

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 22.07.2014

W.P.(C) 3588/2013

COMVERSE NETWORKS SYSTEMS INDIA PVT. LTD. Petitioner

versus

COMMISSIONER OF INCOME TAX DELHI-XVI & ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr M.S.Syali, Sr. Advocate with Mr Mayank Nagi, Ms Husnal Syali
Nagi and Mr Harkunal Singh.
For the Respondents : Mr Kamal Sawhney and Mr Sanjay Kumar.

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

J U D G M E N T

BADAR DURREZ AHMED, J (ORAL)

1. By way of this writ petition the order dated 18.03.2013 passed by the Commissioner of Income Tax under Section 264 of the Income Tax Act, 1961 (hereinafter referred to as the 'said Act') in respect of the assessment year 2003-04 is challenged. The petitioner also seeks the quashing of the

notice dated 16.03.2010 issued under Section 163(2) of the said Act as also the order dated 31.01.2011 passed by the Assistant Commissioner of Income Tax pursuant to the said notice dated 16.03.2010 under Section 163(1)(c) of the said Act.

2. One Mr Francis Daly was an employee with the petitioner which was then known as CSG Systems India Pvt. Ltd. In respect of the assessment year 2003-04 pertaining to the previous year ended on 31.03.2003, the said Mr Francis Daly had submitted his return of income which had been assessed by virtue of the assessment order dated 26.12.2006. From the assessment order dated 26.12.2006 pertaining to Mr Francis Daly, it is evident that his status has been shown as “individual” and his residential status has been indicated as – “R & OR” which means “Resident & Ordinarily Resident”.

3. In other words, the said Mr Francis Daly was not a non-resident in respect of the previous year ended on 31.03.2013. It is an admitted position that Mr Francis who is no longer in the employment of the petitioner became a non-resident subsequently.

4. On 16.03.2010 a show cause notice was issued by the Assistant

Commissioner of Income Tax, Mayur Bhawan, New Delhi to the petitioner for treating the petitioner as the representative agent under Section 163(1)(c) of the said Act in respect of the said Mr Francis Daly for the assessment year 2003-04. By virtue of the said show cause notice, the petitioner was asked to show cause as to why it should not be treated as a representative agent in respect of Mr Francis Daly who was said to be a non-resident employee working with the petitioner and who had been assessed in Circle 46(1), New Delhi. Pursuant to this notice, the petitioner sent a reply in which the petitioner pointed out that the said Mr Francis Daly, when he was working with the petitioner pertaining to the assessment year 2003-04, was not a non-resident but was a resident and he had been assessed as such as pointed out above. In this backdrop, it was submitted by the petitioner that it could not be treated as a representative agent under Section 163(1)(c) of the said Act and, therefore, the proceedings pursuant to the show cause notice dated 16.03.2010 ought to be dropped. However, the Assistant Commissioner of Income Tax did not agree with the submissions of the petitioner and passed an order dated 31.01.2011 and held as under:-

“3. The reply of the assessee has been considered but it found that there is no merit in the reply. The Assessee indeed filed the return of income as resident but left the India and she enjoy the status of Non-resident as on date when the notice has been issued. As the notice has been

issued not for the purposes of assessment proceedings, therefore, the contentions of the assessee that it will serve no purpose is invalid and there is no bar in the Income Tax Act, 1961 to issue the notice for the limited purpose of treating the Employer Company as Representative Assessee. Similarly no such limit time has been imposed in the Income Tax Act, 1961. The limit of 2 years imposed in treating the Representative Assessee pertains to issuance of notice u/s 148. Therefore, it is held that there is no merit in the reply of the Employer Company. The Assessee was in employment of the formerly CSG System India Private Limited later known as Comverse Kenan India Private Limited. The Employer Company deducted taxes on the salary income of the assessee. Moreover, the employer company was liable to pay tax on taxes.”

5. Consequently, the Assistant Commissioner of Income Tax held the petitioner to be a representative assessee in respect of Mr Francis Daly for the assessment year 2003-04.

6. Being aggrieved by this order, the petitioner filed a revision petition under Section 264 before the Commissioner of Income Tax. That petition was disposed of by the order dated 18.03.2013 whereby the Commissioner of Income Tax concurred with the view taken by the Assistant Commissioner of Income Tax and held the petitioner to be the representative assessee insofar as Mr Francis Daly was concerned in respect of the assessment year 2003-04. It is this order dated 18.03.2013 which is impugned before us.

7. In the impugned order the assessee's objections are recorded in the following manner:-

“ii) Assessee objects that provisions of sec. 160(1)(i) read along with sec. 163 of the Act does not apply to the present case. The assessee submits that provisions of sec. 160 read along with sec.163(1)(c) of the Act which lays down the mechanism for treating a person as a representative assessee restricts its purview in respect of a non-resident. The assessee further submits that Francis Daly was a resident within the meaning of sec. 6 of the Act for the assessment year concerned (A.Y. 2003-04) and had filed his return of income in that capacity. Therefore, by no stretch of imagination, CKI can be treated representative assessee in respect of Francis Daly for the subject assessment year.”

On this objection the Commissioner of Income Tax held as under:-

“This objection of the assessee also does not hold any merit as it does not properly appreciate scheme of the Act dealing with Representative Assessee. Sec 160(1)(i) of the Act nowhere mentions as to the residential status should not be seen on the date of issuance of notice u/s 163(2). The assessee indeed filed the return of income as resident but left India and she enjoyed the status of non-resident as on the date when the notice had been issued. As the notice had been issued not for the purpose of assessment proceedings, therefore, the contention of the assessee that it will serve no purpose is invalid and there is no bar in the Income Tax Act, 1961 to issue notice for the limited purpose of treating the employer company as Representative Assessee.”

8. The Commissioner of Income Tax ultimately recorded his findings as under:-

“5. In the present case the issues pertaining to holding CKI

as the representative assessee of Ms. Francis Daly under Section 163 of the Act has been examined objectively and in accordance with the law by the Assessing Officer. The applicant's submission that the notice under Section 163(2) of the Act is not valid because it is issued after the expiry two years is not acceptable as Section 149(3) lays down the time limit for issue of notice under Section 148 of the Act and not the notice under Section 163 of the Act. In its application under Section 264, the applicant has raised certain issues relating to two additions made on account of tax on the income of Francis Daly amounting to Rs.39,20,157/- borne by the Co. and increasing the accommodation perquisite by Rs.18,23,888/-. As these matters pertain to the assessment proceedings and not to the issue relating to Section 163, which is the subject matter of current proceedings, no cognizance of these submissions are being taken. As the A.O. has passed a speaking order for holding CKI as representative assessee of Francis Daly u/s 163 of the Act, it is held that no prejudice is caused to the assessee.

6. In the result, the revision petition filed by the applicant is rejected.”

9. Mr Syali, the learned senior counsel appearing on behalf of the petitioner drew our attention to Section 160(1)(i) which is relevant for the purposes of this case. The said provision reads as under:-

160. (1) For the purposes of this Act, "representative assessee" means—

- (i) in respect of the income of a non-resident specified in sub-section (1) of section 9, the agent of the non-resident, including a person who is treated as an agent under section 163;

10. He also drew our attention to Section 163 which, to the extent

relevant, reads as under:-

163. (1) For the purposes of this Act, "agent", in relation to a non-resident, includes any person in India—

- (a) xxxx xxxx xxxx xxxx
- (b) xxxx xxxx xxxx xxxx
- (c) from or through whom the non-resident is in receipt of any income, whether directly or indirectly;
- (d) xxxx xxxx xxxx xxxx

and includes also any other person who, whether a resident or non-resident, has acquired by means of a transfer, a capital asset in India:

xxxx xxxx xxxx xxxx

11. Upon reading the said provisions Mr Syali submitted that a person could be taken to be a representative assessee only in respect of the income of a non-resident. What he meant by this was that the relevant period to be considered would be the period in which the income accrued and it had to be seen as to whether in that period the person in respect of whom the petitioner was sought to be made a representative assessee was a non-resident or not. He submitted that insofar as the assessment year 2003-04 is concerned, Mr Francis Daly was not a non-resident and was admittedly a “resident and ordinarily resident” as indicated in the assessment order of Mr Francis Daly itself. Therefore, according to Mr Syali, the petitioner could not be regarded as a representative assessee of Mr Francis Daly for the assessment year

2003-04 and it did not matter that on the date on which the notice under Section 163(2) was issued Mr Francis Daly was non-resident. The relevant point to be considered was the accounting year in respect of the assessment year 2003-04.

12. Mr Syali drew our attention to a decision of the Bombay High Court in the case of *Abdullahai Abdul Kadar v. Commissioner of Income-tax:* (1952) 22 ITR 241 (BOM.), wherein the provisions of Section 43 of the Income Tax Act, 1922 were considered. The provisions of Section 43 of 1922 Act and those of Section 163 of the said Act are substantially the same as would be evident from the following extract from the said Section 43:-

43. Any person employed by or on behalf of a person residing out of the taxable territories, or having any business connection with such person, or through whom such person is in the receipt of any income, profits or gains upon whom the Income-tax Officer has caused a notice to be served of his intention of treating him as the agent of the non-resident person shall, for all the purposes of this Act, be deemed to be such agent:

Provided that where transactions are carried on in the ordinary course of business through a broker in the taxable territories in such circumstances that the broker does not in respect of such transactions deal directly with or on behalf of a non-resident principal but deals with or through a non-resident broker who is carrying on such transactions in the ordinary course of his business and not as a principal such first-mentioned broker shall not be deemed to be an agent under this section in respect of such transactions:

Provided further, that no person shall be deemed to be the agent of a non-resident person, unless he has had an opportunity of being heard by the Income-tax Officer as to his liability.

Explanation.— A person, whether residing in or out of the taxable territories, who acquires after the 28th day of February, 1947, whether by sale, exchange or transfer, a capital asset in the taxable territories from a person residing out of the taxable territories shall, for the purposes of charging to tax the capital gain arising from such sale, exchange or transfer, be deemed to have a business connection, within the meaning of this section, which such person residing out of the taxable territories.

13. In *Abdullahai Abdul Kadar (supra)*, the assessee was appointed as a statutory agent under Section 43 for the year 1942-43 on 12.03.1945. The non-resident died on 26.03.1946 and the orders appointing the assessee as the statutory agent with regard to 1943-44, 1944-45 and 1945-46 were passed on 27.06.1946. The assessee therein had contended that inasmuch as the non-resident was dead, no order could be passed after his death appointing the assessee therein as a statutory agent.

14. The Bombay High Court speaking through M.C.Chagla, CJ, observed as under:-

“The first question which has been argued by Sir Jamshedji on behalf of the assessee is that with regard to the assessment years 1943-44, 1944-45 and 1945-46 his client cannot be assessed as an agent under Section 43 in view of the death of the non-resident. Now, the facts which are necessary to be considered with regard to this contention

are that the assessee was appointed a statutory agent under Section 43 for the year 1942-43 on the 12th of March, 1945. The non-resident died on the 26th of March, 1946, and the orders appointing the assessee statutory agent with regard to assessment years 1943-44, 1944-45 and 1945-46 were passed on the 27th of June, 1946. Sir Jamshedji's contention is that inasmuch as the non-resident was dead, no order can be passed after his death, appointing the assessee as statutory agent. It is perfectly true that when one has to deal with a contractual agency, death of the principal brings the agency to an end. But under Section 43 we are dealing, not with a contractual agency, but with a statutory agency, and a statutory agent can be appointed under Section 43 provided the conditions laid down in that section are satisfied; and the conditions necessary are that any person employed by or on behalf of the person residing out of the taxable territories or having any business connection with such person or through whom such person is in the receipt of any income, profits or gains can be appointed a statutory agent. Now the employment contemplated, the business connection contemplated, and the receipt of income contemplated by this section are all within the accounting year. We are concerned here with business connection ; therefore, if there was a business connection in the year of account, a statutory agent can be appointed under Section 43, notwithstanding the fact that at the date of the appointment of the statutory agent the non-resident was not alive. The material and relevant period to consider is not the date of the appointment of the statutory agent, but the period covering the year of account. Now, admittedly during the accounting period the non-resident was alive; and we are concerned with the business connection which he had within the taxable territories. Therefore, the Department was within its rights in appointing the assessee the statutory agent on the 27th of June, 1946, notwithstanding the fact that the non-resident died on the 26th of March, 1946.”

(underlining added)

15. What is to be noted from the above decision is that the material and relevant period to be considered is not the date of the appointment of the statutory agent, but the period covering the year of account. In that case, during the accounting period, the non-resident was alive and, therefore, it was held that the department was within its right in appointing the assessee as a statutory agent on 27.06.1946 notwithstanding the fact that the non-resident had died on 26.03.1946.

16. Despite the fact that the learned counsel for the Revenue argued to the contrary, we feel that the same logic would apply in the present case also. The relevant accounting year is the previous year ending on 31.03.2003 which pertains to the assessment year 2003-04. At that point of time Mr Francis Daly was not a non-resident. Therefore, in relation to that accounting period the petitioner cannot be appointed as a representative assessee. This is notwithstanding the fact that subsequently Mr Francis Daly attained the status of a non-resident and that when he was a non-resident the notice under Section 163(2) were issued. We reiterate, the relevant period for consideration would be the relevant accounting period which in this case happened to be the year ending on 31.03.2003.

17. Section 160(1)(i) of the said Act makes it clear that the expression “representative assessee” has to be seen “in respect of the income of a non-resident”. It is obvious that when we construe the expression “income of a non-resident” it has reference to income in a particular previous year/accounting year. The income of that year must be of a non-resident. If that be so, the agent of the non-resident or the deemed agent under Section 163 of the said Act would be the representative assessee. The petitioner is not an agent of Mr Francis Daly. Section 163(1)(c) talks about the person from or through whom the non-resident “is in receipt of any income, whether directly or indirectly”. We have already seen from the decision in *Abdullahai Abdul Kadar (supra)* that the income bears reference to the accounting year for which the statutory agent is to be appointed. In the present case, the year in question is the year ended on 31.03.2003. During that year Mr Francis Daly was not a non-resident. Therefore, the petitioner cannot even be regarded as a deemed agent under Section 163(1)(c) of the said Act. Consequently, the petitioner cannot be considered to be the representative assessee of Mr Francis Daly in respect of the assessment year 2003-04(relating to the previous year ended on 31.03.2003).

18. This consideration itself is sufficient for us to decide the case in favour of the petitioner and it is for this reason that we have neither mentioned nor considered the other arguments which have been placed before us. As a result, the writ petition is allowed and the impugned order is set aside. The parties shall bear their respective costs.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

JULY 22, 2014

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