

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

निर्धारण वर्ष / Assessment Year : 2011-12

Nalco Company,USA Nalco Water India limited, S.No.238/239, 3 rd Floor, Quadra 1, Panchshil, Magarpatta Road, Pune 411 028 PAN : AACCN3661R	Vs.	CIT City (IT & TP), Kolkata
Appellant		Respondent

Shri Ketan Ved
Smt. Amrita Misra

02-02-2021
05-02-2021

PER R.S.SYAL, VP :

2. Succinctly, the factual matrix of the case is that the assessee is a foreign company incorporated under the laws of Delaware, United States of America (USA). It is a tax resident

of the USA in terms of the India-USA Double Taxation Avoidance Agreement (DTAA). A return was filed declaring total income at Nil claiming refund of Rs.96,53,026/-, being the amount of tax deducted at source by Nalco Water India Ltd. (NWIL) from a sum of Rs.9,14,32,767 paid to the assessee towards Head Quarter service fee, which was claimed by the assessee to be not chargeable to tax in India because of it not having any Permanent Establishment (PE) in India. The assessment order was passed on 10-03-2015 accepting the assessee's claim. The ld. CIT opined that the service charges received by the assessee from NWIL were in the nature of Royalty/Fees for included services as per the DTAA. He observed from the order sheet of the assessment proceedings that only two effective hearings took place and the AO accepted the receipt of Rs.9.14 crore as not chargeable to tax. On being show caused, the assessee tendered explanation that the costs incurred by it in rendering services were allocated amongst the group companies including NWIL and that its case was covered under the non-taxability clause of Article 12 of the DTAA. The ld. CIT observed from the Agreement, under which such services were rendered, that those were in

the nature of technical services as these were special, exclusive and customised. Relying on certain Tribunal orders, rulings of the AAR and the judgment of the Hon'ble Supreme Court in the case of *GVK Industries Limited Vs. ITO (2015) 371 ITR 453 (SC)*, he held that the assessee provided domain knowledge and services in several areas which enabled the NWIL to perform the work and make its own decisions. He opined that such fee was in the nature of Fees for Technical services u/s.9(1)(vii) and Royalty u/s.9(1)(vi) under the Act and also Fees for included services under Article 12 of the DTAA. Taking recourse to Explanation 2 to section 263(1) of the Act, inserted by the Finance Act, 2015 amended w.e.f. 01-06-2015, he held that the assessment order was passed without making enquiries or verification. Setting aside the assessment order, he directed the AO to analyse all the documents, conduct inquiries on various issues, verify the facts and conduct necessary investigation before passing the assessment order afresh. Aggrieved thereby, the assessee has come up in appeal before the Tribunal.

3. We have heard the rival submissions and gone through the relevant material on record. Albeit the facts have set out above, still, we consider it expedient to briefly recapitulate the facts which are germane to issue in appeal. The assessee received a sum of Rs.9.14 crore from NWIL for rendering Head quarter services. This amount was claimed as Business profits under Article 7 of the DTAA and resultantly not chargeable to tax in the absence of it having any PE in India in terms of Article 5. The ld. CIT treated such amount as Royalty or Fees for Technical Services u/s. 9(1)(vi)/9(1)(vii) read with Article 12 of the DTAA bringing it within the taxability net.

4. It is observed that the ld. CIT assumed power to revise the assessment order by primarily relying on Explanation 2 to section 263(1) which was inserted by the Finance Act, 2015. The ld. AR strongly objected to the ld. CIT taking recourse to the Explanation 2 by submitting that the same, having been inserted w.e.f. 01-06-2015, will govern the assessment years commencing after its insertion, namely, 2017-18 onwards and was ergo inapplicable to the assessment year 2011-12 under

consideration. The ld. DR emphatically defended the invocation of the Explanation.

5. In order to examine the rival contentions on this issue, it would be apposite to reproduce Explanation 2 to section 263(1) as under:

“Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.”

6. This Explanation came to be inserted by the Finance Act, 2015 w.e.f. 01-06-2015. It is nobody’s case that it is retrospective. The controversy is about its prospectivity *qua* the assessment year as put forth on behalf of the assessee or *qua* the proceedings as claimed by the Revenue.

7. Normally, most of the provisions are inserted/amended w.e.f. 1st April of a particular year. Such insertions or

amendments from the beginning of a financial or assessment year do not pose a serious challenge in determining the date of their applicability. But when a provision is inserted from a specific date midway the financial year and there is no dispute as to its prospective nature, then one needs to understand its nature for deciding if it applies to the assessment year commencing after its insertion or to the proceedings pending on that date as well. Prospective provisions, inserted from a specific date in the midst of a financial year, falling within the realm of procedural aspects of the assessment or not directly effecting the shrinking or swelling of total income, are ordinarily construed as prospective *qua* the proceedings and not *qua* the assessment year. As Explanation 2 to section 263(1) of the Act, inserted w.e.f. 01-06-2015, is an enabling provision empowering the CIT to deem the assessment order erroneous and prejudicial to the interest of Revenue in the four situations as set out in clauses (a) to (d) therein, it will have its application *qua* the revision proceedings and not the assessment year following such date. We, therefore, jettison the contention urged on behalf of the assessee and hold that no exception, in principle, can be taken to the Id. CIT's decision

in taking recourse to Explanation 2 to section 263(1) of the Act, which was on the statute when he passed the order u/s.263 of the Act on 30-03-2017.

8. Now we turn to examine the view canvassed by the Id. CIT that the amount received by the assessee is chargeable to tax under the relevant provisions and the AO erred in accepting the assessee's claim without making proper enquiry. It is fairly settled that an order to qualify for revision must be erroneous as well as prejudicial to the interest of the revenue. It is equally settled by virtue of several judgments including the celebrated decision by the Hon'ble Supreme Court in *Malabar Industrial Company Ltd. Vs. CIT (2000) 243 ITR 83 (SC)* that if there exists two possible views on a point and the AO adopts one, the CIT cannot revise such an assessment order by substituting his view in place of that adopted by the AO.

9. It is seen that the assessee filed its return with Nil income expressly claiming in the Computation of income itself that Head quarter fee from NWIL was not chargeable to tax under the DTAA. A copy of such computation has been placed at

page 155 of the paper book, which transpires that the assessee declared receipts at Rs.9.14 crore and thereafter computed income at Nil after claiming exemption of the equal amount. The return of income was filed on 17-11-2011. The assessee's case was selected for scrutiny for which the AO issued notice u/s.143(2) on 31-07-2012. Thereafter, the case was transferred to DDIT(IT), 2(1) vide transfer memo dated 30-03-2013. Pursuant to that, a notice u/s.142(1) dated 03-11-2013 was issued to the assessee. Consequently, as per the restructuring order dated 15-11-2014, the case was transferred to the DCIT, Circle-1(2), Kolkata and notice was issued u/s.142(1) of the Act. The assessee's representative appeared on 15-12-2014. The case was discussed. He was requested to produce certain documents as requisitioned u/s.142(1). The case was adjourned for hearing on 23-12-2014. On 27-01-2015, counsel of the assessee appeared and he was required to produce certain more documents by 04-02-2015. Details of such documents running into 10 in number have been set out by the Id. CIT at page 3 of his order. Item at Sl.No.9 is "Details and nature of transactions with NLC Nalco, India Ltd.' The assessee furnished reply to the AO on 04-02-2015, a

copy of which has been placed at pages 156 onwards of the paper book. In response to such query at Sl.No.9, the assessee submitted that: “NLC Nalco India is a fellow subsidiary of Nalco, USA. During the relevant assessment year, Nalco, USA has shared head quarter common expenses with Nalco, India.’ The assessee appeared before the AO on 25-02-2015, when the AO requested him to furnish 3 documents including ‘Copy of agreement’. The assessee tendered its reply on 03-03-2015, a copy of which has been placed at page 160 onwards of the paper book. In reply to the first query of the AO about furnishing the assessment order for assessment year 2010-11, the assessee furnished the assessment order passed u/s.143(3) for the immediately preceding assessment year by categorically stating that: “Please note that the assessee had taken a stand that the ‘Head Quarter Common Expenses’ received/receivable by the assessee from its Indian subsidiary named Nalco Water India Limited did not fall under the category of ‘Fees for included services’ as specified in Article 12(4) of the DTAA and hence, the same was not chargeable to tax in India. The ld. AO was kind enough to accept the stand taken by the assessee.’ Query

no. 3 of the AO was to provide a copy of the agreement under which reimbursement of 'Head Quarter Common Expenses' was received/receivable by the assessee from its Indian subsidiary. In reply to this, the assessee submitted that it entered into Service Agreement with Nalco India, whose copy was furnished. It was further stated that: "The reimbursement of Head Quarter Common Expenses for a sum of INR 91,433 Thousand was received/receivable by the assessee from Nalco, India". The assessee set out the nature of services under point A. Thereafter, on next page under point B, the assessee referred to the provisions of DTAA. This point has been discussed in two and half pages whereby the assessee stated that the services rendered by it were not of any technical nature and hence, did not 'make available' any technical knowledge, experience, skill, know-how etc. to the recipient. It further reiterated that the service charges under the Service Agreement would have to be considered as business profits under Article 7 of the DTAA and in the absence of any PE in India, the service charges received by it could not be considered as its income chargeable to tax in India. Under point C, the assessee submitted Evidence of provision of

services on sample basis, giving 8 samples under different heads of services, such as, Safety; Health and Environment; Operation, Planning; Information Technology; Procurement. In Summary on page 10 of the reply, the assessee submitted before the AO that the services rendered by it to Nalco, India were to facilitate running its day-to-day management activities effectively and efficiently and it did not 'make available' any technical knowledge, experience, skill etc. to NWIL. Under point D dealing with Method of Computation of Head Quarter Common Expenses, the assessee submitted a copy of 'Report of the Independent Accountant' certifying the allocation mechanism used by it to determine portion of management service cost charged to Nalco India. This reply of the assessee runs into 14 pages. It was on the basis of such two detailed replies that the AO treated the Head Quarter service fee of Rs.9.14 crore received by the assessee from NWIL as not chargeable to tax and did not consider it expedient to expressly discuss this issue in the body of the assessment order impliedly as a covered matter from the preceding year.

10. Now the moot question is whether the *per se* non-discussion of an aspect of the assessment in the body of the

order makes it amenable to revision under section 263 of the Act? In a return filed by any assessee doing business, there are several items of income and expenses. The AO is duty-bound to examine each one of them while completing the assessment and make addition, wherever the claim is found to be contrary to law. When an AO examines and gets satisfied with the eligibility of the expenses claimed as to their deductibility or non-taxability of certain items of income, he need not necessarily discuss each such item categorically in the assessment order. What is essential to discuss in the assessment order, and that too with reasons, is deductibility of expenses or non-taxability of items of income, which do not get his nod of approval. Discussing each and every item of income or expense getting imprimatur of the AO would give unassuming length to the assessment order, which is neither contemplated nor is the norm. Thus, to brand every assessment order, not expressly discussing expenses or incomes with which the AO concurs, as erroneous and prejudicial to the interest of Revenue is not justified.

11. In the absence of any discussion in the assessment order on an important point, one may gather *prima facie* impression

that the AO failed to examine the issue at the time of making the assessment. However the simpliciter fact of non-discussion of such an aspect in the assessment order cannot be decisive justifying revision in every case. What is, in fact, required to be seen *de hors* any discussion in the assessment order is if (i) the AO examined the issue; (ii) applied his mind; (iii) and then reached a legally possible conclusion. These three essential ingredients must be satisfied to bring an assessment order out of the revisionary jurisdiction. There can be no difficulty in ascertaining the first ingredient as to whether or not the AO made an enquiry inasmuch as the factum of conducting such an enquiry emanates from the record of the assessment proceedings. The second ingredient as to whether or not the AO applied his mind, in the absence of any discussion in the assessment order, is a question of drawing an inference from the facts and circumstances prevailing in a given case. If after making preliminary enquiry on a point, the AO calls for some further details for substantiation of the assessee's point of view, wherever it is so required, one may presume that he applied his mind. The third ingredient as to whether or not the AO took a possible view, one can find out if the view so taken

by the AO in favor of the assessee is legally sustainable having regard to the relevant facts and the applicable provisions or it is just a fanciful acceptance of claim not backed by any legal force. At the cost of repetition, it is reiterated that in the case of a debatable issue, the power of the CIT to revise the assessment order is ousted when the AO takes one of such possible views. To summarize, if the AO makes inquiry; examines the issue which is borne out from the record of the assessment proceedings; and then reaches a conclusion in favor of the assessee, which is legally possible, the assessment order cannot be characterized as erroneous and prejudicial to the interest of the revenue falling within the ken of section 263 notwithstanding no discussion of such an issue in the body of the assessment order. To put it conversely, CIT can revise an assessment order on the point constituting foundation of the revision, if non-discussion of such an issue in the assessment order is because of either non enquiry by the AO or non application of mind by the AO after making due inquiry or adopting a view which is legally untenable.

12. Turning to the facts of the instant case, we find that even though the AO did not discuss the issue of taxability of receipt

of Rs.9.14 crore in the assessment order, but he did make inquiry on it, sought clarifications from the assessee, applied his mind and got satisfied about its non-taxability on the basis of the view taken by him in the assessment order u/s.143(3) for the immediately preceding assessment year, namely, 2010-11. We have gone through the assessment order for the assessment year 2010-11, whose copy has been placed at page 175 of the paper book. For that year, the assessee filed its return declaring income of Rs.10.97 crore which was accepted as such by means of an order u/s.143(3) on 25-03-2014. In that year also, the assessee received Head Quarter fees of Rs.2.17 crore, which was initially declared in the Computation of income under the heads “Profits and gains of business” and thereafter, the same was: `claimed exempt under Indo-USA DTAA’. A copy of such computation of income has been placed at page 23 of the paper book, which divulges that the assessee offered for taxation Royalty income of Rs.10.97 crore received from Nalco, India, which has admittedly not been received by it for the year under consideration. We have also seen the Profit and loss account of Nalco India. Under the head ‘Other Expenses’ at Schedule-15, the Indian entity paid

Head Quarter service fee to the assessee at Rs.2.17 crore for the preceding year and Rs.9.14 crore for the year under consideration. The same way in which the Head Quarter fee was claimed as not chargeable to tax for the assessment year 2010-11, which got the approval of the AO in his order u/s.143(3), the assessee for the year under consideration also claimed such Head Quarter fee of Rs.9.14 crore as not chargeable to tax. The AO applied his mind to the fact situation obtaining before him and impliedly relying on the assessment order for the immediately preceding assessment year, accepted the assessee's claim for the current year too. We fail to comprehend as to how such an assessment order can be construed as erroneous as well as prejudicial to the interest of Revenue for not having included Rs.9.14 crore in the total income, when the Department itself accepted the same as not chargeable to tax for the immediately preceding assessment year. The ld. CIT took support from the assessment order passed for the assessment year 2014-15, when it was for the first time that the AO disputed non taxability of the amount of Head Quarter service fees and included the same in the total income. Greatly enthused by such an assessment order, the ld.

CIT swung into action and initiated revisionary proceedings for the assessment year under consideration overlooking the fact that the assessment order for the A.Y. 2014-15 was passed on 06-02-2017, that is, almost two years after the passing of the assessment order for the year under consideration. When the order for the immediately preceding assessment year passed u/s.143(3) treating the amount of Head Quarter fees as not chargeable to tax was available on record before the AO, in our considered opinion, he was well justified in adopting such a possible view on the non-taxability of the amount for the year under consideration as well.

13. Having found that the Id. CIT was not justified in revising the assessment order under the normal provisions of section 263, let us have a look at enlarged scope of revision under Explanation 2 to section 263(1), which was taken recourse to by him. We have held *supra*, in principle, that the Explanation is applicable to the assessment year under consideration. This Explanation states that an assessment order shall be deemed to be erroneous and prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner, the assessment order is

deficient on any one or more of the four counts. The words '*if, in the opinion of the Principal Commissioner or Commissioner*', used in the opening part of the Expl. 2 before referring to four situations as discussed in clauses (a) to (d), do not denote any arbitrary, subjective or unsubstantiated opinion of the CIT. Such an opinion as to the prevalence of one or more of such situations must be objective, logical and tenable in law. If albeit the Pr. CIT or CIT opines about the existence of one of the four clauses, but, on the facts and in the circumstances of the case, the same is non-existent, then the formation of such an opinion cannot be countenanced. To put it differently, the existence of one or more of the four situations discussed in the clauses (a) to (d) is a *sine qua non* for exercise of the jurisdiction under the Explanation 2.

14. Now, we proceed to examine if the case falls in either of the four clauses of the Explanation 2. Though the Id. CIT has taken express recourse to the Explanation 2 but he did not specify any particular clause.

15. Clause (a) deems an assessment order erroneous and prejudicial if it is passed without making inquiries or verification which should have been made. On facts, it is

established that the AO did make preliminary inquiry at the first instance by seeking relevant explanation and then after verification, carried out a detailed enquiry on the aspect, which was elaborately replied by the assessee. Thus, the case cannot fall under clause (a).

16. Clause (b) is triggered where the order is passed allowing any relief without inquiring into the claim. Here again, we find that the prescription of this clause is not satisfied. Though the order was passed allowing relief but it was not 'without inquiring into the claim'. The inquiry was duly conducted and the reply of the assessee was sought which was also given and then examined.

17. Clause (c) is magnetized where the order has not been made in accordance with an order of direction or instruction issued by the Board u/s.119. The ld. CIT has not referred to violation by the AO of any order, direction or instruction issued by the CBDT.

18. Clause (d) is attracted when the order passed by the AO is not in accordance with any decision rendered by the jurisdictional High Court or the Supreme Court in the case of the assessee or any other person. This clause refers to the

decisions rendered by the jurisdictional High Court or Supreme Court only and not other judicial authorities. The Id. CIT, in the impugned order, has referred to certain decisions to support his case which have been discussed on pages 17 to 19 of his order. The first decision is of the Tribunal, the second of the AAR, the third and the fourth again of the Tribunal and the last of the AAR, which do not satisfy the requirement of the decisions rendered by the jurisdictional High Court or Supreme Court. Only one decision satisfying the requirement of clause (d) is that of Hon'ble Supreme Court in *GVK Industries Ltd. (supra)*. That was a case in which the appellant, an Indian company, was incorporated for setting up the MW Gas based power project in Andhra Pradesh. With intention of utilizing the expert services of qualified and experienced professionals who could prepare a scheme for raising the required finance and tie up the required loan, it sought services of a consultant and thereafter entered into an agreement with ABB – Projects & Trade Finance International Ltd., Zurich, Switzerland. The Switzerland company offered its services as Financial Advisor to its project for which it was paid a certain amount as 'Success fee'. The assessee's request for no

deduction of tax at source was not accepted. When the matter came up before the Hon'ble Supreme Court, it was held that the Consultancy Services rendered by the Switzerland company were in the nature of 'Fees for Technical services' and the income was to be charged in the country where the source of payment was located. On going through the factual panorama in the case of *GVK Industries (supra)*, we find that it is an absolute mismatch to the Head Quarter service fee received by the assessee under consideration. Thus, clause (d) also fails.

19. Even though the ld. CIT was rightfully entitled to take recourse to the Explanation 2, but thereafter he needed to bring the case with in any one or more of the four clauses given therein. It is palpable that none of the four clauses of the Explanation 2 applies to the case under consideration. The sequitur is that the revisionary power, even under the enlarged scope of the Explanation 2, was not legally exercisable. *Ex consequenti*, we set aside the impugned order.

20. Before putting our words to rest, it is made abundantly clear that the revision in this case has been held to be not valid because the AO took a possible view. We clarify as not having

expressed any opinion on the merits of the case as to whether or not the amount of Head Quarter service fees is chargeable to tax in the hands of assessee, which aspect will be considered and determined as and when it comes up for hearing.

21. In the result, the appeal is allowed.

Order pronounced in the Open Court on 05th February, 2021.

Sd/-
(S.S. VISWANETHRA RAVI)
JUDICIAL MEMBER

Sd/-
(R.S.SYAL)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 05th February, 2021
सतीश

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. The CIT(IT&TP), Kolkata
4. The Pr.CIT (IT&TP), New Delhi
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे
“सी” / DR ‘C’, ITAT, Pune
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune

		Date	
1.	Draft dictated on	02-02-2021	Sr.PS
2.	Draft placed before author	04-02-2021	Sr.PS
3.	Draft proposed & placed before the second member		JM
4.	Draft discussed/approved by Second Member.		JM
5.	Approved Draft comes to the Sr.PS/PS		Sr.PS
6.	Kept for pronouncement on		Sr.PS
7.	Date of uploading order		Sr.PS
8.	File sent to the Bench Clerk		Sr.PS
9.	Date on which file goes to the Head Clerk		
10.	Date on which file goes to the A.R.		
11.	Date of dispatch of Order.		

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