The Commissioner Of Income Tax - ... vs Qualcomm Incorporated on 16 February, 2024

Author: Yashwant Varma

Bench: Yashwant Varma, Purushaindra Kumar Kaurav

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ ITA 63/2024
THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 ..... Appellant
Through: Mr. Ruchir Bhatia, SSC with Ms. Deeksha Gupta, Adv.

versus

QUALCOMM INCORPORATED ..... Respondent
Through: Mr. Percy Pardiwalla, Sr. Ad with Mr. Nishant Thakkar, Mr Nikhil Ranjan, Ms. Jasmin Amalsadwala & Mr. Kamal K. Arya, Advs.

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THE COMMISSIONER OF INCOME TAX - INTERNATIONAL TAXATION -3 ..... Appellant
Through: Mr. Ruchir Bhatia, SSC with Ms. Deeksha Gupta, Adv.

versus

QUALCOMM INCORPORATED ..... Respond
Through: Mr. Percy Pardiwalla, Sr. A with Mr. Nishant Thakkar, Nikhil Ranjan, Ms. Jasmin Amalsadwala & Mr. Kamal K Arya, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

ORDER

% 16.02.2024

1. The Commissioner of Income Tax by virtue of these two This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 19/02/2024 at 23:22:52 appeals assails the order of the Income Tax Appellate Tribunal1 dated 24 November 2021 for Assessment Year2 2006-07 [ITA No. 63/2024] and AY 2005-06 [ITA No. 64/2024]. The ITAT has essentially held that the draft as well as the final assessment orders framed by the Assessing Officer3 for the subject AYs' would be barred by limitation in terms of the provisions of Section 153(2A). Sub-section 2A as it stood on the statute book at the relevant time read as follows:-

> "(2A) Notwithstanding anything contained in sub-sections (1), (1A), (1B) and (2), in relation to the assessment year commencing on the 1st day of April, 1971, and any subsequent assessment year, an order of fresh assessment in pursuance of an order under section 250 or section 254 or section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of one year from the end of the financial year in which the order under section 250 is received by the Principal Chief Commissioner or section 254 is or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be the order under section 263 or section 264 is passed by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner:
>
> Provided that where the order under section 250 or section 254 is received by the Principal Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, on or after the 1st day of April, 1999 but before the 1st day of April, 2000, such an order of fresh assessment may be made at any time to the 31st day up to of March, 2002: Provided further that where the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Commissioner or Commissioner on or after the 1st day of April, 2005 but before the 1st day of April, 2011, the provisions of this sub-section shall have effect as if for the words "one year", the words "nine months" had been substituted: Provided also that where the order under section 254 is received by ITAT AYs AO This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 19/02/2024 at 23:22:52 the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or as the case may be, the order under section 263 or section 264 is passed by the Principal Commissioner or Commissioner on or after the 1st day of April, 2006 but before the 1st day of April, 2010, and during the course of the proceedings for the fresh assessment of total income, a reference under sub-section (1) of section 92CA-

> (i) was made before the 1st day of June, 2007 but an order under sub-section (3) of section 92CA has not been made before such date; or
>
> (ii) is made on or after the 1st day of June, 2007, the provisions of this sub-section shall, notwithstanding anything contained in the second proviso, have effect as if for the words "one year", the words "twenty-one months" had been substituted:
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> Provided also that where the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner as the case may be, the order under section 263 or section 264 is passed by the Principal Commissioner or Commissioner on or after the 1st day of the proceeding for the fresh assessment of total income, a reference under sub-section (1) of section 92CA is made, the provisions of this sub-section shall, notwithstanding anything contained in the second proviso, have effect as if for the words "one year", the words "two years" had been substituted."

2. It was the case of the respondent assessee that the word "received" as occurring therein would include knowledge of the order of the ITAT in light of the judgments rendered by the Full Bench of this Court in CIT vs. Odeon Builders P. Ltd. (Delhi)4 as well as a subsequent decision in GE Energy Parts Inc. vs. Deputy CIT5. The aforesaid submission, and which found favor with the ITAT, was based on the contention of the respondent that the order of the ITAT dated 20 February 2015 had been given effect to by the AO itself on 12 March 2015. In view of the aforesaid, it was contended that the period for drawl of a draft and a final assessment order would have to be computed from that date. It is this submission which has come to be accepted by the ITAT and has led to the filing of these appeals.

The appeals propose the following question of law for our consideration: -

> "(i) Whether on the facts and circumstances of the case the Income Tax Appellate Tribunal has erred in holding that the draft assessment order and final assessment order passed by the Assessing Officer, are barred by limitation under section 153(2A) of the Income Tax Act, 1961?"

3. For the purposes of evaluating the correctness of the submissions which were addressed on behalf of the appellants, we propose to take note of the following salient facts as they appear in ITA 64/2024. On 03 April 2007, the assessee filed its Return of Income which thereafter appears to have been selected for scrutiny assessment and a notice under Section 143(2) of the Income Tax Act, 19616 being issued. On 31 December 2007, the AO passed an assessment order referable to Section 143(3) determining the total taxable income of the respondent at INR 138,83,40,893/-. It also taxed the revenue of the assessee generated through BREW operator agreements as well as royalty on the

sale of CDMA handsets.

4. Aggrieved by the aforesaid, the respondent preferred an appeal before the Commissioner of Income Tax (Appeals)7 which confirmed the view taken by the AO in terms of its order dated 26 September 2009. The CIT(A), however, accorded partial relief to the respondent by permitting recomputation of the income of the assessee for AY 2005-06 in relation to the number of CDMA handsets. The assessee took the aforesaid order before the ITAT and which by its judgment of 20 February 2015 deleted the additions with respect to revenue earned through BREW operator agreement and partially Act CIT(A) This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 19/02/2024 at 23:22:53 remanded the matter to the file of the AO to consider related issues afresh. It is pursuant to the aforesaid order of remit that the AO on 27 December 2016 drew up a draft assessment order.

5. Aggrieved by the aforesaid and asserting that the same had come to be made beyond the period prescribed under Section 153(2A), the respondent filed its objections before the Dispute Resolution Panel8. Those objections came to be disposed of with the DRP confirming the order of the AO on 26 September 2017. Pursuant to the rejection of those objections, a final assessment order came to be framed on 31 October 2017. It was the aforenoted orders which came to be assailed before the ITAT.

6. The ITAT has while accepting the assertion of the respondents observed as under: -

> "39. When the Assessing Officer framed order dated 12.03.2015 giving appeal effect to the order of the Tribunal, he was in full knowledge of the decision of the Tribunal. In our considered opinion, the word "received" mentioned in section 153 (2A) of the Act (supra) has to be construed as "having knowledge". Since the Assessing Officer had full knowledge of the order of the Tribunal and pursuant to such knowledge, he framed the appeal effect order dated 12.03.2015, therefore, the remaining effect should also have been given on or before 31.03.2016. The draft orders dated 27.12.2016 and final assessment orders dated 30.10.2017 are, therefore, barred by limitation in light of the judicial decisions of the Hon'ble Jurisdictional High Court of Delhi (supra) and the Hon'ble High Court of Kerala (supra).

Allowing the additional grounds raised by the assessee, we hold that draft assessment orders and final assessment orders are barred by limitation.

40. Since we have quashed the assessment order as null and void being barred by limitation, we do not find it necessary to dwell into the merits of the case."

7. It was the correctness of the aforesaid view which was questioned by Mr. Bhatia before us. Mr. Bhatia submitted that the DRP This is a digitally signed order.

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8. Appearing for the assessee, Mr. Pardiwalla, learned senior counsel, contended that the issue stands conclusively settled by the judgment of the Full Bench in Odeon Builders and consequently there exists no justification for the Court to either admit or entertain these appeals. It was the submission of Mr. Pardiwalla that quite apart from the principles which the Full Bench enunciated, GE Energy Parts was a decision more apt having been rendered on facts identical to those which obtain in the present case.

9. It was submitted that a plain reading of the order dated 12 March 2015 would establish that the AO had full knowledge of the order dated 20 February 2015 passed by the ITAT and consequently the period of limitation as prescribed in Section 153(2A) would have to be computed accordingly.

10. Our attention was drawn to the order of 12 March 2015 which reads thus:-

> This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 19/02/2024 at 23:22:53 "INCOME TAX DEPARTMENT 1 Name of the assessee M/s Qualcomm Incorporated 2 Address C/o S.R. Batliboi & Co.

401, 4th Floor, Ashoka Bhopal Chambers, S.P. Road, Secunderabad.

3 Assessment Year 2005-06 4 PAN AAACQ1484H 5 Circle Circle -3(1)(1), International Taxation, New Delhi 6 Status Foreign Company 7 Whether Non-Resident Resident/Resident but Not Ordinarily Resident/ Non-reside 8 Previous year 2004-05 9 Date of Order 12.03.2015 Appeal Effect to the order of Hon'ble ITAT New Delhi The assessee filed return of income declaring a taxable income of Rs. 5,32,88,790/-. Assessment was completed u/s. 143(3)/250 18.09.2009 at an income of Rs. 125,52,57,206/-. The assessee filed return of income holding that the royalty income was not taxable in India as the company is a tax resident of USA and the OEM's from which the royalty was received are situated out side India. Against the assessment order, the assessee filed appeal before the. Ld. CIT(A) where CIT(A) upheld action of the A.O but reduced the amount of Royalty chargeable to tax in India. The assessing Officer held that the royalty received by the company is

taxable in India as the end users are situated in India. Accordingly, the income was assessed at Rs. 125,52,57,206/- taxable at 15% being royalty and FTS. The assessee further preferred an appeal before Hon'ble ITAT, Delhi Bench, New Delhi. Hon'ble ITAT has restored back the matter to the Assessing Officer vide the consolidated order dated 20.02.2015. While restoring back, hon'ble ITAT has allowed a partial relief of Rs. 2,72,68,740/- on this issue Royalty from Brew Operator Agreement, which has been held to be not taxable in India.

In view of the Hob'ble ITAT combined order dated 20.02.2015 in ITA No. 3701 & 3702/Del/2009, 5343/Del/2010 This is a digitally signed order.

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Income assessed u/s 143(3)/250 Rs. 125,52,57,206/-

Less:

Relief granted by the Hon'ble ITAT (Royalty from Brew Operator Agreement) Rs 2,72,68,740/-

The other additions made in the assessment order under head Royalty on Handsets of Rs.78,53,40,000/- and Royalty on Infrastructure Equipments of Rs 39,04,76,313/- are also being reduced for giving statistical effect to the order of hon'ble ITAT.

Net Taxable Income Rs. 5,32,88,790/-

Appeal effect given as above for statistical purpose. Allow credit for taxes paid and calculate interest as per law. Issue necessary forms.

(Sanjoy Paul) Deputy Commissioner of Income Tax Cir-3(1)(1), Int'I Taxation, New Delhi Copy to the assessee Deputy Commissioner of Income Tax Cir-3(1)(1), Int'I Taxation, New Delhi"

11. Mr. Pardiwalla laid stress on the aforesaid order acknowledging the judgment rendered by the ITAT on 20 February 2015 and the same embodying the intent of the AO to give effect to the same. In view of the above, he submitted the view as taken by the ITAT merits no interference.

12. We note that although the Full Bench of the Court in Odeon Builders was concerned with Section 260A of the Act, there are certain significant observations appearing in that decision of the Court which would have a material bearing on the question which is proposed for our consideration. It becomes pertinent to note that

> while the principal question which was raised before the Full Bench was This is a digitally signed order.

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13. The Full Bench firstly took note of the ITAT having adopted the practice of pronouncing orders in terms of the observations as rendered by the Court in Commissioner of Income Tax v. Sudhir Choudhrie9. It thus took note of both the authorized representative of the assessee as well as of the Department becoming aware of the judgment of the ITAT upon its pronouncement. It also took note of the significant distinction which existed between Section 256(3) and Section 260A with the former using the word "served" as distinguished from "received" as occurring in Section 260A. The Full Bench thereafter proceeded to reject the contention of the Department that the receipt of the order of the ITAT must be considered as being service upon the jurisdictional Commissioner holding that the acceptance of such a view would amount to rewriting 153(2A) and construing that provision contemplating receipt of the order by the "concerned" Commissioner or Principal Commissioner of Income Tax.

14. It thereafter proceeded to render the following significant observations: -

> 2005 SCC OnLine Del 726 This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 19/02/2024 at 23:22:53 "38. In other words, there can be no doubt that in all cases where the decision of the Income-tax Appellate Tribunal has gone against the Revenue, it is the Revenue as a whole which is the "aggrieved party". An individual Commissioner of Income-tax or Principal Commissioner of Income-tax can prefer the appeal on behalf of the Revenue as an aggrieved party. If the legislative intent was to confer the power to file an appeal only by the "concerned" Commissioner of Income-tax or Principal Commissioner of Income-tax or Chief Commissioner of Income-

tax, then words to that effect ought to have been used. The use of the prefix "the" preceding the words Commissioner of Income-tax or Principal Commissioner of Income- tax in section 260A(2)(a) serves only the grammatical correctness of a preposition and nothing more. It is not to be read as meaning "that particular Commissioner of Income-tax" or the "concerned Commissioner of Income-tax".

39. The interpretation of the prefix "the" has to be both purposive and contextual. The object of the provision is to enable the filing of appeals within a period of limitation. As it is, the period of limitation (120 days) is considerably longer than in routine cases (30, 60 or a maximum of 90 days). The interpretation has to serve the purpose of not lengthening the period of limitation further, but to ensure that the time limit is strictly adhered to. Relaxation of the period of limitation in such cases has to be an exception and not the rule. The decisions in Consolidated Coffee v. Coffee Board (supra) and Shree Ishar Alloys Steels Ltd. v. JayaswalNeco (supra) were rendered in the context of different statutes where the wording of the provisions in question dictated the result of the interpretative exercise. They are not useful in the interpretation of the word "the" which precedes the words Commissioner of Income-tax or Principal Commissioner of Income- tax in section 260A(2)(a) of the Act.

40. The context in which the interpretative exercise is to be undertaken is that of the statute of limitation. Usually, the commencement of limitation is that point when there is "knowledge" of an order or judgment. In the context of section 260A(2)(a), the question that should be asked is : "when was the Department/Revenue aware of the order" and not "when was that particular Commissioner of Income-tax or Principal Commissioner of Income- tax having jurisdiction have knowledge of the order". Once a responsible officer or representative of the Department such as its Departmental representative or the Commissioner of Income- tax (Judicial) is aware of the order, then from that point it is a purely internal administrative arrangement as to how the said officer obtains and further communicates the order to the officer who has to take a decision on filing the appeal. Of course, the time This is a digitally signed order.

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15. As is evident from the aforesaid extracts, the Full Bench had unequivocally found that while examining the issue of limitation, one would have to pose the question of when the Department became aware of the order and not when the concerned Commissioner or Principal Commissioner may have been served or had derived knowledge. It proceeded further to observe that once a responsible officer of the Department becomes aware of the order, the period of limitation would commence form that point in time.

16. In GE Energy Parts, the Court was concerned with the bar of limitation for imposing penalties as raised by virtue of Section 275 of the Act. It is relevant to note that Section 275 prescribed the outer limit which would operate for imposition of penalties from the end of the stipulated period when an order of the Commissioner of Appeals or the ITAT is "received". On facts, the Court in GE Energy Parts found that undisputedly although the Commissioner had received a copy of the order of the ITAT only on 01 November 2017 and had contended on that basis that the period of limitation should be computed from that date, the assessee had already been placed upon notice under Section 271(1)(c) on 16 February 2017. It also took into consideration that the Section 275(1)(a) order which

was framed by the respondents was drawn on 22 May 2017 and thus the said date being liable to be accepted as constituting the starting point from when the respondents would be deemed to have knowledge of the order passed by the ITAT.

17. It was in the aforesaid backdrop that the Division Bench proceeded to observe as follows: -

> "30. It is seen in the present case that an show-cause notice was issued to the assessee on February 16, 2017 itself by the Assessing Officer under section 271(1)(c) of the Act and this could not have happened if the Assessing Officer was not already aware of the order of the Income-tax Appellate Tribunal. The appeal effect order passed on May 22, 2017 could not have been issued without a copy of the order of the Income-tax Appellate Tribunal. Therefore, in any event, the six-month period of limitation in terms of section 275(1)(a) of the Act would begin to run from May 22, 2017.
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> 31. On the other hand, it is sought to be contended by the Revenue that the jurisdictional Commissioner of Income-tax, i. e., the Commissioner of Income-tax (International Taxation) received the copy of the order only on November 1, 2017 and therefore, the period of limitation for the purposes of section 275(1)(a) of the Act did not begin till then. In support of this submission, reference is made to a communication dated November 1, 2017 addressed by the Income-tax Officer, Judicial-II, to the Commissioner of Income-tax (International Taxation) simply enclosing a copy of the order of the Income-tax Appellate Tribunal dated January 27, 2017. The letter states that the Income-tax Officer Judicial-II received the order only on October 31, 2017. It bears the date stamp of November 1, 2017 of the office of the Commissioner of Income- tax (International Taxation) to show that it was received by the Commissioner of Income-tax (International Taxation) on that date.
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> 32. The claim that the Income-tax Officer, Judicial-II received the copy of the order dated January 27, 2017 of the Income-tax Appellate Tribunal only on October 31, 2017 contradicts the fact that an appeal effect was given to the Income-tax Appellate Tribunal order by an order dated May 22, 2017 itself which clearly meant that the Income-tax Appellate Tribunal order was already available on that date. Further in the replies received by the petitioner in response to the application filed by it under the Right To Information, the CPIO has clearly stated that "the said order of hon'ble Income-tax Appellate Tribunal was dispatched by the registry of the Income-tax Appellate Tribunal on April 11, 2017 and received by the office of the Commissioner of Income-tax (Judicial) on April 17, 2017". The proof of service has also been enclosed to that letter. These facts have not been denied by the respondents. This

court is, therefore, unable to accept the plea of the Income-tax Officer, Judicial-II that copy of the order of the Income-tax Appellate Tribunal was received only on October 31, 2017 and could, therefore, be sent to the Commissioner of Income- tax (International Taxation) only on November 1, 2017.

33. If an officer of the Department is allowed to choose a date on which a copy of the order which has to be given effect to or acted upon is sent to the officer concerned, it will defeat the very purpose for which the Legislature has stipulated definite time limits in various provisions of the Act for the authorities to perform their statutory tasks in a time bound manner. In other words, the mandatory period of limitation under section 275(1)(a) of the Act cannot be sought to be defeated by delaying the dispatch of the relevant order of the Income-tax Appellate Tribunal to the concerned "jurisdictional" Commissioner of Income-tax. What is relevant is when the Commissioner of Income-tax (Judicial) representing the Department before the Income-tax Appellate Tribunal received the order, which in any event is generally made available in the public domain soon after the order is pronounced. This is the purport of the decision of the Full Bench of this court in CIT v. Odeon Builders P. Ltd. (supra), the ratio decidendi of which will apply to the case on hand as well since the language of section 260A(1) and section 275(1)(a) of the Act is identical.

34. The result of the above discussion is that the impugned orders of penalty dated April 26, 2018 were issued far beyond the six-month period of limitation in terms of section 275(1)(a) of the Act and were, therefore, invalid. On the date that the said orders were issued, i.e., April 26, 2018 they were without jurisdiction."

18. The ITAT has while passing the orders impugned before us proceeded on the basis of the principles enunciated in the aforenoted two decisions. We thus find no justification to interfere with the view as expressed. The appeal raises no substantial question of law.

19. Consequently, it fails and shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

FEBRUARY 16, 2024/neha This is a digitally signed order.