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

Date of decision: 25.09.2018

+ **W.P.(C) 7435/2015**

ERICSSON INDIA PRIVATE LTD.

..... Petitioner

Through: Mr.M. S. Syali, Senior Advocate
with Mr.Mayank Nagi & Mr.Tarun
Singh, Advocates.

versus

ADDITIONAL COMMISSIONER OF INCOME TAX

..... Respondent

Through: Mr.Ruchir Bhatia, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J.(ORAL)

1. The petitioner's grievance is that the penalty imposed under Section 271G of the Income Tax Act, 1961 (hereinafter 'the Act') was illegal because the Transfer Pricing Officer (TPO) did not possess the requisite jurisdiction, when he issued first show-cause notice dated 30.04.2014 upon the default of the notice dated 18.02.2014, requiring the petitioner/assessee to produce the relevant documents under Section 92D(3) of the Act. The time given for this purpose was till 25.03.2014. It is therefore submitted that the default,

if any, occasioning penalty event occurred on 25.03.2014; since as on that date, the TPO did not possess the requisite jurisdiction to initiate penalty proceedings and its imposition subsequently on 16.01.2015, was not justified.

2. The necessary facts are that for the Assessment Year (AY) 2011-12, the assessee had filed its returns. This included a transfer pricing report. The TPO apparently took cognizance of reports and desired the assessee to produce some documents in support of its case; a notice was issued on 18.02.2014, giving time up-to 25.03.2014. Concededly, the assessee did not comply with the notice. Apparently, on 05.12.2014, second notice was issued by the TPO alleging default and proposing penalty under Section 271G of the Act. The TPO made his recommendations by way of an order dated 16.01.2015. By this order, significantly the adjustments recommended were in line with the adjustments proposed for the past years based upon the methodology for AY 2009-10. The draft assessment order based upon the TPO's report, was issued on 22.06.2015.

3. Till 01.10.2014, the jurisdiction and authority to impose penalty under Section 271G was with the Assessing Officer (AO) – defined in Section 2(7A) to mean the Assistant Commissioner or Deputy Commissioner or Assistant Director or Deputy Director or the Income-tax Officer. This changed with the enactment of Finance Act 2014 and the amendment expanding the jurisdiction of the TPO, who was for the first time authorized to inflict penalty for non-compliance

with the notice requirements under Section 271G of the Act. Based upon this, the TPO issued notice for assessee's default (which was subject matter of the previous notice dated 18.02.2014) afresh on 05.12.2014. The assessee contested this notice and it eventually culminated in the impugned order of 22.06.2015, whereby, the TPO imposed a penalty of ₹64,43,03,352/- upon the assessee, for non-complying with the notice and furnishing requisite documents.

4. Learned Senior Counsel for the assessee contended that the penalty event, as it emerges in the present case, could not be postponed or varied. Learned counsel relied upon the rulings of the Supreme Court in *Brij Mohan vs. Commissioner of Income Tax*, (1979) 120 ITR 1 SC and also *Varkey Chacko vs. Commissioner of Income Tax*, (1993) 203 ITR 885 (SC), to say that event of default or at the most the event of recording reasons constitutes the defining point of jurisdiction. In the present case, so called default, noticed by the AO, was acted upon on 25.03.2014. The mere circumstance that the AO did not choose to act upon, it did not mean that the cause for imposing penalty was postponed within the period when the power was expanded under amendment to Section 271G of the Act.

5. The revenue's contention in these proceedings - in defence of the penalty imposed is that the first notice was not proceeded with. The TPO deemed it appropriate to give a second chance and issued fresh notice to the assessee on 05.12.2014 – *after the amendment was brought into force w.e.f 01.10.2014*. When he issued the notice, the TPO possessed the power. The consequent imposition of penalty on

21.06.2015 was warranted and within the jurisdiction. Learned counsel for the Revenue relies upon *Securities and Exchange Board of India vs. Classic Credit Ltd.*, JT 2017 (9) SC 558, to say that the amendment to Section 271G merely changed the forum but did not in any way confer fresh jurisdiction on a new authority.

6. In *Brij Mohan* (supra), the Supreme Court articulated the correct position in the case of assessments and the law applicable with respect to jurisdiction and other substantive proposition on one hand and the correct position in respect of penalty on the other hand by holding as follows:

“.....In our opinion, the assessment of the total income and, the computation of tax liability is a proceeding which, for that purpose, is governed by entirely different considerations from a proceeding for penalty imposed for concealment of income. And this is so notwithstanding that the income concealed is the income assessed to tax. In the case of the assessment of income and the determination of the consequent tax liability, the relevant law is the law which rules during the assessment year in respect of which the total income is assessed and the tax liability determined. The rate of tax is determined by the relevant Finance Act. In the case of a penalty, however, we must remember that a penalty is imposed on account of the commission of a wrongful act, and plainly it is the law operating on the date on which the wrongful act is committed which determines the penalty. Where penalty is imposed for concealment of particulars of income, it is the law ruling on the date when the act of concealment takes place which is

relevant. It is wholly immaterial that the income concealed was to be assessed in relation to an assessment year in the past.....”

7. In *Varkey Chacko* (supra), the Supreme Court stated as follows:

“A penalty for concealment of particulars of income or for furnishing inaccurate particulars of income can be imposed only when the assessing authority is satisfied that there has been such concealment or furnishing of inaccurate particulars. A penalty proceeding, therefore, can be initiated only after an assessment order has been made which finds such concealment or furnishing of inaccurate particulars. Who, at this point of time, has the authority to impose the penalty is what is relevant. Whoever this authority may be, he is obliged to impose such penalty as was permissible under the law in that behalf on the date on which the offence of concealment of income was committed, that is to say, on the date of the offending return. The two aspects must firmly be borne in mind, namely, who may impose the penalty and in what measure.”

8. In *Varkey Chacko* (supra), the Supreme Court considered the formulation of law in *Brij Mohan* (supra) and reiterated it. The assessee's contention was that the concealment exercise – being penal in nature, committed when the return was filed and cognizance taken by the authority, by virtue of the subsequent amendment, was not legal. It was in these circumstances that the Court held that the penalty for concealment of particulars of income for furnishing

inaccurate particulars would be upon the assessing authority for satisfaction in that regard.

9. The reliance on *Securities and Exchange Board of India* (supra) (by Revenue) in the opinion of this Court is insubstantial. The amendment to the Securities and Exchange Board of India Act empowers the Sessions Court to entertain, take cognizance and try offences under that enactment; either of those offences were triable by the Magistrate. The Supreme Court repelled the submissions made on behalf of the accused/opposite party of prejudice. The arguments made on their behalf was that the Magistrates were empowered to try summarily offences, that was the subject matter of the complaint and other proceedings before them and that this had led to the approval of valuable rights under Section 260 of the Code of Criminal Procedure (Cr.P.C). The Supreme Court repelled this argument, stating that there was no right to particular procedure and that even otherwise under Section 260/262 Cr.P.C, a Magistrate had discretion to ignore the summary proceedings and continue to try the offence in a regular manner. In the opinion of this Court, that judgment does not help the revenue's answer on the charge of lack of jurisdiction and the law as enunciated in *Brij Mohan and Varkey Chacko* (supra) i.e. that the event of default defines the jurisdiction of the concerned authority, who may proceed to initiate the penalty proceedings. In the present case, since "event of default" occurred in March, 2014 i.e. well prior to the date of coming into force the amendment (i.e. 01.10.2014), the impugned order was wholly without jurisdiction.

10. For the above reasons, it is held that the writ petition has to succeed; the impugned order is hereby quashed. The writ petition is allowed in the above terms.

S. RAVINDRA BHAT
(JUDGE)

A.K.CHAWLA
(JUDGE)

SEPTEMBER 25, 2018
SSC

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