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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) 10417/2018**

M/S. EPCOS ELECTRONIC COMPONENTS S.A .....Petitioner
Through Mr.Kamal Sawhney with
Mr. Prashant Meharchandani,
Advocates

versus

UNION OF INDIA & ORS. ..... Respondents
Through Mr. Dev P.Bhardwaj, CGSC with
Mr.Jatin Teotia, Advocates for
Respondent No.1
Mr. Ruchir Bhatia, Advocate for
Revenue

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

O R D E R

% 10.07.2019

Dr. S. Muralidhar, J.:

1. The Petitioner which is a company incorporated in Spain has filed this petition challenging the legality of the order dated 22nd March, 2018 passed by the Commissioner of Income Tax (International Taxation-I) (Respondent No.2) dismissing the Petitioner's application under Section 264 of the Income Tax Act, 1961 ('Act').

2. In the said petition, the Petitioner had prayed for necessary directions to the Assessing Officer (AO) to consider permitting the Petitioner to revise its return of income for Assessment Year (AY) 2014-2015 and paying tax at

10% on its earnings for provision of management services to its associated enterprises EPCOS India Pvt. Ltd. (EIPL) instead of 20% in terms of Article 13 of the Double Taxation Avoidance Agreement ('DTAA') entered into between India and Spain.

3. It should be noted at the outset that in the written note of arguments submitted to the Court it is indicated that the Petitioner, which was formerly known as EPCOS Electronic Components S.A., is now known as TDK Electronics Components S.A. and EPCOS India Pvt. Ltd. is now known as TDK India Private Limited. However, no application for amending the cause title in the present petition has been filed.

4. The brief facts are that during the AY in question the Petitioner earned service fees in the sum of Rs.3,02,95,333/- for providing management related services to EIPL (now known as TDK India). The provision of management services was categorised as an international transaction under Section 92B of the Act and was reported by the Accountant in Form No. 3CEB. It is stated that the aforementioned income being in the nature of Fees for Technical Services (FTS) was taxable at 25% under Section 115A of the Act and at the rate of 20% under Article 13 of the DTAA between India and Spain. The AO by an intimation dated 10th March, 2016 under Section 143(1) of the Act processed the return of income.

5. According to the Petitioner, it realised that while referring to Article 13 of the DTAA it had failed to refer to Clause 7 of the Protocol appended to the DTAA which is considered an integral part and parcel of the DTAA. The

contention is that in terms of the protocol if a further concessional rate of tax was charged in terms of the agreement between India and another member of the OECD, by India after 1st January 1990, wherein India limits its taxation at source on FTS to a rate lower than that provided in Article 13 of the DTAA, then the said rate shall apply under the DTAA to the Petitioner as well.

6. A second mistake purportedly committed by the Petitioner was in paying surcharge of Rs. 1,15,345/- and education cess of Rs. 1,76,478/- aggregating to Rs. 2,91,823/- which is not required to be paid as the tax rate under the DTAA is a final rate inclusive of surcharge and cess.

7. This led the Petitioner to file the revision petition under Section 264 of the Act on 16th January, 2017 before Respondent No.2, seeking to revise the order under Section 143 (1) of the Act claiming it to be prejudicial to the Petitioner's interest. The consequential relief was for grant of refund of the excess tax paid by the Petitioner.

8. It must be mentioned here that in support of its plea that the rate of tax should be 10% and not 20% for the FTS earnings, the Petitioner under Section 264 of the Act referred to the DTAA between India and Sweden entered into on 25th December, 1997 more than two years after the DTAA with Spain which provided for the tax on FTS at 10%. Further, the Petitioner placed reliance on the decision of this Court in ***Steria (India) Limited v. CIT (2016) 72 Taxmann.com (1) (Del)*** which held that the Protocol to a DTAA should be held to be forming a part of the DTAA, notwithstanding that a

separate notification under Section 90 of the Act had not been issued by the Central Government to incorporate the Protocol into the DTAA.

9. However, by the impugned order, the CIT (International Taxation) i.e. the Respondent No.2 herein rejected the above contentions. It was observed that no amount was payable by the Assessee in terms of the intimation under Section 143(1) of the Act and therefore no prejudice was caused to the Assessee in terms thereof. It was observed by Respondent No.2 that if the Assessee was of the view that its income was chargeable to tax at 10% "it should have mentioned the same in its return of income or should have subsequently filed revised return". It was held that Section 264 of the Act cannot be invoked to rectify the Assessee's mistake, if any.

10. Although Respondent No.2 in the impugned order noted the decision of this Court in ***Steria India Private Limited*** (*supra*), he observed that in view of the judgment of the Supreme Court in ***Union of India v. Azadi Bachao Andolan 263 ITR 706 (SC)*** a notification was necessary for tax payers to claim benefits under the DTAA. As far as the decision of this Court in ***Steria India*** *(supra)* was concerned, Respondent No.2 observed that the issues raised in the decision in ***Azadi Bachao Andolan*** were not raised before this Court and further that the department had filed a Special Leave Petition in the Supreme Court against the judgment of this Court in ***Steria India Private Limited***.

11. This Court has heard the submissions of Mr. Kamal Sawhney, learned counsel appearing for the Petitioner and Mr. Ruchir Bhatia, learned counsel

appearing for the Revenue.

12. The first question that arises is whether a revision petition under Section 264 of the Act is maintainable to rectify the mistake committed by the Assessee while filing its return for the AY in question and which return has been accepted by the Department by issuing an intimation under Section 143 (1) of the Act? In support of its plea that such a petition is maintainable, Mr. Sawhney referred to the decision of this Court in ***Vijay Gupta v. Commissioner of Income Tax Delhi –III 2016 68 Taxman.com 131 (Del).*** On the other hand, Mr. Ruchir Bhatia, referred to the decision of the Supreme Court in ***Assistant Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers Private Limited (2008) 14 SCC 208*** to urge that an intimation under Section 143 (1) of the Act could not be treated as an 'order' and therefore no petition under Section 264 of the Act could be maintained against such 'intimation'.

13. This Court at the outset would like to observe that the decision in ***Rajesh Jhaveri Stock Brokers Private Limited*** was in the context of Sections 147 and 148 of the Act. If the original assessment was under Section 143(3) of the Act then the proviso to Section 147 would be attracted and the procedure prescribed thereunder for re-opening an assessment would have to be followed. On the other hand, if the return had been accepted by the Department by a mere intimation under Section 143(1) of the Act, then a different set of consequences would ensue and there would be then no requirement for the department, if it were to re-open the assessment, to follow the procedure it would have to had the assessment order been passed

under Section 143(3) of the Act.

14. The context in the present case is different. Here there is no attempt by the Revenue to re-open the assessment by invoking Sections 147 and 148 of the Act. The context here is the Assessee realising the mistake made by it while filing the return of paying a higher rate of tax. In such a context the intimation received by the Petitioner from the AO accepting the return under Section 143 (1) of the Act would partake the character of an order for the purpose of Section 264 of the Act. The question in ***Vijay Gupta vs. CIT Delhi*** *(supra)* was precisely whether a petition under Section 264 of the Act was maintainable against an intimation under Section 143(1) of the Act. In answering the question in affirmative this Court in ***Vijay Gupta (supra)*** observed as under:

> "The Commissioner further erred in rejecting the application under section 264 holding that intimation under section 143(1) could not be regarded as an order and was thus not amenable to revisionary jurisdiction under section 264 of the Act. The Intimation under section 143(1) is regarded as an order of the purposes of section 264 of the Act. CIT v. K.V. Manakaram [2000] 245 ITR 353/111 Taxman 439 (Ker.), Assam Roofing Ltd. vs. CIT [2014] 43 taxmann. com 316 (Gau) and S.R. Koshti v. CIT [2005] 275 ITR 165/146 Taxman 335 (Guj.). He failed to appreciate that the petitioner was not only impugning the intimation under section 143(1) but also the rejection of the application under section 154 of the Act."

15. It must be noted here that in ***Vijay Gupta*** the Court took note of the decision of the Supreme Court in ***Asstt. CIT v. Rajesh Jhaveri Stock Brokers Private Limited*** (*supra*).

16. Indeed, it is seen that there are at least three High Court decisions, referred to by this Court in ***Vijay Gupta*** (*supra*) which have taken an identical view, namely that an intimation under Section 143(1) of the Act is regarded as an 'order' for the purpose of Section 264 of the Act. Three decisions have been referred to in the above extract. It appears that the Revenue has accepted all of the above decisions included in ***Vijay Gupta***. Indeed for determining whether intimation under Section 143(1) of the Act should be construed as 'order' the only limited context is that of Section 264 of the Act. In the context of Section 147 and 148 of the Act it may have a different connotation. However, the fact remains that the consistent view of the High Court has been that for the purposes of Section 264 of the Act a revision petition seeking rectification of the return accepted by the Department in respect of which intimation is sent under Section 143(1) of the Act is indeed maintainable.

17. This Court therefore disagrees with the view expressed by the CIT i.e. Respondent No.2 in the impugned order and holds that a revision petition under Section 264 of the Act would be maintainable vis-a-vis an intimation under Section 143(1) of the Act, by the Assessee.

18. The next issue is whether the intimation under Section 143(1) of the Act was prejudicial to the interest of the Assessee. It must be noted here that although the tax calculated as payable in the return filed and accepted by the Department by sending intimation under Section 143(1) of the Act is nil, it cannot be said that no prejudice is caused to the Assessee thereby. The Assessee has voluntarily paid tax at the rate of 20% in terms of the Indo

Spain DTAA as tax on FTS and therefore there was no further tax to be paid at the time of filing of the return. However, it is not even denied by the Department that the Petitioner committed a mistake and should have paid tax at 10%. Even though, this extra 10% paid by the Petitioner was of its own volition, it was indeed prejudicial to the Assessee/Petitioner. Consequently, all the ingredients of Section 264 of the Act stand attracted. It is accordingly held that a revision petition under Section 264 of the Act by the Petitioner before the CIT against the intimation under Section 143(1) of the Act was maintainable.

19. The Court fails to appreciate how the CIT could have declined to follow the decision of the jurisdictional Court i.e. this Court in ***Steria India Limited****(supra)*. Although, an SLP may have been filed against the said decision the fact remains that the operation of the said judgment is not stayed by the Supreme Court. Being the jurisdictional High Court, as far as the CIT who issued the impugned order is concerned, he was bound by the decision of this Court.

20. The Petitioner has sought a clarification regarding the erroneous payment of the surcharge. Indeed the Court finds that the payment of tax on FTS under the DTAA included surcharge and cess etc. There was no requirement that once the tax rate at the appropriate slab was paid, to separately pay the surcharge and cess.

21. For the aforementioned reasons, the Court quashes the impugned order passed by the Respondent No.2 and directs the Respondents to permit the

Assesee to rectify its return by paying tax on FTS at 10%. The excess amount of tax, including the surcharge and cess paid shall be refunded to the Petitioner along with the interest due thereon, not later than eight weeks from today.

22. The petition is allowed in the above terms. No order as to costs.

CM Appl. No. 40603/2018 (Exemption)

23. Exemption allowed, subject to all just exceptions.

S. MURALIDHAR, J.

TALWANT SINGH, J.

JULY 10, 2019
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