R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 25TH DAY OF AUGUST 2021

BEFORE

THE HON'BLE MR. JUSTICE KRISHNA S.DIXIT

WRIT PETITION NO.20040/2019 (T-IT)

BETWEEN:

WIPRO LIMITED,
DODDAKANNELLI, SARJAAPUR ROAD,
BANGALORE-560 035,
REP. BY ITS VICE PRESIDENT – TAXATION,
SRI BALASUBRAMANIAN K.,
SON OF SRI KRISHNAMURTHY,
AGED ABOUT 39 YEARS.

... PETITIONER

(BY SHRI S.GANESH, SR. COUNSEL
A/W. SHRI VENKATESH S. ARBATTI, ADVOCATE)

AND:

1. THE JOINT COMMISSIONER OF INCOME TAX,
SPECIAL RANGE-7,
2ND FLOOR, INCOME TAX OFFICE,
BMTC BUILDING, 8 FEET ROAD,
KORAMANGALA, BANGALORE-560 095.

2. THE DEPUTY COMMISSIONER OF INCOME TAX,
CIRCLE-7(1)(2),
7TH FLOOR, INCOME TAX OFFICE,
8 FEET ROAD, KORAMANGALA,
BANGALORE-560 095.

... RESPONDENTS

(BY SHRI K.V. ARAVIND, ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE DIRECTION IN THE ORDER MARKED AS ANNEXURE-A PASSED BY RESPONDENT NO.2, DATED 29.03.2019 AND GRANTING ADDITIONAL INTEREST U/S.244A(1A) FROM THE EXPIRY OF TIME PRESCRIBED R/S.153(5) OF THE ACT.

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR ORDER, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

The tone for this judgment may be set by quoting what **Richard Brinsley Sheridan**, an acclaimed Irish dramatist of 18th century, on being asked by his tailor for at least the interest of his bill had retorted:

> *"**It is not my interest to pay the principal, nor my principle to pay the interest**".*

2. Petitioner Assessee *inter alia* engaged in the business of manufacture of computer software & providing IT enabled services, is knocking at the doors of Writ Court for assailing the order dated 29.03.2019, a copy whereof is at Annexure-A whereby the second respondent-DCIT having negatived its application dated 22.03.2019 filed u/s 244A(1A) of the Income Tax Act, 1961 (hereafter '1961 Act') has denied additional 3% interest on the allegedly delayed refund of amount relatable to Assessment Year 2008-09.

3. The second respondent having contexted Section 244A(1A) of the Act has styled the operative portion of the impugned order as under:

> *"In this case, the Hon'ble ITAT, Bengaluru has remitted back the issue of Transfer Pricing to the AO for fresh assessment/re-assessment as per Para No. 5 & 6 of the ITAT order. Further, fresh approval has been taken from the Hon'ble Prl. CIT-7, Bengaluru for reference to the Transfer Pricing Officer and the same has been referred. The TPO re-computed the adjustments, based on the directions of Hon'ble ITAT, and TP order was passed on 31.10.2017.*
>
> *As this is the case of fresh assessment/re-assessment, an additional interest u/s 244A(1A) will not be applicable in this case."*

4. After service of notice, the respondents having entered appearance through their Panel Counsel resisted the writ petition making submission in justification of the impugned order and the reasons on which it has been structured.

5. **FACTS IN BRIEF:**

(a) Petitioner's return of income for the Assessment Year 2008-09 declaring a total income of Rs.588,08,04,584/- having been selected for scrutiny u/s 143(2) of the Act, a reference was made to the Transfer Pricing Officer (hereafter 'TPO') qua the international transactions; the TPO in exercise of power u/s 92C(A) carried out an aggregate adjustment of Rs.10,54,52,192/-; the first respondent-Joint Commissioner of Income Tax (hereafter 'JCIT') had proposed a Draft Assessment Order dated 28.12.2011 u/s 143(3) r/w 144C(1), to which petitioner filed his Objections before the Dispute Resolution Panel (hereafter 'DRP'); in terms of DRP order dated 17.09.2012, the JCIT assessed the income at Rs.2389,89,57,307/- against the original amount of Rs.588,08,04,584/- supra.

(b) Both the Assessee and the Revenue having appealed against the above, the Income Tax Appellate Tribunal (hereafter 'ITAT') passed the order dated 4.1.2017 u/s 254 of the Act partly favouring the Assessee and remitted the case to TPO with a direction for re-computation of the Transfer Pricing Adjustment (hereafter 'TPA'); accordingly, the TPO re-computed the said adjustment in terms of direction of

ITAT; the JCIT to give effect to the ITAT order, on 28.12.2017 determined the total income of the Assessee at Rs.693,88,05,177/- and the tax payable thereon was determined at Rs.206,69,34,730/-; however, the tax on book profit was higher at Rs.316,85,23,810/-; the above calculations eventually resulted in a refund of Rs.1057,45,30,057/- which included interest payable u/s 244A amounting to Rs.267,54,62,251/-.

(c) The files of the Assessee were transferred to another Assessing Officer i.e., second respondent-DCIT before whom Rectification Application dated 18.01.2018 was moved u/s 154; on a similar application being moved, the TPO made rectification of the adjustment u/s 92C(A) of the Act; since the Rectification Application dated 18.01.2018 was still pending, further Rectification Applications were also filed, followed by their summarization vide letters dated 17.05.2018 & 22.03.2019; the second respondent having considered the same, passed the impugned order u/s 154 enhancing the refund to Rs.1380,13,00,740/- which included an interest amount of Rs.397,56,39,522/-; the Assessee grieves against denial of 3% addl. interest envisaged u/s 244A(1A) for the

period between 28.12.2017 i.e., date of ITAT order and 4.5.2019 i.e., the date on which refund was finally granted; this period being seventeen months, the Assessee quantifies the interest amount at Rs.58.65 crore.

6. SUBMISSIONS CANVASSED ON BEHALF OF THE ASSESSEE:

(a) Section 153(2A) of the Act prior to 2016 amendment encompassed within itself the power to make fresh Assessment Order in terms of orders made in appeal; if recomputation was required for giving effect to these appellate orders, no time limit was prescribed since that was covered by Section 153(6); however, a significant change was brought in by amendment vide Finance Act, 2016 that contemplates two scenarios viz., (i) making of fresh assessment orders pursuant to appellate orders that have set aside or cancelled the assessment, under sub-section (3) of section 153, & (ii) giving effect to appellate orders other than those covered by fresh assessment orders in terms of sub-section (5) of section 153; the 2016 Act amended section 244A by introducing sub-section (1A)

providing for the grant of additional interest in cases falling u/s 153(5).

(b) The orders of the kind made u/s 244A(1A) can be classified into two categories viz. (i) the ones where a fresh assessment/re-assessment needs to be made, & (ii) the others where only effect is to be given to the appellate orders straightway sans any fresh assessment/re-assessment; the direction of the ITAT to the TPO to re-compute the transfer pricing adjustment would not fall within the later category; even otherwise, effect had to be given expeditiously to rest of the ITAT order which has attained finality, regardless of contemplated transfer pricing assessment;

(c) After all the transfer pricing adjustment would account for a refund of a paltry sum of Rs.3.88 crore compared to refund of Rs.978/- crore; to hold up the entire refund of such a huge amount on the pretext of deciding a small issue of TPA, offends the sense of fairness & proportionality; the transfer pricing adjustment actually was not determinative of the refund inasmuch as the tax

amount was paid based on book profit, as provided u/s 115JB; the entitlement of the assessee for interest u/s 244A(1A) is intended to bring parity in the converse situation where the Revenue levies interest on delayed payment of taxes as provided u/s 234B.

So arguing, learned Senior Counsel appearing for the assessee seeks allowing of the Writ Petition.

7. SUBMISSIONS MADE ON BEHALF OF REVENUE:

(a) A plain reading of the provisions of section 244A(1A) makes it clear that an assessee is entitled to an additional interest only in cases where there is no requirement of fresh assessment or re-assessment in terms of appellate orders; assessment or re-assessment cannot by their very nature be done in piecemeal or in a truncated way; the total income of an assessee can be determined only after the fresh assessment or re-assessment is accomplished, consistently with section 4 of the Act r/w the extant CBDT Explanatory Notes dated 20.1.2017; an argument to the contrary amounts to asking the AO to

undertake the exercise even after he becomes *functus officio* and therefore is unsustainable.

(b) Section 240 contemplates refund, only after the accomplishment of the exercise mandated under the appellate order; where the assessment is set aside and a fresh assessment is directed, the question of granting interest at once would not arise till after the ascertainment of amount to be refunded, and that happens after the fresh assessment/re-assessment is done in terms of the ITAT order; the time limit of three months prescribed in Section 153(5) for passing 'giving effect to' orders is applicable only in cases where no fresh assessment or re-assessment is contemplated under the appellate orders; since the matter was remitted to the TPO for fresh assessment/re-assessment, case of the petitioner does not fit into section 244A(1A);

(c) Section 240 provides that the refund on appeal would arise where an order in appeal on assessment is set aside or cancelled with a direction to undertake a fresh assessment/re-assessment and such a direction is accomplished; although, section 153(5) prescribes a time limit

of three months for giving effect to the orders passed under any of the provisions i.e., Ss.250, 254, 260, 262, 263 or 264 of the Act by the Assessing Officer; however, an exception is carved out in cases where a fresh assessment/re-assessment is contemplated; the provisions of section 153(5) and section 244A(1A) employ the expression "wholly or partly" to mean a fresh assessment/re-assessment to be made "wholly or partly" and that the said expression does not qualify "the order to give effect to the order on appeal"; the matter having been remitted to the TPO and to the AO for a *de novo* consideration though in certain aspects, the assessee is not entitled to the grant of addl. interest u/s 244A(1A), till after consideration takes place.

(d) The ITAT order is made by following the earlier order in the appeal of the assessee for the Assessment Years 2003-04 & 2004-05; accordingly, the matter has been remitted to the TPO to undertake a fresh exercise in terms of directions given in the earlier order; this exercise warrants a judicious approach since the matter merits re-examination of the issue in the light of the orders of the Tribunal and therefore, the case of the petitioner fits into second Proviso to

section 153(5) of the Act, which makes a period of nine months availing to the AO.

So contending, learned Panel Counsel for the Revenue seeks dismissal of Writ Petition.

8. Both the counsel for the Assessee and the Sr. Panel Counsel for the Revenue have filed their Written Submissions and have pressed into service a catena of decisions, relevant of which have been adverted to; having heard the learned counsel for the parties and having perused the Petition Papers, this Court is inclined to grant indulgence in the matter as under and for the following reasons:

I. Some legal principles & morals which are to animate levy of tax and refund of un-taxable:

(i) A great Indian poet **Kalidasa** (500 CE) in his epic poem "Raghuvamsham" (1-18) states: *"The King Dilip collects from his subjects only 1/6th of their income as tax for the welfare of State, indeed like the sun taking earthly water drops, only to indemnify her with multiples of rain-drops..."* **Chanakya** in his acclaimed work "Arthashastr" advises the

Rulers: "*Collect taxes from the citizens as honeybees collect nectar from the flowers, gently and without inflicting pain…*";

(ii) A renowned jurist of yester-decades late **Mr. Nani Palkhivala**, in the concluding paragraph of Preface to the Eighth Edition of "The Law and Practice of Income Tax" said "*Every Government has a right to levy taxes. But no Government has the right, in the process of extracting tax, to cause misery and harassment to the taxpayer and the gnawing feeling that he is made the victim of palpable injustice.*"; the function of the Assessing Officer is to administer the statute with solicitude for the Public Exchequer with an inbuilt idea of fairness to tax payers; this view finds expression in the decision of the Apex Court in ACIT vs. Rajesh Jhaveri Stock Brokers P. Ltd. **(2007) 291 ITR 500 (SC).**

(iii) **Walton J**. had observed in Vestey v. Inland Revenue Commissioners **[1979] Ch 177 (197 – 198)** "*I conceive it to be in the national interest, in the interest not only of all individual tax payers – which includes most of the nation – but also in the interests of the Revenue authorities themselves, that the tax*

system should be fair... One should be taxed by law, and not be untaxed by concession ... A tax system which enshrines obvious injustices is brought into disrepute with all tax-payers accordingly, whereas one in which injustices, when discovered, are put right (and with retrospective effect when necessary) will command respect and support...".

(iv) A Welfare State like ours is constitutionally expected to be fair & reasonable in dealing with the subjects and it must avoid any harassment to the assessee public, without causing any loss to the Exchequer (see Nokia Corporation v. Director of Income-tax **[2007] 292 ITR 22 (Delhi HC)**; the State as constitutionally ordained, needs to conduct itself as a **virtuous litigant** and should meet honest claims; this view finds resonance in the decision of the Apex Court in State of U.P. v. Manohar **[2005] 2 SCC 126**; the maxim *actus curiae neminem gravabit*, i.e., an act of court shall prejudice none, is equally applicable to the quasi-judicial functions of Tax Authorities, as well.

(v) Article 265 of the Constitution of India mandates that no tax shall be levied or collected except by authority of

law; if a tax has been paid in excess of the tax specified, the same has to be refunded; in Tata Chemicals **363 ITR 658 (SC)**, the Apex Court reasoned out why State should pay interest for holding tax payers' money; a "tax refund" is a refund of taxes when the tax liability is less than the tax paid; when the said amount is refunded, it should carry interest as a matter of course, since it is a kind of recompense for the 'unauthorized use or retention' of money; refund due & payable to an assessee is a debt owed; Parliament has enacted this principle in Section 244A of the 1961 Act; in *Aluminium Corporation of India Ltd. v UOI* 1978 **(2) ELT 452 (SC)** the Apex Court observed that a good government involves not only diligent collection of taxes, but also ready refunds of excess levies.

II. As to meaning of "assessment"; difference between "assessment" & "assessment order"

(i) The DCIT has stated in the impugned order "... *As this is the case of fresh assessment/re-assessment, an additional interest u/s. 244A(1A) will not be applicable ...* "; much has been argued on behalf of the assessee that his is not a case of fresh assessment/re-assessment, and therefore

the impugned order is liable to be voided, whereas the Revenue has contended to the contrary; therefore, it becomes necessary to discuss these concepts. While juxtaposing contextual construction qua literal interpretation of statutes, Justice Krishna Iyer in CIT vs. ARAVIND REDDY, **AIR 1980 SC 96** observed:

"The significance of a word of a plural semantic shades may, in a given text depend on the pressure of the context or other indicia. Absent such compelling mutation of sense, the speech of the lay is also the language of the law …";

Keeping *inter alia* the above observation in mind, one has to ascertain the meaning of the above terms.

(ii) The 1961 Act has a Dictionary Clause in Sec.2; Section 2(9) merely states that the assessment includes reassessment; this does not throw much light on the debated questions; in Sir Rajendranath Mukerjee v. CIT, **(1934) 2 ITR 71 (PC)**, it has been held under the erstwhile Income Tax Act, 1922 that the word 'assessment' is not confined to the definite act of making an order of assessment; in C.A. Abraham v. ITO **[1961] 41 ITR 425 (SC)**, in the context of section 44 of 1922 Act (similar to section 189 of the 1961 Act), it has been held

that the term 'assessment' employed therein not only referred to computation of income but included the procedure for declaration & imposition of tax liability and the machinery for enforcement thereof;

(iii) It is pertinent to refer to what the Hon'ble Supreme Court observed in Auto & Metal Engineers v. Union of India **[1998] 229 ITR 399 (SC)**:

> *"7. In the Act the provisions regarding procedure for assessment are contained in Chapter XIV (sections 139 to 158). Under the said provisions, the process of assessment involves (i) filing of the return of income u/s. 139 or u/s. 142 in response to a notice issued u/s. 142(1); (ii) inquiry by the Assessing Officer in accordance with the provisions of sections 142 and 143; (iii) making of the order of assessment by the Assessing Officer u/s. 143(3) or section 144; and (iv) issuing of the notice of demand u/s. 156 on the basis of the order of assessment. The process of assessment, thus, commences with the filing of the return or where the return is not filed by the issuance by the Assessing Officer of notice to file the return u/s. 142(1) and it culminates with the issuance of the notice of demand u/s. 156. The making of the order of assessment is, therefore, an integral part of the process of assessment..."*

(iv) In CIT v. Purshottamdas T. Patel **[1994] 209 ITR 52 (Guj)**, the Hon'ble High Court of Gujarat has observed that

section 153 requires that the assessment should be completed within the prescribed time limit and unless the total income is ascertained & tax payable is determined, the process of assessment cannot be said to be complete; it also held that an 'order of assessment' is an order in writing whereby the total income of the assessee is assessed and the tax payable by him is determined; thus, the passing of an assessment order is only an integral part of the process of assessment and therefore, the word 'assessment' cannot be confined to the act of making an order of assessment; there is a certain legal difference between the terms 'assessment' & 'assessment order'; it can be stated that the use of the word 'assessment' would mean the whole process of determination of income and the same should not be restricted to a mere passing of an assessment order.

III. As to meaning of the term 'setting aside or cancelling an assessment'

(i) Ordinarily, when an assessment is set aside or cancelled, a fresh assessment follows; a perusal of the following sections reveals that making of a fresh assessment invariably precedes setting aside or cancelling an assessment:

- Section 153(2A) prior to substitution by Finance Act, 2016 with effect from 01.06.2016.
- Section 153(3) post substitution by Finance Act, 2016 with effect from 01.06.2016.
- Proviso (a) to Section 240;
- Explanation 1(iii) to section 245A(b)
- Section 251(1)(a) – words as omitted by Finance Act, 2001 with effect from 01.06.2001.

It may be noted that Section 153 which is the subject matter of interpretation herein, is entitled "Time limit for completion of assessment, reassessment and recomputation; therefore it is primarily concerned with laying down time limits which have to be adhered to by the assessing officers.

(ii) In the light of the above, a question arises as to whether the terms 'setting aside' or 'cancelling' an assessment employed in the subject provisions, do mean setting aside or cancellation of the entire assessment order or would it include even setting aside or cancellation of only a part of the assessment order [as with respect to particular issues, rest having been left intact by the ITAT or the like]; the said provisions cautiously employ the word 'assessment' and not

the term 'assessment order'; however, one will have to see the setting in which these provisions actually occur. A summary of the said provision is set out hereunder:

Sub-Section	**Nature of Assessment**	**Proceedings under section**	**Time limit *[from the end of the assessment year in which income was first assessable]***	***Time limit [from the end of the Financial Year***
153(1)	Regular Assessment	To pass assessment orders under section 143(1) and 144.	21 months From AY 2018-19, time limit has been amended to 18 months From AY 2019-20, time limit has been further reduced to 12 months	
153(2)	Income escapement assessment	To assess/re-assess/ recompute under section 147	NA	*12 months from the end of FY in which notice under section 148 was served.* *From 1st April 2019, the above time limit has been reduced to 9 months.*

153(3)	To make fresh assessment pursuant to order u/s 254/263/264 setting aside or cancelling assessment received by the PCIT or CCIT or the orders passed by the PCIT or CCIT.		NA	*9 months from the date of referred order's under this section (254, 263,264 orders) Post 01.04.2019, If the order is received after 01.04.2019, then in such cases the time limit has been increased to 12 months*
153(4)	Notwithstanding sub-sec, (1), (2) & (3), where a reference has been made to Transfer Pricing Officer during the proceeding for assessment, reassessment made.			*The period as specified in sub-section (1)(2) & (3) shall be further extended by 12 months.*
153(5)	To give effect to the order of the higher authorities i.e. CIT (A), ITAT, HC and SC orders	To give effect to an order passed by higher authorities other than those orders which require fresh assessment or reassessment and such order requires verification of any issue by way of		*Effect to the order to be given within 3 months from the end of the month in which order is received.* *PCIT or CIT may allow an additional period of six months.*

		submission of any document by the assesse or an opportunity is required to be provided to the assessee.		*[subject to certain conditions]* *If the order which has to be given effect to requires verification of any issue then the time limit of 9 months is applicable.*
153(6) subject to provision of section [153(3) and (5)]	Exceptions to clause (1) and (2) above.	Assessment, reassessment or recomputation made on assessee or any person.	In consequence of or to give effect to any findings or directions contained in order's otherwise than in appeal.	**12 months** from the end of the month in which order is received .
		Assessment of partner order in consequence of an assessment made on the firm under section 147		**12 months** from the end of the month in which order in case of firm is passed
153(7) Applicable for the period prior to 1.4.2016	To give effect to the order, finding or direction referred to in section 153(5) & (6)	AO to give effect to such orders within time specified u/s 153(5) & (6) and such orders are passed/ received by income-tax authorities		Effect to be given before 31.03.2017

		before 1-6-2016		
153(8)	Revival of order passed u/s. 153A(2) or 153(1)			1 month from the end of month of revival or within 21 months from the date of authorization for search has been issued – whichever is earlier.

Further, Explanation 1 below section 153 provides that in computing the period of limitation, time taken for specified processes, as listed therein, should be excluded.

Section 153 lays down the time limit to make assessment, reassessment & recomputation under various scenarios; section 153 is substituted by Finance Act, 2016; the brief outline of this section is as under:

- Sub-section (1) deals with time-limit for making assessment order under sections 143 or 144. With the advancement of e-assessments, the time limits for doing an assessment are progressively going to be reduced.
- Sub-section (2) deals with time-limit for making assessment order under section 147, Section 147 deals with re assessment orders.
- Sub-section(3) deals with time-limit for making order of fresh assessment in pursuance of an order under section 254 or section 264, by virtue of which the original assessment is either set aside or cancelled.

- Sub-section (4) states that where a reference under section 92CA(1) is made during the course of the proceeding for the assessment or reassessment, the period available for completion of assessment or reassessment, as the case may be, under the said sub-sections (1),(2) and (3) shall be extended by twelve months. This would apply only when the reference is made in the course of proceeding for assessment or reassessment and not otherwise.
- Sub-section (5) deals with time-limit to give effect to an order under section 250 or section 254 or section 260 or section 262 or section 263 or section 264, wholly or partly, otherwise than by making a fresh assessment or reassessment.
- Sub-section (6) deals with time-limit for making assessment, reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order under section 250, Section 254, section 260, section 262, section 263, or section 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under the Act. The said sub section is subject to subsection (3) and (5).
- Sub-sections 7 and 9 deal with transition provisions as section 153 is substituted.
- Sub –section 8 deals with time-limit in case of search based assessments.

A second proviso is added to sub-section (5) of section 153 by the Finance Act, 2017. The said proviso states that where an order under section 250 or section 254 or section 260 or section 262 or section 263 or section 264 requires verification

of any issue by way of submission of any document by the assessee or any other person or where an opportunity of being heard is to be provided to the assessee, the Order Giving Effect to the said order u/s.250 or sec.254 or sec.260 or sec.262 or sec.263 or sec.264 shall be made within the time specified in sub-section (3). The dates specified in the Table above shown as B would be relevant for this purpose.

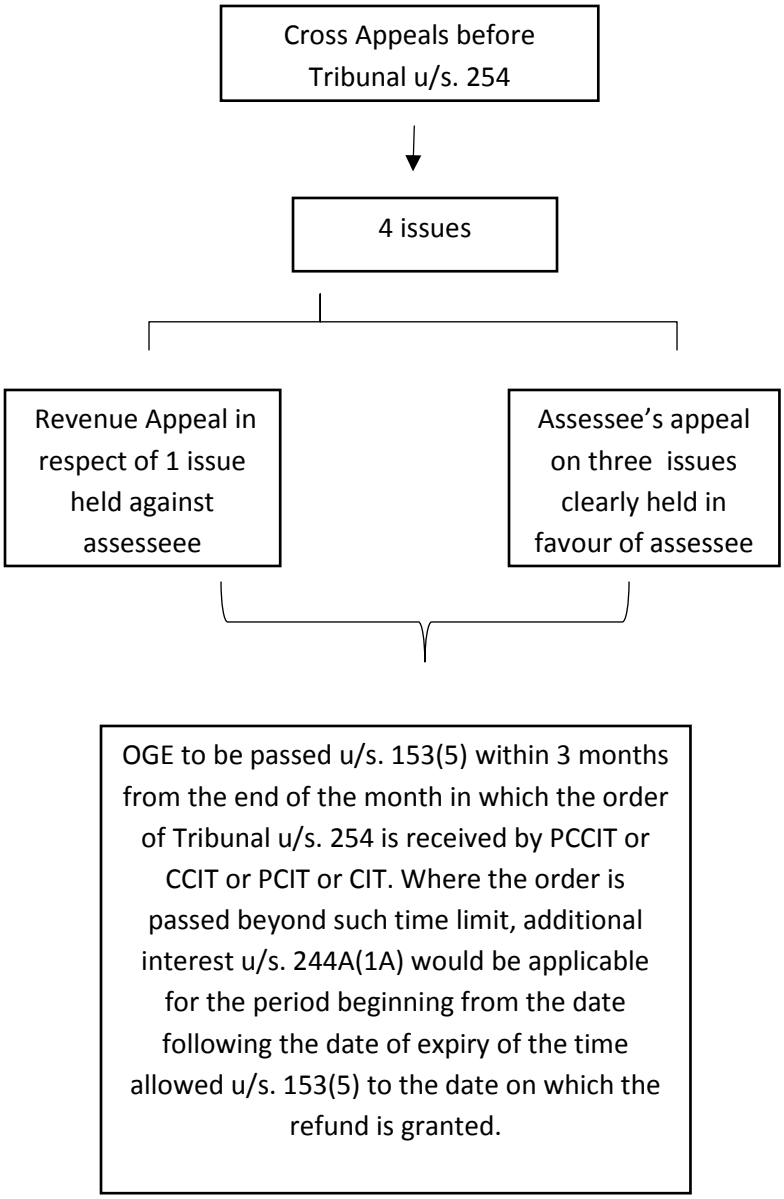
IV. As to Order Giving Effect (OGE):

(i) The following general principles have relevance in considering the Orders Giving Effect in the light of Parliamentary amendments to the 1961 Act:

- It is a fundamental principle that income tax is payable on real income, vide Apex Court decision in Poona Electric Co. Vs. CIT (1965) 57 ITR 521.
- This real income can be brought to tax through assessment contemplated under the Act.
- The basic principle is that ordinarily assessments cannot be done piecemeal.
- There are a few exceptions to the rule of "no piecemeal assessment' as in the case where income has escaped assessment where re-assessment powers do avail, as discussed by

Calcutta High Court in Karan Chand Thapar vs. ACIT (2005) 276 ITR 105 para 13.

(ii) OGE is not a regular assessment as held in the case of Sundaram Finance **417 ITR 679 Mad**; passing an Appeal Effect Order is an implied obligation of every authority to comply with the directions of his superior in the hierarchy; this is an inherent aspect of adherence to judicial discipline; OGE to an order on appeal or on revision has to be passed in order to compute the total income and to determine the tax payable by or refundable to the assessee for the assessment year concerned, in the light of additions/disallowances affirmed or varied at every such stage; it may be noted that such OGE could either be adverse or beneficial as it may either result in a tax payable by or refundable to the assessee, as illustrated by the following:


Cross Appeals before Tribunal u/s. 254
4 issues
Revenue Appeal in respect of 1 issue held against assesseee
Assessee's appeal on three issues clearly held in favour of assessee
OGE to be passed u/s. 153(5) within 3 months from the end of the month in which the order of Tribunal u/s. 254 is received by PCCIT or CCIT or PCIT or CIT. Where the order is passed beyond such time limit, additional interest u/s. 244A(1A) would be applicable for the period beginning from the date following the date of expiry of the time allowed u/s. 153(5) to the date on which the refund is granted.

(iii) It may be important to note that even before such amendments were made, binding appellate orders used to be given effect to by the Writ Courts on being moved by the assesses grieving against denying or delaying of refund of tax, The Parliament presumably having taken cognizance of the difficulties faced by the prudent assesses has through the amendment has obviated the principle of judicial discipline in a hierarchical structure that, orders of the higher ups in the hierarchy have to be unreservedly followed by the lower authorities, as has been explained by the Apex Court in UOI vs. KAMALAKSHI FINANCE CORPORATION, **1991 (55) ELT 433**; the Parliament by the subject amendments has prescribed a time limit for making refund of tax and has also provided for the payment of interest on the delayed refunds.

V. Difference between 'assessment', 'reassessment' or 'recomputation' and 'fresh assessment'

(i) The words 'assessment, 'reassessment' or 'recomputation' have been used in the following sections of the 1961 Act:

- Section 147 (prior to substitution vide Finance Act, 2021 with effect from

01.04.2021) and section 147 (post substitution vide Finance Act, 2021 with effect from 01.04.2021)

- ❖ Explanation to section 147 (post substitution vide Finance Act, 2021 with effect from 01.04.2021)
- ❖ Section 148 (prior to substitution vide Finance Act, 2021 with effect from 01.04.2021) and section 148 (post substitution vide Finance Act, 2021 with effect from 01.04.2021)
- ❖ Section 150
- ❖ Section 153(3)(ii) [prior to substitution vide Finance Act, 2016 with effect from 01.06.2016]
- ❖ Section 153(6)(i) [post substitution vide Finance Act, 2016 with effect from 01.06.2016]

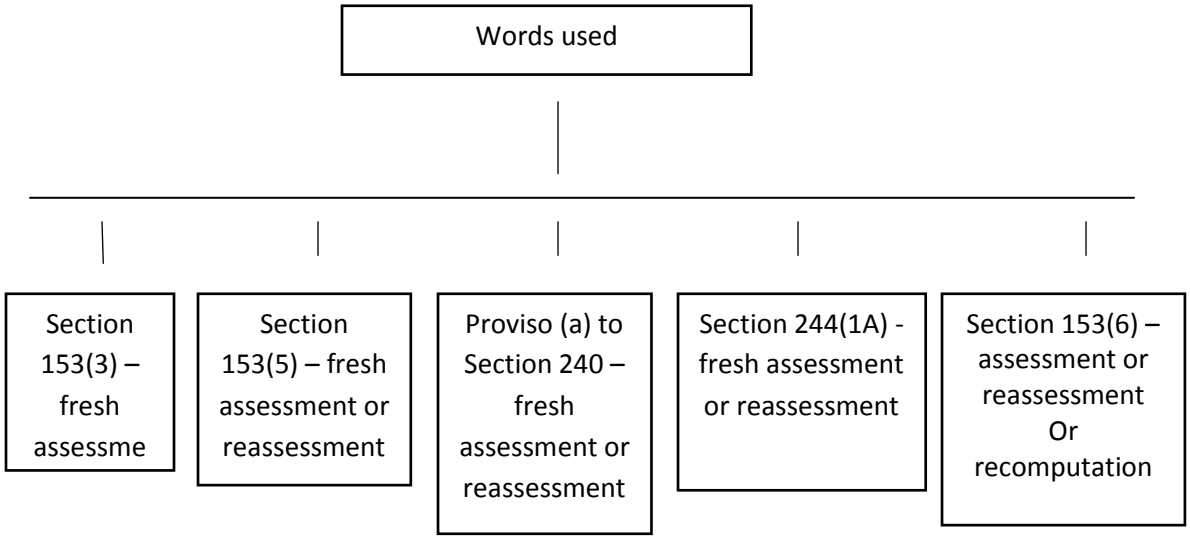
From the above, it can be safely assumed that the word 'reassessment' has been used in cases where income has escaped assessment.

(ii) On the other hand, the phrase 'fresh assessment' has been used in the following sections:

- Proviso (a) to Section 240;
- Section 251(1)(a) –words omitted by Finance Act, 2001 with effect from 01.06.2001.
- Explanation 1(iii) to section 245A(b).

- Section 153(2A) prior to substitution by Finance Act, 2016 with effect from 01.06.2016.
- Section 153(3) post substitution by Finance Act, 2016 with effect from 01.06.2016.

The term 'fresh assessment' as employed in the above sections is accompanied by the term 'setting aside or cancelling an assessment'; it may further be noted that section 153(6) is subject to the provisions of sections 153(3) & 153(5); therefore, the 'assessment, reassessment or recomputation' as referred to in sections 153(6) would not include the 'fresh assessment' as contemplated in sections 153(3) & 153(5); the following table is illustrative:



(iii) The word 'reassessment' is used next to the term 'fresh assessment' in section 153(5), Proviso (a) to section 240 & section 244A(1A); the definition of the term 'assessment' as contained in section 2(8) which merely provides that assessment includes reassessment, shall not *ipso facto* be applicable in all situations governed by various provisions of the 1961 Act; if the fresh assessment included a fresh reassessment, there was no need for the Parliament to employ the two terms, simultaneously; **Lord Hewart C.J.** in Spillers Limited Vs. Caradix Assessment Committee & Pritchard**, (1931) All E.R. 524** stated: "*It ought to be the rule... that words are used in an Act of Parliament correctly and exactly and not loosely and not inexactly...*"; section 2 i.e., the Dictionary Clause of the Act employs the usual expression 'unless the context otherwise requires' and this itself indicates that the words used in various provisions of the Act may take their colour from their context and at times, in variance with the statutory definitions; The maxim *expressio unius exclusio alterius* with all its arguable limitations also lends support to the above view to some extent; **Maxwell** on

"The Interpretation of Statutes" 12th Edition, LexisNexis at page 293 explains this maxim as under:

> *"By the rule usually known in the form of this Latin maxim, mention of one or more things of a particular class may be regarded as silently excluding all other members of the class: expressum facit cessare tacitum. Further, where a statute uses two words or expressions, one of which generally includes the other, the more general term is taken in a sense excluding the less general one: otherwise there would have been little point in using the latter as well as the former."*

(iv) It is pertinent to note that section 153(3) [post substitution vide Finance Act, 2016 w.e.f. 01.06.2016] does not use the word 'reassessment' alongside 'fresh assessment'; however, the said word has been used alongside 'fresh assessment' in section 153(5) [post substitution vide Finance Act, 2016; accordingly, reassessment is not envisaged u/s 153(3); such reassessment can only come u/s 153(2) or Section 153(6) which deals with assessment, reassessment or recomputation to give effect to any finding or direction contained in the order of superior authority or court; thus if an order of assessment is set aside in appeal with a direction that a fresh reassessment be made, the same would be covered by section 153(3); One may also note that section

2(40) of the Income Tax Act, 1961, Act defines the term "regular assessment" to mean assessment under sub section 3 of section 143 or section 144; therefore these terminologies have different import in different sections. In the light of this discussion, it is clear that the term "assessment" is used in section 153(1) to mean the entire process of assessment; section 153(2) uses the words, 'assessment', 'reassessment' or 'recomputation' but in respect of section 147 which deals with income escaping assessment; section 153(3) uses the term "fresh assessment" in pursuance of the orders passed setting aside or cancelling an assessment; therefore, this term "fresh assessment", though not defined, contemplates a new assessment consequent to the higher authorities cancelling or setting aside the assessment; Section 153(5), talks of giving effect to an order passed by the higher authorities, wholly or partly, otherwise than by making a fresh assessment or reassessment. The words "wholly or partly" obviously pertain to giving effect to the order of the higher authorities which would be done by the lower authority either in part or in whole depending on the issues that are settled by the higher authorities. However, such an exercise cannot be done within

the time limits specified in Section 153(5), where there is a fresh assessment or reassessment and in such cases the longer time limits specified in Section 153(3) would apply; a harmonious construction of these provisions would mean as under :

a. That in order to give effect to the order of the superior authorities, either wholly or partly in terms of Section 153(5), it should not be a case of reassessment or fresh assessment, which if they are, would otherwise fall into Section 153(3);

b. That Section 153(3), when it uses the term 'fresh assessment', would mean that the entire exercise of assessment is to be done afresh as it is used along with the terminology "setting aside or cancelling" which would mean the whole order of assessment being set at naught and not some issues comprised in the assessment order; when the assessment order is set aside on some issues only and confirmed on other, it is not a case of 'setting aside or cancelling the assessment'.

c. That Section 153(5) would apply where the assessing officer has to give effect to the order of the higher authorities in whole or in part provided that no fresh assessment i u/s.153(3) or a reassessment u/s. 153(2) relating to income escaping assessment, is to be undertaken.

d. Therefore, if the orders to be given effect to are to be made by following the principles already laid down by the higher forum, it would not be a case pf fresh assessment in terms of Section 153(3) or a reassessment in terms of Section 153(2); it would simply mean that the orders of the higher forum are to be applied & followed by the assessing officer; . it may be borne in mind that longer time limits are provided in Section 153(3) & second proviso to Section 153(5) because it may entail doing the entire process once over or where detailed evidences may be required for accomplishing the task; however where a shorter time limit is prescribed u/s. 153(5), the legislative mandate is to subserve the objectives of ensuring timely compliance with the orders of the superior authorities.

(v) One more aspect needs to be stated here: instructions were issued by the CBTD long before Sec.244A(1A) was loaded to the statute book making the right to interest on delayed refund a substantive right; the relevant portion of instruction 7 of F.No.279/MISC/M-42/2011-ITJ dated 24.05.2011 reads as under:

> *"iv. Appeal effect should be particularly monitored by the CIT in the cases in which the ITAT has decided certain issues in favour of the assessee and set aside-remanded back other issues to the Assessing Officer. The set-aside issues must be decided on priority".*

The said practice & procedure are reflected by the following observations of the ITAT in the case of Sanat Products Ltd. v. DCIT **[2006] 5 SOT 510 [ITAT – Del.**]:

> *"No particular procedure has been given in the Act or the Rules to carry out the appeal effect. Wherever no particular procedure has been given in the Act or the Rules, then naturally the authorities have to adopt a procedure or practice, which is practical, adheres to the well-settled legal principle and does not cause prejudice to the assessee or the Government. One of the basic principle in the administration of justice in India, where hierarchy of courts is existing, is that it is mandatory on the subordinate Tribunal or authorities to carry out the directions given to them by the superior authorities or Tribunals in exercise of appellate powers. Failure to do so will result in chaos in the administration of justice..... [vide Para 7]*
>
> *Whenever an appellate authority passes an order, there are three possibilities. Firstly, the appellate authority may confirm the whole or part of the order passed by the lower authority. Secondly, the whole or part of the order may be quashed or additions may be deleted. Thirdly, the whole or part of the issue raised may be set aside for fresh examination with or without any specific directions. Whenever some additions are confirmed or deleted, the issues become final as far as the Assessing Officer is concerned. Only course open to him is to carry out the directions given by the Commissioner (Appeals). Of course, if the assessing authority is not satisfied with the order of the Commissioner (Appeals), he can prefer an appeal before the Tribunal but, at the same time, the appeal effect has to be given. There is a practice that appeal effect orders are passed under section 250, read with section 143(3), and issues which have become final are dealt in such*

order and accordingly, fresh demand, if any, is raised. There is no bar in the Act for raising the demand and, therefore, there is nothing wrong in this practice being followed by the revenue authorities. [Para 8]

However, difficulties would arise only where some of the additions are confirmed and/or deleted and some issues are set aside for fresh examination by the Assessing Officer, as in the instant case. [Para 9]

Piecemeal assessment is not possible under section 143(3), however, while giving appeal effect in the present kind of situation, the Assessing Officer was performing two functions, namely, carrying out the directions of the appellate authority in respect of the issues which had become final and secondly, re-examining the issues which had been set aside to him. Each of these functions seemed to be independent and there is no bar in the Act to carry out these functions separately. There was no infirmity in the practice being followed by the revenue authority in passing the separate appeal effect order by firstly giving appeal effect order in respect of issues which had become final and passing the second order in respect of those issues which had to be examined afresh. Such kind of practice was more practical and convenient to both the parties and there was no legal bar against such a practice. [vide Para 10]"

VI. As to limitation period under the 1961 Act:

(i) The provisions of 1961 Act prescribe periods of limitation for various acts & procedures of assessees and assessing authorities; limitation is prescribed, *inter alia*, for the issue of scrutiny notice u/s 143(2), issue of notice u/s 147, for completing assessment u/s 153, etc; limitation is

provided for acts of assessee as well ie., due date for filing of returns u/ss 139(1)/(4)/(5); in Parashuram Pottery Works Col Ltd. v. ITO **[1977] 106 ITR 1** at p.10, it is stated: "At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity"; arguably, limitation may have arbitrariness in its fixation but has to be strictly construed without equitable consideration vide R. Rudraiah v. State of Karnataka **(1998) 3 SCC 23;** similarly, in C. Ramaiah Reddy **339 ITR 210 Kar**, a Bench of this court has observed that if proceedings are not initiated within the time prescribed, the remedy is lost and the assessee would acquire an indefatigable right; such a right accruing by the lapse of time cannot be at the mercy of the officials, who do not discharge their duties within the prescribed period or a reasonable time; in the matter of limitation, question of prejudice does not arise vide M. Janardhana Rao Case **273 ITR 50 SC**; if no action is taken within the prescribed time

limit, the authority in a sense becomes *functus officio* and thus lacks jurisdiction to take the action in the concerned matter.

(ii) The above principle would apply even to passing of fresh assessment or OGEs where different time limits are prescribed u/s. 153(3/(5)(6); in Freight Systems (India) Pvt. Ltd **[TS-143-HC-2021(MAD)-TP]**, the Hon'ble Madras High Court quashed the final assessment order dated 29.10.2010 for AY 2006-07 as being barred by limitation u/s.153(2A) [presently section 153(3)]; similar view is expressed by a Bench of this Court in Paul Noel Rodrigues **[2015] 57 taxmann.com 12 (Karnataka);** an assessee may challenge an adverse OGE as being barred by time; while the similar principle applies to favourable OGE as well, the Department cannot take advantage of its own lapse both on the first principle of doctrine against unjust enrichment and on the statutory mandate that it has to grant the refund to an assessee as a functional consequence of an appellate order even without the assessee having to make any claim [section 240]; the right to receive interest on the delayed refund does not depend on the application of the assessee, but follows as

a natural corollary to the right to receive refund vide NATIONAL HORTICULTURE vs. UNION OF INDIA, **253 ITR 12;** this can be likened to centuries-old-principle that *the debtor should find the creditor and pay the debt.*

VII. Payment of interest on delayed refunds u/s. 244A(1A):

(i) This provision has been brought on the statute book vide Finance Act, 2016 w.e.f. 01.06.2016; entitlement of an assessee to the interest on delayed refund as envisaged under this provision to some extent brings a sort of parity in the converse situation where he is liable to pay interest for delayed payment of taxes in terms of section 234B; it may be pertinent to note that it was inserted and brought into effect from the same time as section 153 was substituted by Finance Act, 2016; similarly, section 153(5) was substituted by Finance Act, 2016 prescribing the time limit to give effect to the orders passed under the sections mentioned therein, wholly or partly, otherwise than by making a fresh assessment or reassessment; prior to such amendment, no time limit was prescribed for passing of OGE; it may be noted that the requirement of paying interest u/s 244A(1A) has

been brought in for the cases covered u/s 153(5); this is for the following reasons:

- ❖ Both the sections have been enacted vide Finance Act, 2016 and both they have been brought into effect from 01.06.2016.
- ❖ Both sections 153(5) and 244A(1A) deal with giving effect to orders u/s. 250 or section 254 or section 260 or section 262 or section 264.
- ❖ The said sections deal with giving effect to orders passed under the sections mentioned therein, either wholly or partly.
- ❖ The said sections make exception to making of fresh assessment or reassessment.
- ❖ Section 244A(1A) provides for interest for the period beginning from the date following the date of expiry of the time allowed u/s. 153(5) to the date on which the refund is granted.

(ii) The legislative intention in enacting section 244A(1A) can be discerned from the Memorandum explaining the provisions of the Finance Bill, 2016, the relevant extract of which reads as under:

"Payment of interest on refund

.....

It is also proposed to provide that where a refund arises out of appeal effect being delayed beyond the time prescribed under sub-section (5) of section 153, the assessee shall be entitled to receive, in addition to the interest payable under sub-section (1) of section 244A, an additional interest on such

> ***refund amount calculated at the rate of three per cent per annum, for the period beginning from the date following the date of expiry of the time allowed under sub-section (5) of section 153 to the date on which the refund is granted.*** *It is clarified that in cases where extension is granted by the Principal Commissioner or Commissioner by invoking proviso to sub-section (5) of section 153, the period of additional interest, if any, shall begin from the expiry of such extended period."*

Similar legislative intent is forthcoming from the Notes on Clauses to the Finance Bill, 2016 and paragraph 60.4 of the Circular No. 3 of 2017 dated 20.01.2017.

(iii) Interest u/s 244A(1A) would not accrue in cases of fresh assessment or reassessment; use of words 'wholly or partly' therein would again indicate that the bar of interest accrual is confined only to that part of the assessment that are occasioned by remittance/remand and would not extend to other concluded issues that give rise to refund u/s 153(5); employment of identical language in section 153(5) and section 244(1A) too supports this analogy; it is clear that section 244A(1A) would apply to cases covered u/s 153(5); thus where, in respect of certain issues, order giving effect to be passed u/s 153(5), otherwise than by making a fresh assessment or reassessment is passed beyond the prescribed

time-limit, interest u/s 244A(1A) has to be granted in respect of refund arising on such issues that are concluded and that the pendency of consideration on remitted issues does not interdict the statutory accrual of interest; an argument to the contrary cannot be countenanced without straining the text & context of the provision.

VIII. Application of the above principles to facts of the case:

(i) In the instant case, the following "title facts" are not in dispute;

a) Assessment Year is 2008-09

b) ITAT order is dated 04.01.2017

c) TPO's OGE is dated 31.10.2017

d) AO's OGE is dated 28.12.2017

e) Assessee filed Rectification u/s 154 against OGEs of TPO and AO on 18.01.2018

f) TPO passed the Rectification Order on 26.03.2018

g) Assessee follows up his application dated 18.01.2008 u/s 154 before AO with:

i) Application u/s 154 dated 24.1.2018
ii) Application u/s 154 dated 3.4.2018
iii) Letter dated 17.5.2018
iv) Letter dated 22.3.2019

v) Impugned order 29.3.19

(ii) A careful analysis of the order of ITAT dated 4.1.2018 would reveal that the ITAT dealt with several issues differently, some having been remitted for reconsideration and the conclusions on other left intact; the same may be summarised as follows:

On TP issue, following earlier order, issue was remitted to the file of TPO to follow the directions given for earlier AYs

Sl.Nos:

1. On 14A issue, issue was set aside to the record of AO to re-examine the same in the light of orders of ITAT in assessee's own case for earlier assessment years.

2. Issue of set off of loss was allowed in favour of assessee.

3. Issue of depreciation of software was allowed in favour of assessee.

4. Issue of allocation of corporate expenses between eligible and non eligible units was allowed in favour of assessee.

5. Issue of computation of profits of overseas development centre (ODC), was remitted to the record of AO and assessee was directed to file relevant details as required by AO so that AO can ascertain the market value of goods and services transferred.

6. Issue of eligibility of interest income, rental income and other income u/s. 10A was remitted to AO by following earlier decision in assessee's own case. In

earlier decision, issue of scrap sales and issue of interest were decided in favour of assessee and issue of other income was remitted as no details were available. While issue of interest is clearly in favour of assessee and issue of other income is a case of set aside for further verification, and it is not clear as regards guidelines to AO on rental income.

7. Issue of taxability of interest received u/s. 244A was remitted to the record of AO for limited purpose of computation of interest.

8. Issue of deemed export turnover for purpose of section 10A was held against the assessee.

9. Issue of exclusion of VAT/GST from export turnover was held against the assessee.

10. Issue of exclusion of communication charges and other reimbursement of expenses from export turnover, it was held that the same shall be reduced from the total turnover as well.

11. Issue of denial of section 10A relief in respect of amount of export turnover not remitted into India within six months was held in favour of the assessee.

12. Issue of denial of section 10A relief in respect of undertaking established prior to 1993 was held in favour of the assessee but to the extent of extended capacity. The matter was remitted to AO to verify the same if necessary.

13. Issue of allocation of corporate overhead to section 80IB unit beyond what was already allocated by the assessee was held in favour of the assessee.

14. Issue of denial of deduction u/s. 80IB in respect of trading of monitory and printer was held in favour of the assessee.

15. Issue of allocation of corporate overhead to section 80IC unit beyond what was already allocated by the assessee was held in favour of the assessee.

16. Issue of eligibility of other income for deduction u/s. 80IC was held against the assessee.

17. Issue of allocation of corporate overhead to section 80IAB beyond what was already allocated by the assessee was held in favour of the assessee.

18. Issue of eligibility of other income for deduction u/s. 80IB was held against the assessee.

19. Issue of foreign tax credit was held in favour of the assessee.

(iii) In para 50 of the ITAT order, it is stated that the appeal is partly allowed; it is not stated that the appeal is allowed for "statistical purposes"; thus, it is a case where the ITAT has held some issues definitively, and on some other, it had remitted the matter to the AO/TPO for a limited consideration afresh; in respect of issues in Sl.Nos.1, 2 & 7 in the above summary, there is virtually a direction warranting OGE; it is quiet clear from the facts of the case that the respondents have not undertaken any fresh assessment or reassessment; the ITAT has not directed assessment or reassessment at all, but it only asked the TPO to follow its directions in the earlier year; in respect of other issues

definitive answers having been given, it cannot be a case of setting aside entire assessment; it is a case of setting aside an assessment only on specific issues; as already discussed above, in respect of issues where there is a definitive holding, section 153(5) would apply and the AO has to pass OGE within the time specified thereunder read with II Proviso thereto; in respect of issues which are set aside [ie., Sl.Nos. 1, 2 & 7],the AO had to pass OGE following the principles already settled; accordingly, it has to be held that the AO was required to pass OGE within the time specified u/s. 153(5); in respect of issues which are set aside (i.e., Sl.Nos.1, 2 & 7 above), the AO ought to have passed an assessment order u/s 153(5) following the principles already laid down by the superior forum.

IX. As to Revenue's other contention being unsustainable:

(i) Even according to the argued case of the Revenue, regardless of its sustainability only that part of the order giving effect to ITAT order which relates to the Transfer Pricing Adjustment constitutes a fresh assessment; as a

corollary of that, the balance portion of the order which otherwise warranted giving effect to the ITAT order, does not amount to a fresh assessment or reassessment; both the TPA and the other substantial portion of giving effect were completed by one order giving effect to ITAT, dated 28.12.2017; if refund was granted immediately thereafter, the claim for additional interest in terms of section 244A(1A) would not have arisen, as rightly argued by the assessee; the actual refund having been made only on 04.05.2019, even when the assessment in respect of one issue of TPA as early as 28.12.2017, delay has been brooked in granting refund.

(ii) The above apart, case of the assessee becomes stronger since his book profit is far greater than its profit as per the normal provisions and that the refund arises only because tax paid by the assessee was more than the tax payable on the book profit; therefore, it can be safely stated that no part of the refund payable arose because of the reduction in the TPA; added to this, the demand attributable to the TPA as finally made is miniscule ie., Rs.25 lakh or so, as compared to the total refund including interest of over Rs.1,380/- crore admittedly made over to the assessee; the

contention of the Revenue militates against the rule of proportionality and the fairness standards which the Tax Authorities are expected to adhere.

(iii) The vehement contention of the Revenue essentially structured on the text of section 4 of the 1961 Act that any order giving effect to the order of the ITAT will result in re-determination of the assessee's total income and therefore will constitute a fresh assessment, if accepted, would inexorably lead to the result that the Revenue can invariably retain the refund determined, without the liability to pay the additional interest in terms of Sec.244A(1A) for the delayed period; that would also lead to an absurd conclusion that every OGE has to be considered as a fresh assessment or reassessment and therefore would be outside the purview of Sec.153(5) and consequently any delay in granting actual refund would also be outside the ambit of Sec.244A(1A); this would defeat the very object for which this provision has been brought on the statute book.

In the above circumstances, this writ petition succeeds in part;

i) A Writ of **Certiorari** issues quashing the impugned order; petitioner-Assessee is permitted to submit the fresh claim for additional interest at the rate of 3% per annum for the period envisaged in section 153(5) r/w section 244A(1A), within eight weeks.

ii) A Writ of **Mandamus** issues to the respondents to compute the interest amount till date and pay it to the petitioner- Assessee within eight weeks next following.

iii) If delay is brooked in complying the above direction, the Revenue shall pay to the petitioner - Assessee an extra interest, at the rate of 1.5 % per month and this amount, after payment, may be recovered personally from the erring officials of the Department.

Now, no costs.

Sd/-
JUDGE

Snb/cbc/Bsv