THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 29.08.2012

+ W.P.(C) 7959/2010

QUALCOMM INCORPORATED ... Petitioner

versus

ASISTANT DIRECTOR OF INCOME TAX ... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Percy Pardiwala, Sr Advocate with Mr Nishant Thakkar, Mr Salil Kapoor and Mr Ankit Gupta

For the Respondent : Mr Sanjeev Sabharwal with Mr Puneet Gupta and Mr Gyatri Verma

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SIDDHARTH MRIDUL

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition has been filed seeking quashing of the notice dated 30.03.2010 purportedly issued under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') as also the order dated 27.10.2010 passed by the Assessing Officer on the objections preferred on behalf of the petitioner.

2. We may point out, at the outset, that this is the second occasion on which a notice under Section 148 of the said Act has been issued by the

Assessing Officer to the petitioner in respect of the assessment year 2003-04. It is also an admitted position that the notice dated 30.03.2010 has been issued beyond the period of four years from the end of the assessment year 2003-04 and, therefore, the conditions stipulated in the proviso to Section 147 of the said Act would be applicable.

3. The point on which the purported notice under Section 148 of the said Act has been issued is that the petitioner had not fully and truly disclosed the fact that the petitioner has a permanent establishment (PE) in India. It is the case of the revenue that inasmuch as, according to the revenue, the petitioner/ assessee has a permanent establishment in India, the petitioner would be subjected to the higher rate of tax of 20% on the gross amount of royalty. According to the petitioner, even if the petitioner has a permanent establishment in India, it would still not be subjected to the higher rate of tax of 20%. However, it is the contention of the petitioner that that it does not have a permanent establishment in India and, therefore, in any event, it could only be subjected to the rate of tax of 15%. The entire controversy in the present writ petition centres on the point as to whether the petitioner has or does not have a permanent establishment in India. Moreover, the conditions

stipulated in the proviso to Section 147 of the said Act, have to be fulfilled before the petitioner could be subjected to the proceedings under Section 147. It was, therefore, contended on behalf of the petitioner that before the proviso to Section 147 could be invoked, the respondents should have a clear case that the petitioner had failed to disclose fully and truly all material facts necessary for its assessment and as a result whereof, income chargeable to tax has escaped assessment in the said assessment year. It was contended by the learned counsel for the petitioner that the revenue has not been able to indicate as to how the petitioner failed to disclose fully and truly all material facts necessary for the assessment. The failure to fully and truly disclose all material facts has to be connected with the question of the petitioner having a permanent establishment in India.

4. Before we examine this aspect of the matter, it would be necessary to set out the steps which have taken place leading to the issuance of the notice under Section 148 on 30.03.2010. Initially, the petitioner had not filed any return in respect of the assessment year 2003-04. The petitioner's claim was that it was not liable to pay any income tax in India. However, the stand of the revenue was that the petitioner was liable to pay income tax on the

royalty that it received. Consequently, the Assessing Officer issued a notice under Section 148 of the said Act on 29.03.2007. The reasons for the issuance of the said notice under Section 148 of the said Act were also provided to the petitioner. In the said reasons dated 29.03.2007, it was, *inter alia*, alleged that the petitioner had full-fledged research and development centres in India. It was also alleged that many of the technological developments were undertaken at these development centres located in India and the products were patented by the petitioner and were exploited commercially worldwide including in India. On the basis of this, it was the revenue's case that the petitioner was earning royalties from patenting the technological innovations in the field of communication technology and that the petitioner was conducting its core business of research and development from the centres located in India. It was, therefore, contended on behalf of the revenue that the locations in India constituted the business connection as well as the permanent establishment of the petitioner in India.

5. The said notice under Section 148 dated 29.03.2007 and the reasons therefor were objected to by the petitioner in view of the petitioner's objections dated 14.09.2007. In the said objections, the petitioner submitted

that it did not have research and development centres in India nor did the petitioner conduct any research and development in India. It was pointed out that two related Indian companies conduct research and development on behalf of a subsidiary of the petitioner. The said subsidiary did not generate licencing revenue. However, the said subsidiary paid the related Indian companies arm's length service fees for research and development services performed in India. It was further mentioned that the related Indian companies were being assessed to income tax separately before the respective jurisdictional officer in India. It was, therefore, contended on behalf of the petitioner that it had no other business connection or permanent establishment in India insofar as the assessment year 2003-04 is concerned. It was also contended that under the double taxation avoidance agreement between India and the U.S.A, the executive meetings and fees for included services, which had been referred to by the revenue, did not constitute a permanent establishment.

6. After considering the said objections dated 14.09.2007, the Assessing Officer passed an order on 30.11.2007 holding that the petitioner should cooperate in the assessment proceedings and submit the details / information

as called for by the notices issued during the assessment proceedings under the said Act. In the said order dated 30.11.2007, it was specifically noted that the objection to the allegation that the petitioner had a permanent establishment through research and development centres in India, needed no comment as the same was yet to be verified.

7. Subsequent to the said order dated 30.11.2007, the assessment proceedings were continued and it culminated in the assessment order dated 31.12.2007. It is relevant to note that after considering the submissions made on behalf of the petitioner and examining all the details of the case before her, the Assessing Officer assessed the total income of the petitioner at ₹ 377,451,421/- out of which the component of royalty was ₹ 357,375,000/-. The total tax payable was worked out to ₹ 5,66,17,713/- at the rate of 15%. It was submitted by the learned counsel for the petitioner that from the assessment order dated 31.12.2007 this much is evident that the submissions made by the petitioner with regard to the petitioner not having any permanent establishment in India was accepted and it is for this reason that the lower rate of 15% was employed and not the higher rate of 20%. It is another matter that the petitioner had filed an appeal against the said

assessment order which has also culminated in the order of the Commissioner of Income Tax (Appeals), whereby the same rate of 15% has been employed. The learned counsel for the petitioner states that now the matter is pending in appeal before the Income Tax Appellate Tribunal.

8. The matter rested there for some time, that is, till 30.03.2010, when the Assessing Officer, once again, issued a notice under Section 148 of the said Act. The purported reasons for issuing the notice under Section 148 were as under:-

> "**Reasons for the belief that income has been under assessed in the case of M/s Qualcomm Inc for A.Y 2003-04**
>
> The assessee, M/s Qualcomm is a foreign company engaged in the design, development, manufacture marketing & licensing of digital wireless telecommunications products and services based on its code division multiple access (CDMA) technology. For the year under review, order u/s 143(3)/ 147 was passed assessing the income of the assessee at Rs. 37,74,51,420- as against returned income of Rs 20,07,76,421/-. The additional income was assessed as royalty income and taxed @ 15% in accordance with the provisions of section 9(1)(vi) and Article 12(7)(b) of the DTAA.
>
> Subsequently, it was observed that the assessee has business connection and PE in various form, in India, under provisions of section 9(1)(i) of IT Act and in terms of Article 5 of the DTAA, respectively. The assessee company is earning Royalties in India from utilization of its patented products including CDMA technology embedded in the handsets

> supplied to Indian telecom operators. Moreover, Fees for Technical Services is earned from providing technical support services for facilitating the utilization of its products in India. As the year under review pertains to F.Y. prior to 01.04.2003 it is therefore implied that the agreements must/ should have been executed well before 01.04.2003. Therefore, this income must be taxed @ 20% gross instead of 15%.
>
> It was the duty of the assessee to disclose fully and truly all material facts necessary for the assessment but it has not done so. The facts pertaining to existence of PE and business connection in India has not been fully disclosed. This has led to taxation of the royalty income at 15% instead to 20%. Therefore, I have reasons to believe that income of more than Rs 1 lakh of the assessee company for AY 2003-04, has escaped assessment. I am therefore satisfied that it is a suitable case to be reopened for reassessment."

9. From the said purported reasons, it is evident that there is an allegation that the petitioner did not fully and truly disclose all material facts necessary for the assessment. It is pointedly mentioned therein that the facts pertaining to the existence of the permanent establishment and business connection in India had not been fully disclosed. According to the said reasons, it is this non-disclosure which has led to the taxation of the royalty income at the rate of 15% instead of 20%.

10. The petitioner submitted its objections on 26.07.2010, wherein the petitioner, *inter alia*, took the specific plea that the re-assessment

proceedings were barred by limitation. On this aspect, the petitioner took the following objections:-

> "B. <u>On law and facts- Reassessment proceedings barred by limitation</u>
>
> The assessment was reopened by your kind office under section 147 of the Act vide notice dated March 30, 2010 after the expiry of four years from the end of the relevant AY i.e. AY 2003-04. In accordance with the proviso to section 147 of the Act, QCOM vide its letter of May 3, 2010 had challenged the validity of the 148 notice stating that the notice is barred by limitation. Accordingly, QCOM requested your good self to drop the reassessment proceedings.
>
> However, in the reasons recorded for reopening the assessment, your good office has wrongly alleged that QCOM has not disclosed fully and truly all material facts pertaining to the existence of PE and business connection in India.
>
> At the outset, we wish to submit that a reference to the reasons show that it is not explained by your good self as to how the true and full particulars were not disclosed in as much as the reason pertain to the same record and not to any new material / information which has come subsequently to the notice of your kind office. With due respect, we submit that the above cited allegation of non disclosure of facts is without any basis and the same is not supported by any justification or explanation as to how the assessee has failed to disclose fully and truly all the material facts necessary for the assessment.
>
> The above allegation by your kind office is completely contrary to the facts and evidences on record. In this regard, it is pertinent to bring to your kind notice all the information sought/ required for determining the existence of PE in India that was furnished during the course of assessment proceedings……."

It was also pointed out by the learned counsel for the petitioner that the impugned notice dated 30.03.2010 and the purported reasons of the same date were misconceived inasmuch as the entire issue of the petitioner having a permanent establishment in India had been gone into in the first round, that is, pursuant to the notice dated 29.03.2007 which had been purportedly issued under Section 148 of the said Act and which culminated in the assessment order dated 31.12.2007. Therefore, according to the learned counsel for the petitioner, the objection that the impugned notice dated 30.03.2010 was barred by limitation, was fully justified. However, the Assessing Officer did not pay any heed to these objections and passed an order dated 27.10.2010. The objections were disposed of in the following manner:-

> "3. The objections raised by the assessee have been carefully perused:
>
> (a) The assessee argues that the reason to believe in the instant case is based on the same set of facts as mentioned in the earlier 148 notice dated March 29, 2007. The subsequent notice amounts to change of opinion on the facts which already existed. The assessee has relied upon a plethora of case laws to support its argument. However, this assertion of the assessee is based upon a wrongful appreciation of law. The reasons recorded, as also provided to the assessee, clearly show that the

assessing officer had sufficient reason based on which the proceedings u/s 147 were initiated. Hence, this objection of the assessee deserves to be rejected.

(b) It is argued by the assessee that the re assessment proceedings have been barred by limitation. This again does not hold water. The proceedings have been initiated within time as prescribed in the Act. There was reason to believe that income of more than Rs 1 Lakh has escaped assessment for the year under review and after recording the reasons the notice u/s 148 was issued in Financial Year 2009-10 for AY 2003-04 which is within the prescribed time frame of 6 years. Hence, it is factually incorrect to say that the notice is barred by limitation.

(c) The assessee has objected that the reopening proceeding initiated is based- on the audit objection. To this, it must be pointed out that reasons were recorded before issuing the notice u/s 148 after application of mind by the AO. The copy of these reasons recorded was provided to the assessee on request. A perusal of the reasons would show that there is no mention of any audit objection. Hence, it is factually incorrect to say that the initiation of the proceedings is based on audit objection. This objection, of the assessee also deserves to be rejected.

4. Accordingly, the objections of the assessee stand disposed off. The assessee is directed to co-operate in the assessment proceedings and submit the details / information as called for vide notice u/s 142 issued along with the questionnaire (attached)."

11. It is clear that in the order dated 27.10.2010 there is no finding, even *prima facie*, that the petitioner had failed to disclose fully and truly all material facts with regard to the allegation that the petitioner had a PE in India. Despite that, the objections of the petitioner have been rejected. Even

where the order dated 27.10.2010 deals with the question of limitation, it does not indicate as to how the impugned notice dated 30.03.2010 would be within limitation when admittedly, it was issued after four years from the end of the assessment year 2003-04.

12. Being aggrieved by the said notice dated 30.03.2010 and the order dated 27.10.2010, the petitioner has filed this writ petition seeking the quashing of the same. On the first date of hearing, that is, on 29.11.2010, this Court, *inter alia*, directed that the assessment proceedings could continue but no final order was to be passed without the leave of this Court.

13. In this factual backdrop, we have to decide as to whether the impugned notice dated 30.03.2010 and the impugned order dated 27.10.2010 can be sustained in law or not. From what has been mentioned above, it is evident that the question of the petitioner having a permanent establishment in India had been gone into in the first round. This is apparent from the reasons dated 29.03.2007 read with the objections dated 14.09.2007 and the order dated 30.11.2007 and ultimately the assessment order dated 31.12.2007, wherein the lower rate of tax of 15% was employed. We have already indicated that throughout the proceedings in the earlier round, one of

the questions that had been raised was with regard to the petitioner having a permanent establishment in India. Once that aspect of the matter had been gone into in the earlier round, it was not open to the Assessing Officer to re-agitate it in the second round without any other / fresh material. No such other or fresh material has even been alleged in the reasons in the second round. It has also not been indicated as to how the petitioner has failed to fully and truly disclose all material facts with regard to the question of the petitioner having a permanent establishment in India. Whatever information was required from the petitioner in the first round by the Assessing Officer on this question of permanent establishment, has been given by the petitioner. It is obvious from the assessment order dated 31.12.2007 that the submissions of the petitioner that it did not have a permanent establishment in India had been accepted and that is the reason why the petitioner was subjected to the lower tax rate of 15% and not the higher tax rate of 20%, which might have been the case, if the petitioner had a permanent establishment in India.

14. It is well settled that re-opening of assessments cannot be done merely on the basis of change of opinion. It is also a settled position in law that

unless and until the conditions stipulated in the proviso to Section 147 are fully satisfied, such re-opening cannot be done beyond the period of four years from the end of the relevant assessment year. In the present case, we find that not only is there a change of opinion but also the re-opening is barred by limitation inasmuch as the condition that the escapement of income must have resulted from the failure on the part of the petitioner to fully and truly disclose all material facts, has not been satisfied. The impugned order dated 27.10.2010 merely glosses over the objections raised by the petitioner with regard to limitation. As we have already observed above, there is no finding in the order dated 27.10.2010 that there was a failure on the part of the petitioner to fully and truly disclose all material facts particularly in connection with the issue of the petitioner having a permanent establishment in India. On the contrary, the above facts reveal that the issue of permanent establishment was specifically raised and dealt with in the first round which culminated in the assessment order dated 31.12.2007. The issue of permanent establishment having been addressed in the first round, the allegation that the petitioner had not fully and truly disclosed the material particulars in relation thereto has no basis. Consequently the condition stipulated in the proviso to Section 147 is not

satisfied and, therefore, the notice dated 30.03.2010, being admittedly beyond four years from the end of the relevant assessment year (i.e., 2003-04), is barred by limitation.

15. As a result of the foregoing discussion, the impugned notice dated 30.03.2010 and the impugned order dated 27.10.2010 cannot be sustained in law. Resultantly, the same are quashed. So, too, all proceedings pursuant to the said notice dated 30.03.2010. The writ petition is allowed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

AUGUST 29, 2012
SR