respect of the above buyback of its own shares from GII was unsustainable in law.

13. An additional point raised on merits by Mr Ganesh, which admittedly is not pleaded in the writ petition, is based on the recent decision dated 25th July, 2019 of the Supreme Court in CA No. 5409/2019 [**Pr. Commissioner of Income Tax, New Delhi v Maruti Suzuki India Limited 2019 (10) SCALE 21**]. Elaborating this point, Mr Ganesh pointed out that in the impugned assessment order, the name of the Assessee was shown "*Genpact India (Now merged with 'Genpact India - Private Limited', PAN: AABCE446JB)*" whereas the assessment was framed in the name of an entity which did not exist as of the date of the order since it stood merged with Genpact India Private Limited ('GIPL'). Even the PAN number in column No.3 was shown as '*AAACG9163H*', which was admittedly different from the PAN number of GIPL. It is accordingly contended that the entire assessment order under Section 143 (3) of the Act would be bad in law and to the extent it includes the demand under Section 115-QA of the Act, it would be unsustainable in law.

14. Mr Zoheb Hossain, learned Senior Standing Counsel for the Revenue, on the other hand, submitted, that the petition is not maintainable and that the Revenue would straightway concede that it was in fact an appealable order under Section 246-A of the Act. Referring to the decisions in **Director**

General of Police, Central Reserve Police Force, New Delhi v P.M Ramalingam (2009) 1 SCC 193; Authorized Officer, State Bank of Travancore v Mathew K.C. (2018) 3 SCC 85 and CIT v. Chhabil Dass Agarwal (2013) 357 ITR 357 (SC), Mr. Hossain submitted that this Court ought not to entertain the present writ petition when the Assessee had an efficacious alternative remedy of appeal before the CIT (A) under Section 246-A of the Act.

15. On merits, Mr. Hossain submitted that the issue was not confined to interpretation of Section 115-QA of the Act. He submitted that if the Assessee had gone in appeal before the CIT (A) then the Revenue could have been in a position to defend the demand raised by the AO in the impugned assessment order under Section 115-QA by referring to Section 2(22) (d) of the Act read with the proviso to (vii) thereto. He further submitted on instructions from Mr Deepak Garg, Additional CIT, Range-10, who was present in the Court that the Revenue would not raise any issue regarding limitation if the Assessee was to be relegated to the CIT (A). Further, the Revenue would be agreeable to the impugned demand not being enforced till the disposal of the said appeal.

16. At the outset, the Court would first like to deal with the submissions of Mr Ganesh that the impugned demand raised under Section 115-QA of the Act should not be construed as forming part of the impugned assessment order and that it is something separate from it. While it is true that the demand under Section 115-QA of the Act would be in addition to the total income, the fact of the matter is that in the present case it forms an integral

part of the impugned assessment order under Section 143 (3) of the Act. Reading the assessment order as a whole, it is plain to the Court that this demand under Section 115-QA of the Act is in addition to demands under other issues, all of which form part of the impugned assessment order. In fact, Paragraph 11 of the impugned assessment order, which gives the computation of the total taxable income, includes the demands raised under all heads and it includes the demand under Section 115-QA of the Act. Therefore, it is not possible for this Court to read this part of the order separate from the rest of the assessment order.

17. The decisions cited by both sides appear to indicate that depending on the facts of the particular case, the Supreme Court has expressed the view that the High Courts either should not have entertained the writ petition under Article 226 of the Constitution in the face of the availability of an efficacious alternative remedy or that it should have entertained the writ petition, notwithstanding the availability of such a remedy. For instance in ***CIT v. Chhabil Dass Agarwal*** (*supra*) where the challenge was raised in a writ petition to a notice under Section 148 of the Act and the subsequent assessment order, the Supreme Court, referring to its earlier decisions, observed as under:

“15. Thus, while it can be said that this Court has recognized 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, Titagarh Paper Mills case 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.

16. In the instant case, the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In *Ram and Shyam Co. vs. State of Haryana*, (1985) 3 SCC 267 this Court has noticed that if an appeal is from “Caesar to Caesar’s wife” the existence of alternative remedy would be a mirage and an exercise in futility.”

18. Liberty was granted to the Assessee in the aforementioned case to file an appropriate appeal against the order of reassessment.

19. On the other hand, in *Siemens Ltd v. State of Maharashtra* (*supra*), the demand of cess against the Petitioner by means of a show cause notice (‘SCN’) was challenged in a writ petition under Article 226 of the Constitution of India before the High Court of Bombay. The Bombay High Court refused to entertain the challenge to the SCN by the following short order:

“Challenge is to a show cause notice issued by the Corporation

demanding certain payment of cess on the value of goods imported from Aurangabad and Daman. Petitioners may file their reply to the show cause notice and produce the relevant documents within two weeks. In case the order is adverse to the petitioner no recovery shall be made for a period of four weeks from the date of service of the order on the petitioner.”

20. On the facts of the case, the Supreme Court was of the view that the authority issuing the SCN had already formed an opinion as regards the liability of the Assessee. It proceeded to observe as under:

“If in passing the order the respondent has already determined the liability of the appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show cause notice. The writ petition, in our opinion, was maintainable.”

21. In ***Whirlpool Corporation v. Registrar of Trade Marks*** (*supra*), it was pointed out that:

“15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the *vires* of an Act is challenged.”

22. In the present case while there is no challenge to the constitutional validity of Section 115-QA of the Act. The impugned order is not challenged

on the ground that it is “wholly without jurisdiction”. What is sought to be urged is that the point involved a pure question of law concerning the interpretation of Section 115-QA of the Act and therefore this Court should entertain the present writ petition. It is also urged that since the Assessee had already been heard on more than one occasion by this Court, it should not have at the stage of final hearing, be rejected only on the ground of maintainability.

23. The question regarding the interpretation of Section 115-QA of the Act, as it stood at the relevant time, can definitely be gone into by the CIT (A). Further, this Court has in fact not expressed any view yet on the maintainability of the petition, although as rightly pointed out the matter was heard on this aspect earlier as well. The fact remains that the Respondent raised the objection at the first available opportunity. Due to reasons noted hereinbefore, the issue could not be decided till now. It would, however, not be correct to state that this Court has impliedly overruled such an objection and decided to hear the petition on merits.

24. The Court also notes in this context that the Assessee has in fact succeeded in its appeal before the CIT (A) on other issues arising out of the same impugned assessment order and it is the Revenue which is now in appeal before the ITAT. There is no reason why this one other issue arising from the impugned assessment order cannot also be examined by the CIT(A).

25. The Court is conscious that nearly three years have elapsed since the passing of the impugned assessment order. However, in view of the

statement made on behalf of the Revenue that they would raise no objection regarding maintainability of the appeal under Section 246A of the Act before the the CIT (A) and would also not raise any objection regarding limitation, the Court sees no prejudice being caused to the Assessee by being relegated to the CIT (A). Most importantly, with the Revenue agreeing not to enforce the demand till the conclusion of the appellate proceedings before the CIT (A), the Assessee is not going to be inconvenienced. Moreover, this Court proposes to issue directions for a time bound disposal of the appeal by the CIT (A).

26. On the additional point raised by Mr. Ganesh on whether the impugned assessment order was framed against an entity which ceased to exist at the time of passing of the impugned order, on the strength of the decision of the Supreme Court in ***Pr. Commissioner of Income Tax, New Delhi v Maruti Suzuki India Limited*** (*supra*), this Court leaves it open to the Assessee to raise this issue in the appeal before the CIT (A). Likewise, although the impugned assessment order does not refer to the alternative plea of the Revenue seeking to justify the impugned demand with reference to Section 2 (22) (d) of the Act, the Court leaves it open to the Revenue raise this issue before the CIT (A).

27. Accordingly, the writ petition is disposed of with the following directions:

- (i) The Court declines to entertain this writ petition under Article 226 of the Constitution against the impugned demand raised by the Revenue by way of the impugned assessment order under Section 115-QA of

the Act against the Assessee.

- (ii) The Assessee is granted an opportunity to file an appeal under Section 246-A of the Act before the CIT (A) to challenge the impugned assessment order only insofar as it creates a demand under Section 115 QA of the Act.
- (iii) If such an appeal is filed within ten days from today, it will be considered on its own merits and a reasoned order disposing of the appeal will be passed by the CIT (A) on all issues raised by the Assessee, not limited to the issues raised in the present petition as well as on the response thereto by the Revenue in accordance with law.
- (iv) The reasoned order shall be passed by the CIT (A) not later than 31st October, 2019. It will be communicated to the Petitioner within ten days thereafter. For a period of two weeks after the date of such communication of order, the demand under the impugned assessment order, if it is affirmed by the CIT (A) in appeal, will not be enforced against the Assessee.
- (v) The Court places on record the statement of the Revenue that it will not raise any objection before the CIT (A) as to the maintainability of such an appeal and as to the appeal being barred by limitation. The Court also takes on record the statement of the Revenue that it will not enforce the demand in terms of the impugned assessment order till the disposal of the above appeal. All of the above is subject to the Assessee filing the appeal before the CIT (A) within ten days from today.

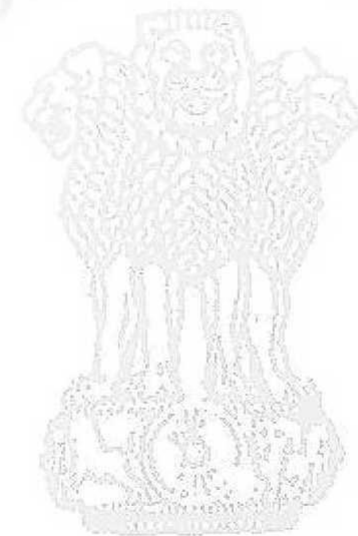
(vi) It is made clear that this Court has not expressed any view whatsoever on the contentions of either party on the merits of the case.

28. The writ petition and pending application are disposed of with above directions. No costs.

S. MURALIDHAR, J.

TALWANT SINGH, J.

AUGUST 19, 2019
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