IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH PUNE – VIRTUAL COURT

BEFORE SHRI R.S. SYAL, VICE PRESIDENT AND
SHRI S.S. VISWANETHRA RAVI, JUDICIAL MEMBER

ITA No.178/PUN/2021

Assessment Year : 2016-17

Deere & Company C/o John Deere India Private Limited Tower No.14, Cybercity, Magarpatta City, Hadapsar, Pune – 411013 PAN: AADCD3993M	Vs.	DCIT(International Transaction), Circle-1, Pune
Appellant		Respondent

Assessee by : Shri Nikhil Mutha
Revenue by : Smt. Divya Bajpai

Date of hearing : 02-11-2021
Date of pronouncement : 05-11-2021

ORDER

PER R.S.SYAL, VP :

This appeal by the assessee emanates from the order dated 22.12.2020 passed by the ld. CIT(A) dismissing the appeal against the order u/s 139(9) of the Income-tax Act, 1961 (hereinafter also called „the Act“) as not appealable u/s 246A in relation to the A.Y. 2016-17.

2. Briefly stated, the facts of the case are that the assessee is a foreign company. A return was filed declaring total income of

Rs.474,37,58,130 consisting of income from Royalty at Rs.1,96,93,72,012 and Fees for Technical Services at Rs.2,77,43,86,118. The assessee computed its tax liability on the said income at Rs.51,30,37,442. There was tax withholding to the tune of Rs.52,64,80,317. The assessee claimed refund of Rs.1,34,42,875. The return was processed by the Centralized Processing Centre (CPC), Bengaluru, which highlighted difference between the income shown in the return at Rs.474.37 crore and as shown in Form No. 26AS at Rs.4,78,61,86,673. A notice dated 15.11.2017 issued under Explanation (a) to section 139(9) took cognizance of such a defect in the return of income. The assessee responded to the same on 4.12.2017 through e-portal elaborating the reasons for difference in the two amounts by maintaining that correct income was reported in the return of income. The DCIT (CPC), Bengaluru rejected the assessee‟s contention and declared the return to be invalid by means of the order u/s 139(9) of the Act. The appeal against such an order before the ld. CIT(A) came to be dismissed at the threshold on the ground that the order u/s 139(9) of the Act was not appealable under

section 246A of the Act. This has brought the assessee to the Tribunal.

3. We have heard both the sides and scanned through the relevant material on record. The ultimate effect of the proceedings is that the refund amounting to Rs.1.34 crore due to the assessee as per the return of income got eclipsed with the return having been declared as defective and invalid as if never filed and the CIT(A) not entertaining the appeal. Undoubtedly, the assessee declared an income of Rs.474.37 crore in its return and the corresponding figure in Form 26AS stood at Rs.478.61 crores. On a notice issued u/s 139(9) of the Act on this count, the assessee furnished its reply through the e-portal, which is as under:-

> "The total of receipts shown in return of income is computed as per provisions of Rule 115 of Income Tax Rules, 1962. Accordingly, to compute Assessee"s taxable income in India, invoices raised in foreign currency is converted into INR on the basis of SBI TT Buying Rate of such currency prevailing on the date of credit to the account of the payee or payment, whichever is earlier. The Indian entities have converted the foreign currency amount into Indian Rupees and deducted taxes on a basis of the exchange rates other than SBI TT Buying rate which appear in Form 26AS and also there are certain reimbursements and reversals on which TDS had been deducted which has been claimed as refund in the return. Hence, the gross receipts shown in Form 26AS on which credit for TDS has been claimed are different than the total of the receipts shown in the return of income."

4. From the above reply, it clearly emerges that the assessee advanced three reasons leading to difference in the two figures, viz., conversion rates for recording the transactions; reimbursements; and reversals. Insofar as the first reason is concerned, rule 115 of the Income Tax Rules, 1962 (hereinafter called `the Rules") provides that the rate of exchange for the calculation of the value in INR of any income accruing or arising etc. to the assessee in foreign currency etc. shall be the `telegraphic transfer buying rate" of such currency on the `specified date". The term `specified date" has been defined in Explanation (2) to rule 115, providing through clause (c), in relation to `Income from other sources" payable in foreign currency and from which tax has been deducted, as, the date on which the tax was required to be deducted at source. The term `telegraphic transfer buying rate", in relation to a foreign currency, has been defined in the Explanation to rule 26 to mean the rate adopted by the State Bank of India for buying such currency, where it is made available to that bank through a telegraphic transfer. Pages 2 to 14 of the paper book contain invoice-wise conversion of the income of the assessee from USDs into INRs. The assessee claims that it converted income accruing in

foreign currency into Indian rupees on the basis of SBI TT Buying rate on the date of credit to its account or the date of payment, whichever is earlier but the Indian entities converted the foreign currency into Indian rupees at a rate different from the SBI TT Buying rate.

5. The second reason for difference in the figures given by the assessee is `Reimbursements‟. The Indian entity paid some amount to the assessee and deducted tax thereon. The claim of the assessee is that the receipt is in the nature of reimbursement and hence not chargeable to tax. If the amount is really in the nature of reimbursement, then tax deducted at source on such an amount would call for refund without the corresponding inclusion of the amount in the total income.

6. The third reason given by the assessee is the reversal of some entries. For example, the assessee raised invoice of 100 USD on the Indian entity, which deducted tax at source on 100 USD. However, later on the assessee issued credit note on that invoice, say, to the tune of 15 USD. Even though the tax was deducted at source initially on

100 USD by the Indian entity, but the ultimate amount includible in the total income of the assessee would be equivalent of 85 USD.

7. On going through the assessee‟s reply given to the DCIT (CPC), Bengaluru, it emerges that a case was set up that it did not omit to include any income in the total income. Rather, the difference arose either due to conversion of invoice value from the foreign currency into Indian rupees or certain amounts on which tax was deducted by Indian entities, which were not chargeable to tax in its hands by reason of reimbursement or reversal of some invoice value. The three reasons noted above are bound to bring difference in the figure of income reported by the assessee in its return and as appearing in Form No. 26AS. However, such a differential amount, in principle, would not constitute income chargeable to tax in the hands of the assessee.

8. Before coming to the core issue as to whether such a mismatch in the figures of income returned and as reported in Form 26AS constitutes a defect in the return so as to warrant initiation of proceedings u/s 139(9) of the Act, we need to consider the mandate of section 143(1) of the Act, which deals with the processing of return. This section provides that: “Where a return has been made u/s 139 …,

such return shall be processed in the following manner…". Clause (a) contains a list of six items given in sub-clauses (i) to (vi), requiring the making of adjustments in computing total income. Sub-clause (vi) mandates the making of an adjustment in the total income towards `addition of income appearing in Form 26AS or Form 16A or 16 which has not been included in computing total income in the return". The sub-clause (vi) was inserted by the Finance Act, 2016 w.e.f. 01.04.2017. The effect of this sub-clause is that if certain amount of income appearing in Form 26AS etc. is not fully or partly included in the total income returned by the assessee, then the AO will process the return u/s 143(1) and make adjustment by way of addition to the total income so computed by the assessee. The first proviso to the sub-clause (vi) provides that "no such adjustments shall be made unless an intimation is given to the assessee of such adjustments either in writing or in electronic mode". The second proviso further states that the "response received from the assessee, if any, shall be considered before making any adjustment….". The effect of these two provisos to sub-clause (vi) of section 143(1)(a) is that the AO, at the stage of processing the return u/s 143(1), is required to increase the total

income computed by the assessee in its return with the differential higher income as appearing in Form 26AS etc. However, this can be done only after giving prior intimation to the assessee about such proposed adjustment and that too, after considering the response of the assessee, if given thereto. Thus, it is overt that if the explanation furnished by the assessee is found to be satisfactory, then the AO cannot carry out any such adjustment at the time of processing the return u/s 143(1) of the Act.

9. The AO in the extant case has invoked Explanation (a) to section 139(9) of the Act on account of mismatch of the figures of income as returned and as per Form 26AS. Section 139(9) provides in the opening part that: `a return of income shall be regarded as defective unless the following conditions fulfilled". Then there are clauses (a) to (f). The AO has activated clause (a), which states that: "the annexures, statements and columns in the return of income relating to computation of income chargeable under each head of income, computation of gross total income and total income have been duly filled in". A cursory glance at the Explanation (a) manifests the nature of defect, being, not *duly filling in* the annexures, statements

and columns in the return of income relating to computation of income chargeable under each head of income, computation of gross total income and total income. In other words, if all the annexures, statements and columns etc. of the return have been duly filled in, there can be no defect as per clause (a). The defect referred to herein is of non-filling of the requisite columns of the return of income and not filling of columns but non-tallying of the figures due to a valid difference of opinion. If the intention of the Legislature had been to treat the mismatch of income between Form 26AS and as shown in the return of income rendering the return defective, then there was no need to incorporate clause (vi) of section 143(1)(a) of the Act requiring the AO to carry out the *adjustment* during the processing of return of income on this score.

10. It goes without saying that if a subject is covered under a specific provision, then it cannot be included in any general provision. We are reminded of the latin maxim *generalia specialibus non derogant,* which means that special provisions override general provisions. In view of the fact that clause (vi) of section 143(1)(a) of the Act specially covers a situation of mismatch in the amount of

income returned and as appearing in Form 26AS requiring the making of an adjustment and that too, subject to two provisos, the same subject matter cannot be covered within the purview of Explanation (a) to section 139(9) of the Act so as to render a return defective on this score. It is so for the *raison d`etre* that the adjustment u/s 143(1) at the time of processing of return and the return becoming defective u/s 139(9) entail different consequences.

11. At this juncture, it is relevant to note that the third proviso to section 143(1)(a)(vi) was inserted by the Finance Act, 2018 w.e.f. 01.04.2018 providing: "that no adjustment shall be made under sub-section (vi) in relation to return furnished for the assessment year commencing on or after 1st day of April, 2018". A conjoint reading of the third proviso with the main sub-clause (vi) of section 143(1) along with the first two provisos amply demonstrates that the Legislature required the AO to make such an adjustment only for the A.Y. 2017-18. The Memorandum explaining the provisions of Finance Bill, 2018 justified the insertion of the third proviso, having the effect of omission of clause (vi) from the scope of *prima facie* adjustments during the processing of return of income, by stating that: *`With a*

view to restrict the scope of adjustments, it is proposed to insert a new proviso to the said clause to provide that no adjustment under sub-clause (vi) of the said clause shall be made in respect of any return furnished on or after the assessment year commencing on the first day of April, 2018.‟ A careful circumspection of the provision along with Memorandum makes it explicitly clear that the Parliament wanted to *restrict* the scope of adjustments and thus excluded the cases of such a mismatch from its ambit. The effect of the third proviso is that such a genuine mismatch will be resolved by taking recourse to assessment u/s 143(3) of the Act by issuing notice u/s 143(2) of the Act. In fact, section 143(2) unambiguously provides that "where a return has been furnished u/s 139 …., the Assessing Officer …., if considers it necessary or expedient *to ensure that the assessee has not understated the income…,* shall serve on the assessee a notice ….". It means that where the assessee claims a particular amount as not chargeable to tax, with which the AO is not *prima facie* agreeable, as is the case under consideration, the only option with the AO is to take up the assessment after issuing notice u/s 143(2) of the Act. The position of law which prevails from the A.Y. 2018-19, that is, after the insertion

of the third proviso to section 143(1)(a), is similar to what it was before the A.Y. 2017-18. Thus except for the A.Y. 2017-18, when the AO could have made adjustment on account of such a mismatch while processing the return u/s 143(1), the AO has no power to correct a mismatch, as is instantly the case, otherwise than through making assessment u/s 143(3) in the years before or after that. We are concerned with the A.Y. 2016-17 and, as such, the DCIT (CPC), Bengaluru could not have taken action u/s 139(9) in an attempt to correct the mismatch and in the process declared the return as invalid, thereby depriving the assessee from refund claimed in the return of income.

12. Once a return of income is declared as *non est* as if it was never filed, there can be two possible situations. One, the assessee, knowing that it has income chargeable to tax, again files a fresh return and the second, the AO, having knowledge of the assessee having taxable income, issues a notice u/s 142(1)(i) requiring the assessee to file a return of income. Albeit section 142(1)(i) uses the word `may", but when the AO knows for sure that the assessee has income chargeable to tax but not filed return, it becomes obligatory on the part of the AO

to issue notice under this provision, in the same way as it is necessary for the assessee, having taxable income, to file return of income. Now we consider the effect of the two situations in the facts and circumstances of the case under consideration. In the first possible situation, the assessee would have again filed its return with income of Rs.474.37 crore and the AO, sticking to his earlier stand, would have held such return invalid on the same premise, throwing the proceedings in a vicious circle resulting in an impasse. In the second possible situation, the AO, knowing pretty well that the assessee has income chargeable to tax and the earlier return has been declared by him as never filed, should have issued notice u/s 142(1)(i) requiring the assessee to file a return of income. This would have resulted in the assessee filing its return and then the AO determining correct total income of the assessee as per law after making assessment u/s 143(3) of the Act. However, in the instant case, the AO did not issue any notice u/s 142(1)(i) and pushed the proceedings to a dead end, leaving the assessee without any apparent legal recourse. Left with no option, the assessee preferred an appeal before the ld. CIT(A) against the order u/s 139(9) of the Act, which has been dismissed as not

maintainable on the ground that an order u/s 139(9) is not covered by the list of appealable orders given in section 246A of the Act.

13. Bearing in mind the pitiable condition of the assessee descending in a quagmire, having been created by the DCIT (CPC), Bengaluru, the assessee cannot be left remediless. It goes without saying that every piece of legislation ultimately aims at the well being of the society at large. No technicality can be allowed to operate as a speed breaker in the course of dispensation of justice. In the context of taxes, if a particular relief is legitimately due to an assessee, the authorities cannot circumscribe it by creating such circumstances leading to its denial. A look at different clauses of section 246A(1) transpires that an order u/s 139(9) is *ex facie* not covered therein. However, there are two clauses of section 246A(1), namely, (a) and (i), which can provide succor to the assessee.

14. Clause (a) of section 246A provides for filing an appeal before CIT(A), *inter alia,* against "an order against the assessee where the assessee denies his liability to be assessed under this Act". It is pertinent to note that such an order has been covered in the provision separately and distinct from an intimation u/s 143(1) or an order of

assessment u/s 143(3). The word `order‟ in the expression `an order against the assessee where the assessee denies his liability‟ is not preceded or succeeded by the word `assessment‟. Thus any order passed under the Act against the assessee, impliedly including an order u/s 139(9) in the circumstances as are obtaining in this case, having the effect of creating liability under the Act which he denies or jeopardizing refund, gets covered within the ambit of clause (a) of section 246A(1).

15. Clause (i) of section 246A(1) of the Act deals with the filing of an appeal before the CIT(A) against an order u/s 237 of the Act. The latter section, in turn, provides that: `If any person satisfies the Assessing Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess.‟ Technically speaking, the AO has not passed an order u/s 237 but only u/s 139(9) of the Act. We have noticed above that firstly, the AO could not have treated the return as invalid u/s 139(9) of the Act because of mismatch between the figure of income shown in the

return and that in Form 26AS and secondly, if at all he did so on a wrong footing, he ought to have issued notice u/s 142(1)(i) of the Act for enabling the assessee to file its return so that a regular assessment could take place determining the correct amount of income and the consequential tax/refund. Here is a case in which the assessee has been deprived by the DCIT (CPC), Bengaluru of any legal recourse to claim the refund. Considering the intent of section 237 in mind and the unusual circumstances of the case, we hold that the order passed by him is also akin to an order refusing refund u/s 237 making it appealable u/s 246A(1)(i). We, therefore, set aside the impugned order and remit the matter to the file of the ld. CIT(A) for disposing off the appeal on merits as per law after allowing a reasonable opportunity of hearing to the assessee.

16. In the result, the appeal is allowed for statistical purposes.

Order pronounced in the Open Court on 5th November, 2021.

Sd/-	Sd/-
(S.S. VISWANETHRA RAVI)	**(R.S.SYAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

Pune; Dated : 5th November, 2021

BY ORDER,

Senior Private Secretary
ITAT, Pune

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