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W.P Nos.34254 & 34256 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 22.01.2024

C O R A M

The Hon'ble Mr. Justice **SENTHILKUMAR RAMAMOORTHY****W.P Nos.34254 & 34256 of 2023****&****WMP No.34143 of 2023**

M/s.Tiong Woon Project & Contracting Pte. Ltd.
Singapore,
C/o.Sundaram & Narayanan,
Chartered Accountants,
No.18, Luz Church Road,
Mylapore, Chennai-600 004
Represented by: K.Meenatchi Sundaram,
S/o.K.V.Krishnan,
aged about 59 years

... Petitioner in
both WPs

vs.

1. The Central Board of Direct Taxes
Ministry of Finance, Government of India,
Department of Revenue,
Central Secretariat,
North Block, New Delhi-110 001.

2. The Deputy Director of Income Tax,
International Taxation-II(1)
No.16, Greams Road,
Chennai-600 034.

... Respondents in
both WPs



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PRAYER in WP.No.34254 of 2023: Writ Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorarified Mandamus calling for the records in F.No.312/15/2017-OT dated 03.11.2023 on the file of the 1st Respondent relating to the A.Y.2012-13, and quash the same and direct the 1st Respondent to condone the delay in filing the Return of Income.

PRAYER in WP.No.34256 of 2023: Writ Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorarified Mandamus calling for the records in F.No.312/15/2017-OT dated 03.11.2023 on the file of the 1st Respondent relating to the A.Y.2013-14, and quash the same and direct the 1st Respondent to condone the delay in filing the Return of Income.

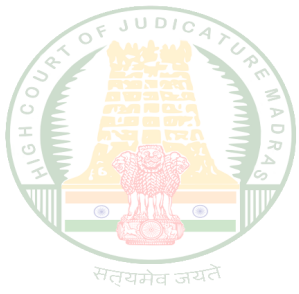
In all Writ Petitions

For Petitioner : Mr.G.Baskar

For Respondents : Mr.Prabhu Mukund Arunkumar,
Junior Standing Counsel

COMMON ORDER

In these two writ petitions, the petitioner assails a common order dated 03.11.2023 refusing to condone delay in filing the return of income of the petitioner for Assessment Year (AY) 2012-13 and 2013-14.

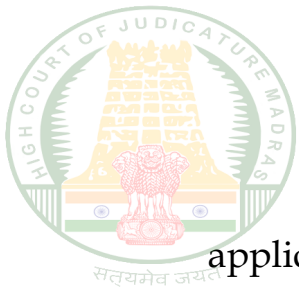


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2. The petitioner is a company incorporated in Singapore

and engaged in undertaking turnkey construction projects involving erection, installation and commissioning activities. In relation to three projects undertaken in AYs 2010-11, 2011-2012 and 2013-14, the petitioner approached the Authority for Advance Rulings (AAR) and such authority provided a ruling to the effect that income earned from the said three projects were not taxable in India. With regard to three other projects relating to AYs 2012-13, 2013-14 and 2014-15, respectively, the petitioner once again approached the AAR on 11.04.2014 and requested for a ruling with regard to the tax liability in India of the petitioner. The due date for filing the return of income for AY 2012-13 was on 30.09.2012 and the extended deadline under Section 139(4) of the Income Tax Act, 1961 (the Income Tax Act) was on 31.03.2014. As regards the AY 2013-14, the due date was on 30.09.2013 and the extended deadline was on 31.03.2015.

3. By referring to the proviso to Section 245(R)(1) of the Income Tax Act which provides that the AAR shall not allow an



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application where the question raised in the application is already pending before any income tax authority, the petitioner asserts that returns of income for the three AYs were not filed by the petitioner because of the pending applications before the AAR. Eventually, the AAR ruled on the application filed in respect of the G.R. Engineering Private Limited project, which pertained to AY 2014-15, on 16.08.2016. Since a common question of law arises with regard to all these three projects and such question was answered by holding that the income is taxable in India, the petitioner states that it decided to file returns of income in respect of all three AYs upon receipt of said ruling. The petitioner further states that it experienced difficulty in filing the returns because the digital signature certificate (DSC) of one of the foreign directors could not be obtained easily. Eventually, the returns in respect of all three AYs were filed in March 2017.

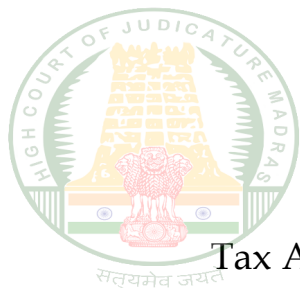
4. With regard to AY 2014-15, upon rejection of the application to condone delay, the petitioner filed W.P. No.16681 of 2019 and the said writ petition was allowed subject to payment of



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costs by order dated 17.06.2019. These writ petitions were filed upon rejection of the applications to condone delay by the common order impugned herein.

5. Learned counsel for the petitioner invited my attention to Section 119(2)(b) of the Income Tax Act and submitted that it enables the Central Board of Direct Taxes (the Board) to condone delay in admitting applications for *inter alia* refund where the Board considers it desirable or expedient to do so for avoiding genuine hardship. By referring to the judgment of the Bombay High Court in *Sitaldas K. Motwani v. Director General of Income-tax (International Taxation)*, New Delhi, [2010] 187 taxmann.com 44 (Bombay), particularly paragraph 15 thereof, learned counsel submitted that the expression genuine hardship in Section 119(2)(b) of the Income Tax Act should be construed liberally unless the delay was *mala fide*. He also pointed out that the AAR in the ruling *In re Wavefield Inseis Asa*, [2013] 33 taxmann.com 545, concluded that an application before the AAR is not maintainable once the return of income is filed under Section 139 of the Income



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Tax Act. As regards the judgment of the Hon'ble Supreme Court in

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Sin Oceanic Shipping ASA Norway v. Authority for Advance Rulings(Sin Oceanic), [2014] 41 taxmann.com 444 (SC), it was submitted that the said judgment was based on the consent of parties to set aside the impugned order and restore the matter to the file of the AAR.

6. By contending that the petitioner did not file returns of income for the two AYs on account of its *bona fide* belief that the filing of returns would result in the rejection of its applications before the AAR, learned counsel submitted that the petitioner's case would fall squarely within the scope of Section 119(2) (b). As a consequence of delay, learned counsel submitted that the petitioner would, in any event, not be entitled to interest up to the date of filing of the respective return.

7. In response to these contentions, Mr.Prabhu Mukund Arunkumar, learned junior standing counsel for the respondents, raised the preliminary objection that the writ petition should not



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have been filed by the Chartered Accountants of the petitioner. By referring to the authorization issued by the petitioner to the Chartered Accountants, it was submitted that the authorization does not extend to the conduct of proceedings before this Court. A reference was also made to the ethics code of the Institute of Chartered Accountants of India and the Annual Report of Tiong Woon Corporation Holding Ltd. to contend that the Chartered Accountants through whom the writ petitions were filed were the statutory auditors of one of the subsidiaries of the above mentioned holding company, and that Chartered Accountants should not act as authorised representatives in such situation.

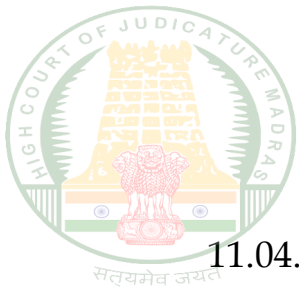
8. On the merits, learned counsel submitted that the filing of a return of income is not a bar to the filing of an application before the AAR. Learned counsel contended that this position was clarified by the Hon'ble Supreme Court in *Sin Oceanic*. He also referred to a ruling of the AAR in *Monte Harris v. Commissioner of Income-tax(Monte Harris)*, [1995] 82 taxmann 365 (AAR), particularly paragraph 10 thereof, for the proposition that the



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words “already pending as on the date of application” in Section 245(R)(2) mean proceedings already pending before the Income Tax authorities on the date of application before the AAR and not to returns/proceedings submitted later. He also referred to a judgment of the Division Bench of the Delhi High Court in *Hyosung Corporation v. Authority for Advance Rulings* [2016] 66 *taxmann.com* 217 (Delhi), where the interpretation placed on Section 245R(2) of the Income Tax Act in *Monte Harris* was cited with approval. By relying on these decisions, learned counsel submits that the petitioner had the option of either approaching the AAR after filing the return but before receipt of notice under Section 143(2) or filing the returns of income after filing the applications before the AAR. If either option had been exercised, he submits that the applications for advance ruling would not have been rejected on account of the returns of income having been filed.

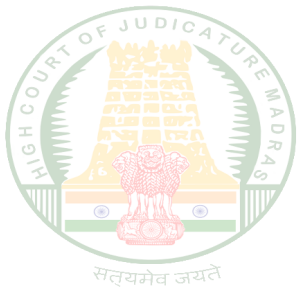
9. Learned counsel then countered the reliance on the earlier order of this Court with regard to AY 2014-15 on the ground that the application before the AAR was filed on



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11.04.2014, which was prior to the due date (30.11.2014) for filing the return of income in that case. By referring to the application under Section 119(2)(b), learned counsel submitted that the reasons set out in the application do not constitute a justification for filing the returns of income belatedly on 04.03.2017. In this regard, learned counsel submitted that ignorance of law is not an excuse and that a foreign company undertaking large scale business in India is required to know the law of the land.

10. Upon taking stock of the rival contentions, it is necessary to address the preliminary objection first. The authorisation in favour of the Chartered Accountants is on record and the company has authorised the Chartered Accountants to represent it in relation to its income tax assessments and all other proceedings arising therefrom. Although proceedings before court are not expressly referred to, the language of the authorisation is wide enough to embrace these proceedings. As regards the alleged breach of the ethics code, even if established, the same cannot be the basis to reject this petition.



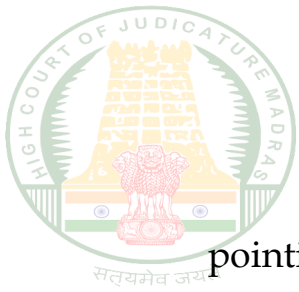
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11. Having dealt with the preliminary objection, the question that falls for consideration is whether the delay in filing the returns of income seeking refund should have been condoned. The provision enabling the Board to condone delay is Section 119(2)(b), which is set out below:

“(b) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise [any income-tax authority, not being [a Joint Commissioner (Appeals) a Commissioner [Appeals)] to admit an application or claim for any exemption, deduction, refund or any other relief under this Act after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law;”

The provision extracted above indicates that the test is whether it is desirable or expedient to condone the delay so as to avoid genuine hardship.

12. In the case at hand, the petitioner explained the delay up to 16.08.2016, which is the date of ruling of the AAR in the matter relating to the G.R.Engineering Private Limited project, by



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pointing out that its applications for advance ruling may have been rejected otherwise. The petitioner relied on the proviso to Section 245R(2) in this regard. Section 245R(2), in relevant part, is set out below:

“(2) The Authority may, after examining the application and the records called for, by order, either allow or reject the application :

[Provided that the Authority shall not allow the application where the question raised in the application,-

(i) is already pending before any income-tax authority or Appellate Tribunal [except in the case of a resident applicant falling in sub-clause (iii) of clause (b) of section 245N] or any court;

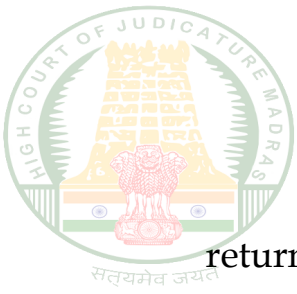
13. As per the above provision, the AAR shall not allow an application for advance ruling where the question raised in the application is already pending before any income tax authority or the Appellate Tribunal. The petitioner asserted and contended that it was under the *bona fide* belief that the filing of returns of income would qualify as a proceeding pending before the assessing officer



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and that, as a consequence, the applications filed before the AAR would be rejected. In order to corroborate this contention, the ruling of the AAR in *In re Wavefield Inseis Asa* was relied upon. The respondent countered this contention by relying upon the judgment of the Hon'ble Supreme Court in *Sin Oceanic*. On examining the judgment of the Hon'ble Supreme Court in *Sin Oceanic*, it is clear that the order was passed by consent and not upon interpretation of the proviso to Section 245R(2).

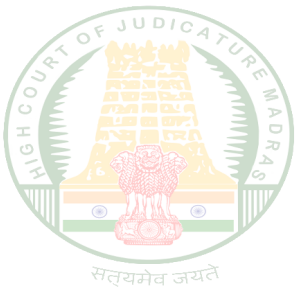
14. For purposes of this case, in any event, it is unnecessary to interpret the proviso to Section 245R(2) or conclude that the petitioner's interpretation is correct. All that is required is to determine whether the petitioner had a reasonable basis for asserting that it was under the *bona fide* belief that it would lose the valuable right of receiving an advance ruling if the returns of income had been filed. Upon examining the relevant provisions and the precedents cited in this regard, I am of the view that the petitioner's assertion that it believed *bona fide* that it could lose the valuable right of requesting for an advance ruling by filing the



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returns of income while the applications are pending before the AAR cannot be disregarded as lacking credibility.

15. Given the fact that the returns of income were filed on 04.03.2017, which is more than six months after the AAR ruling, another question arises, namely, whether the delay between 16.08.2016 and 04.03.2017 was adequately explained. In the affidavit in support of the writ petitions, the petitioner has attributed this period of delay to the delay in obtaining the DSC of one of the foreign directors and the consequent delay in filing the returns of income. The reason cited by the petitioner cannot be brushed aside since compliance requirements in this regard are exacting. At the same time, the explanation is not wholly satisfactory. In the return of income for AY 2012-13, the petitioner seeks a refund of Rs.1.02,61,480/- and in the return of income for AY 2013-14, the refund claim is Rs.2,80,15,691/-. These refund claims arise because substantial amounts were deducted towards tax at source. These are material facts while assessing genuine hardship.



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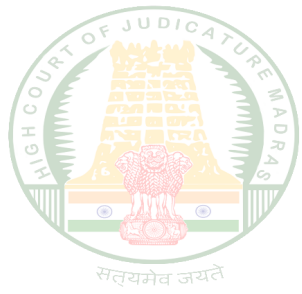
16. The contention of learned standing counsel that the applications for advance ruling were filed for AYs 2012-13 and 2013-14 after the due dates for filing the returns of income and, therefore, these cases are distinguishable from the case relating to AY 2014-15 remains to be considered. As a matter of fact, as regards AY 2012-13, both the due date and the extended deadline under Section 139(4) had expired when the application for advance ruling was filed, whereas the extended deadline had not lapsed as regards AY 2013-14. In the affidavit in support of the petition, the petitioner referred to the earlier rulings of the AAR in respect of previous projects of the petitioner to the effect that the income of the petitioner was not taxable in India and asserted that this led to the *bona fide* belief that returns need not be filed. The petitioner also averred that taxes were deducted and remitted in respect of income earned by the petitioner. The petitioner asserted that it did not file the returns of income on the due dates in these circumstances. If the petitioner had filed the returns of income prior to the due dates, it is likely that the applications for advance



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ruling would have been held to be not maintainable as per the proviso to Section 245R(2). Therefore, the filing of applications before the AAR after the due dates for filing returns of income does not lead to the conclusion that the petitioner has not made out a case of genuine hardship for purposes of Section 119(2)(b).

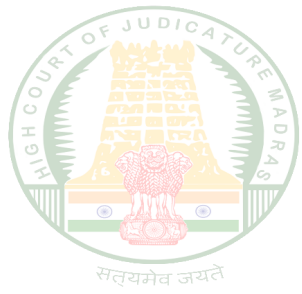
17. In the common order impugned herein, the applications were rejected primarily on two grounds. The first ground being the decision of the Hon'ble Supreme Court in *Sin Oceanic*. As discussed earlier, the Supreme Court issued a consent order and did not interpret the proviso to Section 245R(2) in that case. The second ground being that the petitioner failed to establish sufficient cause for not filing returns by the due dates, which is also dependent on the first ground. The decision making process was, therefore, vitiated both by taking into account immaterial factors and by non-consideration of material factors for determining genuine hardship, and this justifies interference in exercise of discretionary jurisdiction.



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18. By taking all the facts and circumstances into account, I am of the view that the applications to condone delay in filing returns of income and seeking refund are liable to be condoned on terms since such applications fall within the scope of the expression 'genuine hardship' in Section 119(2)(b). For the avoidance of doubt, it is clarified that no opinion is expressed herein on the merits of the refund claims. Therefore, the orders impugned herein are quashed and the delay is condoned subject to payment of a sum of Rs.50,000/- as costs in each petition to the Tamil Nadu State Legal Services Authority. Such payment shall be made within a period of *two weeks* from the date of receipt of a copy of this order. The Assessing Officer is required to process the returns filed by the petitioner for Assessment Years 2012-13 and 2013-14 after satisfying himself that the conditional order was complied with.



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19. In the result, both the writ petitions are allowed on the above terms. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

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Index : Yes/No

Internet : Yes/No

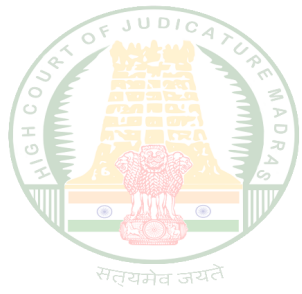
Neutral Citation : Yes/No

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To

1. The Central Board of Direct Taxes
Ministry of Finance, Government of India,
Department of Revenue,
Central Secretariat,
North Block, New Delhi-110 001.

2. The Deputy Director of Income Tax,
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