M/S.Wabco India Limited vs The Deputy Commissioner Of Income-Tax on 1 August, 2018

Author: P.T.Asha

Bench: Indira Banerjee, P.T.Asha

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.08.2018

CORAM :

The Hon'ble Ms.INDIRA BANERJEE, CHIEF JUSTICE
AND
The Hon'ble Ms.JUSTICE P.T.ASHA

W.A.No.884 of 2018
and C.M.P.Nos.8825 and 7726 of 2018

M/s.WABCO India Limited,
Rep. by its Chief Financial Officer,
Mr.R.S.Raja Gopal Sastry. .. Appellant

-vs-

The Deputy Commissioner of Income-tax,
International Taxation 1(1), BSNL Building,
Room No.407, 4th Floor, Tower 1,
No.16, Greams Road, Chennai 600 006. .. Respondent

Appeal filed under Clause 15 of the Letters patent against the order dated 20.03

For Appellant : Mr.R.V.Easwar, Sr. Counsel
for M/s.Rubal Bansal and
Sandeep Bagmar.

For Respondent : Mrs.Hema Muralikrishnan
Stng. Counsel

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J U D G M E N T

(Delivered by Ms.Indira Banerjee, Chief Justice) This intra-court appeal is against an order dated 20.03.2018 passed by the learned Single Bench dismissing W.P.No.1649 of 2018 filed by the

appellant challenging a show cause notice issued to the appellant under Section 163 (1)(c) of the Income Tax Act, 1961, (in short 'the IT Act').

2.The appellant incorporated under the Companies Act, 1956, in the year 1962, is engaged in the business of designing, manufacturing and marketing conventional braking products, advance braking systems and other related air assisted products and systems. The company is duly listed in the Stock Exchange and its shares are transferable.

3.In 2012-13, 75% of the shares of the appellant were held by Clayton Dewandre Holdings Ltd., hereinafter referred to as 'Clayton Dewandre' and the balance 25% held by the public. In 2013-14, Clayton Dewandre transferred its entire shareholding to WABCO Asia Private Limited, Singapore, hereinafter referred to as 'WABCO, Singapore'.

4.The consideration for the transfer was settled by WABCO, Singapore, by issuance of its own shares to Clayton Dewandre by execution of a Share Transfer Agreement between Clayton Dewandre and WABCO, Singapore.

5.Mr.R.V.Easwar, learned Senior Counsel appearing on behalf of the appellant, pointed out that the appellant was not a party to the said Share Transfer Agreement, which was between two non-residents. As required, necessary disclosures were made to Securities Exchange Board of India (SEBI). These facts are not in dispute.

6.In the writ petition, it is stated that the Deputy Commissioner of Income Tax, International Taxation 1 (1) being the respondent, has issued a certificate under Section 197 of the IT Act, in respect of the aforesaid transaction to Clayton Dewandre certifying 'Nil' withholding of taxes. However, the certificate was not issued to the appellant.

7.A summons dated 26.12.2017 was issued to the Chief Financial Officer of the appellant under Section 133 of the IT Act. The summons was received by the Chief Financial Officer on 27.12.2017. Pursuant to the aforesaid summons, the Chief Financial Officer appeared before the respondent on 27.12.2017 and furnished the information as sought for by the respondent. A sworn statement of the Chief Financial Officer was also recorded by the respondent. But, according to the appellant, no copy of the same was furnished in spite of requests.

8.According to the appellant, the Chief Financial Officer was questioned about transfer of shares of the appellant by Clayton Dewandre to WABCO, Singapore, even though the Chief Financial Officer was not employed with the appellant during the Financial Year 2013-14 and had no knowledge of the transaction. Be that as it may, Clayton Dewandre has apparently been subjected to tax in respect of the transaction and a draft assessment order dated 31.12.2017 has been issued to Clayton Dewandre.

9.On or about 09.01.2018, the impugned Show Cause Notice under Section 163 (1) (c) of the IT Act was issued to the appellant, the contents whereof are set out hereinbelow for convenience:

M/s..Clayton Dewandre Holdings Ltd was holding 75% of shares i.e. 1,42,25,684 Shares in your company. On sale of 1,42,25,684 shares dated 27.6.2013 M/s.Clayton Dewandre Holdings Ltd (CDH) received capital gain for the relevant AY 2014-15. In lieu of sale of M/s.WABCO India Limited shares. CDH received 50,55,05,000 shares of M/s.WABCO Asia Private Limited, Singapore as a sale consideration. The sale consideration of 1,42,25,684 shares amounts to 29,84,97,852 Euros which is equivalent to Rs.2347,23,78,600/-. After claiming deduction CDH has received capital gains of Rs.2146,98,34,163/-.

2.During scrutiny assessment in the case of M/s.Clayton Dewandre Holdings Ltd it was established that place of its effective management is at United Kingdom and that CDH wilfully engaged in a paper arrangement in order to obtain unintended and undue benefit of the India-Netherlands treaty.

3.Based on the findings, a draft assessment order has been served on CDH on 31.12.2017 and a tax liability of Rs.429,39,66,833/- may arise in the hands of CDH subject to the company availing the option to challenge the draft assessment order before the Dispute Resolution Panel.

4.The capital gains has directly arisen as a result of the consideration received from you. I therefore propose to treat you, M/s.WABCO India Ltd as the agent of M/s.Clayton Dewandre Holdings Ltd in respect of tax liability that may arise for the AY 2014-15 on account of capital gain taxation. In the event of demand arising in the case of M/s.Clayton Dewandre Holdings Ltd in the assessment proceedings for AY 2014-15, I propose to hold you as an agent under section 163(1)(c) of the I.T. Act, 1961.

5.You may therefore show cause why for the purpose of section 160 to 163 of the I.T. Act, 1961 M/s.WABCO India Ltd should not be treated, as the agent in the terms of the provisions of section 163(1)(c) of I.T. Act 1961. Your reply in writing should reach the undersigned on or before 31.01.2018, failing which it will be presumed that you have no objections to this proposal.

10.On a perusal of the aforesaid show cause notice, it is patently clear that it was accepted that there was transaction between Clayton Dewandre and WABCO, Singapore. In the show cause notice, it was alleged that scrutiny assessment of Clayton Dewandre established that the place of effective management was the United Kingdom, but Clayton Dewandre had deliberately made a paper transaction to obtain undue benefit of the Indo Netherlands treaty. Based on such finding, a draft assessment order had been issued giving rise to possibility of tax liability of Rs.429,39,66,833/- arising in the hands of Clayton Dewandre subject to Clayton Dewandre availing the option to challenge the draft assessment order before the Dispute Resolution Panel.

11.In the show cause notice, it was alleged that capital gains had directly arisen as a result of the consideration received from the appellant. The respondent, therefore, proposed to treat the

appellant as agent of Clayton Dewandre in respect of tax liability that might arise for the Assessment Year 2014-15, on account of capital gain tax. The appellant was called upon to show cause why for the purpose of Sections 160 to 163 of the IT Act, the appellant should not be treated as agent in terms of the provisions of Section 163 (1)(c) of the IT Act. The appellant challenged the aforesaid notice in this Court under Article 226 of the Constitution of India.

12.Before the learned Single Bench, it was contended that the impugned show cause notice was without jurisdiction as the conditions precedent for issuance of notice under Section 163 (1)(c) of the IT Act were absent. It was also submitted that to treat a person in India as representative assessee/agent of a non-resident, the non-resident must be in India. Clayton Dewandre was not in receipt of any income from the appellant. As such, the show cause notice was not sustainable in law. The learned Single Bench, however, dismissed the writ petition on the ground that the appellant had only challenged the show cause notice and no orders had, till then, been passed by the respondent. It was open to the appellant to give a reply to the show cause notice, which would not prejudice the appellant in any manner whatsoever.

13.From the order of the learned Single Bench, it is patently clear that the writ petition was dismissed on the sole ground that the appellant had a right to give a reply to the impugned show cause notice and as such, there was no merit in the writ petition. The appellant was directed to reply to the show cause within six weeks from the date of receipt of a copy of the order under appeal. Being aggrieved, the appellant has filed this intra-court appeal.

14.The short question in this appeal is whether the writ petition ought to have been dismissed on the sole ground that the appellant had a right of reply to the show cause notice. The answer to the aforesaid question has to be in the negative, for the reasons discussed hereinbelow.

15.A show cause notice is not ordinarily interfered with in proceedings under Article 226 of the Constitution of India. However, in exceptional cases, a show cause notice might be interfered with in proceedings under Article 226 of the Constitution of India, for example, when the show cause notice is without jurisdiction and/or that conditions precedent for a show cause notice are absent and/or the acts alleged in the show cause notice do not disclose any case for action against the noticee called upon to show cause, a show cause notice under Section 163(1)(c) of the IT Act would necessarily have to disclose a liability on the part of a noticee.

16.In Raza Textiles Ltd. vs. Income Tax Officer, reported in (1973) 1 SCC 633, the Supreme Court held that no authority, much less a quasi-judicial authority could confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question whether the jurisdictional fact had been rightly decided or not was a question that was open for examination by the High Court in an application for a Writ of Certiorari. If the High Court came to the conclusion that the Income Tax Officer had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the assessee was entitled for a writ of certiorari prayed for by him. The Supreme Court observed that it is incomprehensible to think that a quasi-judicial authority like the I.T.O. can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen .

17.It is well settled that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. The High Court, having regard to the facts of the case, has the discretion to entertain or not to entertain a writ petition. However, the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But, the alternative remedy has been consistently held by the Supreme Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of a fundamental right; where there has been a violation of principle of natural justice; and where an order or alternatively proceedings are without jurisdiction or the constitutional vires of an Act is under challenge. Reference may be made to State of U.P. v. Mohd. Nooh, reported in AIR 1958 SC 86, A.V.Venkateswaran, Collector of Customs vs. Ramchand Sobhraj Wadhwani, reported in AIR 1961 SC 1506, Calcutta Discount Co. Ltd. vs. ITO, Companies Distt. I, reported in AIR 1961 SC 372 and Whirlpool Corporation vs. Registrar of Trade Marks, reported in (1998) 8 SCC 1.

18.In Calcutta Discount Co. Ltd., supra, a Constitution Bench of the Supreme Court held the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction . The Supreme Court held that both the conditions (i)the Income-tax Officer having reason to believe that there has been under assessment and (ii) his having reason to believe that such under assessment has resulted from nondisclosure of material facts, must co-exist before the Income-tax Officer has jurisdiction to start proceedings after the expiry of 4 years. The argument that the Court ought not to investigate the existence of one of these conditions, viz., that the Income-tax Officer has reason to believe that under assessment has resulted from non-disclosure of material facts cannot, therefore, be accepted . The Supreme Court further held that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences .

19.Where the jurisdiction of the respondent to issue the impugned show cause notice was under challenge, in our considered view, the writ petition ought not to have been dismissed on the ground that the appellant had a right to reply to the show cause notice. The learned Single Bench ought to have examined whether the show cause notice was in excess of jurisdiction, by examination of jurisdictional facts, which led to issuance of the show cause notice.

20.As observed above, the following facts emerge from the impugned show cause notice itself:

> i.There was a Share Transfer Agreement between Clayton Dewandre and WABCO, Singapore, in terms whereof Clayton Dewandre transferred its share holding to WABCO, Singapore.
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> ii.The sale consideration of 1,42,25,684 shares amounted to Rs.29,84,97,852 Euros equivalent to Rs,2347,23,78,600/-, for which capital gain of Clayton Dewandre was

Rs.2156,98,34,163/-.

iii.Clayton Dewandre was assessed and a draft assessment order was served on Clayton Dewandre on 31.12.2017 in respect of tax liability of Rs.429,39,66,823/-, subject to Clayton Dewandre availing the option to challenge the draft assessment order before the Dispute Resolution Panel. We are informed that the draft assessment order has been finalised and final assessment order issued under Section 143(3) read with Section 144C of the IT Act.

iv.The show cause notice alleged that the capital gains had arisen directly as a result of consideration received by Clayton Dewandre from the appellant and the appellant was proposed to be held as agent under Section 163 (1)(c) of the IT Act, in the event of any demand against Clayton Dewandre in the assessment proceedings for the Assessment Year 2014-15.

21.It is true, as contended by the respondent, that quoting of a wrong provision in the impugned show cause notice does not invalidate the show cause notice. The question is whether the show cause notice was at all without jurisdiction; whether respondent wrongly assumed jurisdiction by erroneously deciding jurisdictional facts; whether in the facts and circumstances of the case, the appellant at all had any liability in respect of the capital gain in question; and whether the appellant could be said to be an agent under Section 163(1)(c) of the IT Act.

22.In Claggett Brachi Co. Ltd. vs. CIT, reported in (1989) 44 Taxman 186 (SC), the Supreme Court held that it was open to an Income Tax Officer to assess either a non-resident assessee or to assess the agent of such non-resident assessee. If an assessment had been made on one, there could be no assessment on the other. In the aforesaid case, assessment had been made on the Indian agent. The Supreme Court held that assessment could not have been made on the assessee. In this case, a draft assessment order has been issued to the non-resident assessee.

23.In Commissioner of Income Tax vs. Alfred Herbert (India) (P.) Ltd., reported in (1986) 26 Taxman 145 (Cal.), a Division Bench of Calcutta High Court held that having assessed a non-resident company, the Income Tax Officer could not assess the agent in India in respect of the same income.

24.In General Electric Co. and another vs. Deputy Director of Income-Tax and Others, reported in (2012) 347 ITR 60 (Del.), the shares of an Indian company were, by a series of transfers, ultimately transferred to a company incorporated in Luxembourg. A show cause notice was issued to the Indian company alleging that the income arising to the foreign company from the sale of its direct/indirect stake in the Indian company was liable to tax in India in view of the deeming provisions in Section 9(1)(i) of the IT Act. It was, thus, proposed to treat the Indian company as an agent and consequently, the representative of the non-resident assessee under the provisions of Section 136 read with Sections 160 and 161 of the IT Act. The Revenue challenged the maintainability of the writ petition raising preliminary objections including the objection that the matter was still at the show cause notice stage, as in this case. It was contended that the writ petition

was premature. Maintainability was also challenged on the ground that disputed questions of fact arose and that the High Court, in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India, could not exercise its discretionary powers in such a scenario. The Division Bench, however, accepted the submission that a harmonious reading of Sections 160 to 163 of the IT Act, would show that:

> i.in order to become liable as a representative assessee, a person must be situated such as to fall within the definition of a representative assessee;
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> ii.the income must be such as is taxable under section 9;
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> iii.the income must be such in respect of which such a person can be treated as a representative assessee;
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> iv.the representative assessee has a statutory right to withhold sums towards a potential tax liability;
>
> v.since the liability of a representative assessee is limited to the profit, there can be multiple representative assessees in respect of a single non-resident entity-each being taxed on the profits or gain relatable to such representative assessee.
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> The Division Bench held that no case was made out by the Department that in respect of transfer of share to a third party, that too outside India, the Indian company could be taxed when the Indian company had no role in the transfer. Merely because those shares related to the Indian company, that would not make the Indian company as agent qua deemed capital gain purportedly earned by the foreign company. The writ petition was held to be maintainable and was allowed.

25.We are in full agreement with the judgment of the Division Bench of Delhi High Court in General Electric Co. and another, supra. May be, there is an appeal from the aforesaid judgment, as contended on behalf of the Revenue, but the fact remains that the judgment has not yet been interfered with. The issues in this writ appeal are covered by the aforesaid judgment of the Delhi High Court, with which we are in full agreement.

For the reasons discussed above, the Writ Appeal is allowed. The judgment and order under appeal is set aside and consequently, the impugned show cause notice is also set aside. No costs. Consequently, C.M.P.Nos.8825 and 7726 of 2018 are closed.

(I.B., CJ.) (P.T.A., J.)

Index : Yes/No
Website : Yes/No

sra

The Hon'ble Chief Justice
and
P.T.Asha, J.

(sra)

01.08.2018