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

% *Judgment delivered on: 24.01.2024*

\+ **W.P.(C) 17376/2022**

READERS DIGEST BOOK AND HOME ENTERTAINMENT (INDIA) PVT LTD ..... Petitioner

Through: Mr. Percy Pardiwalla, Sr. Adv. with Mr. Sidhinath Singh Sengar, Adv.

Versus

DEPUTY COMMISSIONER OF INCOME TAX & ORS. ..... Respondents

Through: Mr Puneet Rai, SSC with Mr. Ashvini Kumar and Mr. Rishabh Nangia, Advocates

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\+ **W.P.(C) 4550/2023**

READERS DIGEST BOOK AND HOME ENTERTAINMENT (INDIA) PVT. LTD. ..... Petitioner

Through: Mr. Percy Pardiwalla, Sr. Adv. with Mr. Sidhinath Sengar Adv.

versus

DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE 19(1), NEW DELHI & ORS. ..... Respondents

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kumar and Mr. Rishabh Nangia, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. These two writ petitions have been preferred seeking the following reliefs:

WP(C) 17376/2022

"a. Writ of Mandamus or Writ, Order or Direction in the nature of Mandamus, or any other appropriate Writ, Order or Direction under Article 226 / 227 of the Constitution of India for issuance of writ of mandamus or an Order directing the Respondents to issue the refund of Rs. 4,87,48,460/- (alongwith with interest under section 244A) for AY 2011-12 in a time bound manner, more particularly since the remand back proceedings are barred by limitation.

b. pending the hearing and final disposal of this petition, the Respondents be directed to compute the refund along with interest under section 244A of the Act for the year under consideration.

c. pass any other order(s) as this Hon'ble Court may deem to be fit and more appropriate in order to grant interim relief to the petitioner;"

WP(C) 4550/2023

"a) A Writ of Certiorari, or a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 and 227 of the Constitution of India quashing the Impugned Order dated 13.02.2023 (Annexure P-24) as bad in law, null and void inasmuch as it is barred by limitation and without following the procedure prescribed under section 144C of the Act.

b) A Writ of Mandamus, or a writ in the nature of Mandamus or any other appropriate writ, order or direction under Article 226 and 227 of the Constitution of India directing Respondents to issue the balance consequential refunds arising as a result of quashing the Impugned Order dated 13.02.2023 amounting to Rs1.94 crores along with statutory interest under section 244A of the Act forthwith, given that the Impugned Order dated 13.02.2023 (Annexure P-24) is barred by limitation and passed in violation of the provisions of section 144C of the Act.

c) pass any other order(s) as this Hon'ble Court may deem to be fit and more appropriate in order to grant interim relief to the petitioner;"

2. With the consent of parties, we propose to dispose of both the writ petitions by way of this common judgment since the issues raised in WP(C) 17376/2022 are in a sense consequential to the judgment that would be rendered on WP(C) 4550/2023. The events leading up to the petitioner approaching this Court stand succinctly captured in WP(C) 4550/2023 and the salient facts that can be gathered from the disclosures made in that writ petition are as follows.

3. The **Assessment Year**[1] under consideration is 2011-12 and pertains to the Return of Income as submitted by the petitioner and which included aspects pertaining to the import of books and music CDs' for re-sale in India from its associate enterprise - Readers Digest Asia Pte. Ltd. The Return of Income declared the total taxable income to be 'Nil'. The said return is stated to have been selected for scrutiny and led to the **Assessing Officer**[2] referring the case of the petitioner to the **Transfer Pricing Officer**[3] in accordance with Section 92CA of the **Income Tax Act, 1961**[4]. The TPO by an order dated 30 January 2015 proposed an adjustment of Rs.16,62,47,629/- in relation to advertisement and sales promotion and postage expenses incurred by the petitioner.

4. Based on the aforesaid, a Draft Assessment Order came to be framed on 26 March 2015. The petitioner questioned the proposed adjustment as contained in the Draft Assessment Order by filing an

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[1] AY
[2] AO
[3] TPO
[4] Act

application before the **Dispute Resolution Panel**[5]. That application came to be decided by the DRP on 23 December 2015.

5. Proceeding further, the first respondent passed a Final Assessment Order on 29 January 2016 upholding the adjustments as referred to hereinabove. This came to be assailed by the petitioner by filing an appeal before the **Income Tax Appellate Tribunal**[6] on 02 March 2016. The ITAT by its order of 20 December 2018 set aside the Final Assessment Order and remitted the matter back to the AO and TPO for re-adjudication. We deem it apposite to extract paragraph 7 of the order dated 20 December 2018 pronounced by the ITAT hereinbelow:

> "**7.** We have heard both the parties and perused the material available on record. The components of the assessee's Advertising and Sales promotion and postal expenses are different from what is ordinarily understood as an advertisement, marketing and promotion (AMP) expenses. The components of these expenses are that of billing material, personalization, promotion freight, list rentals and other promotions, premiums, sweeptakes judging, paper and printing of brouchers and also postage. Therefore, the same cannot in any circumstances lead to creation of AMP expenses for the A.E. Thus, these expenses cannot in any circumstances be categorized for creation of making intangible for the AE. These expenses were incurred by the assessee wholly and exclusively on account of its own business and any benefit to the AE was only incidental. From the records, it can be seen that the assessee is incurring its own selling and distribution expenses. There was no advertisement in media nor the products are available in the shop. It is made available only through order placed. There exist a distinction between product promotion and brand promotion. The mechanism used by the assessee company is altogether different for its product promotion. From the records, it can be seen that there is only a mail order marketing use as promotion for products sales. The Ld. AR has aptly relied on the various decisions regarding

[5] DRP
[6] ITAT

> involvement of AMP expenses but in the present case, the facts are altogether different as here the method for using product sales and promotion are totally different. The assessee company's products are not available in market as such in general. Therefore, the TPO/DRP ignored these basic differences while holding that these expenses are international transaction itself. Besides that both the revenue authorities failed to bring on record as to how the said activity of the assessee company is having an element of international transaction itself. These factors were not at all verified by the revenue authorities. The issue of Bright Line Test method is now settled by the judicial precedence in case of the decision of the Hon'ble Delhi High Court in case of PR. CIT vs. Mary Kay Cosmetic Pvt. Ltd. Thus, this also should be looked into by the AO/TPO. Therefore, it will be appropriate to remand back this entire issue to the file of the AO/TPO for fresh adjudication as also done in the earlier Assessment years i.e. 2008-09 to 2010-11. Needless to say that the assessee be given opportunity of hearing by following principles of natural justice. Thus, Ground No. 1 to 23 are partly allowed for statistical purpose. As regards to Ground No. 24, the same also needs to be verified and hence is remanded back to the file of the AO. As regards to Ground Nos. 24 to 29 are consequential in nature hence the same are not adjudicated at this juncture. As regards to Revenue's appeal the same is also partly allowed as per the findings given in the assessee's appeal hereinabove."

6. The respondents are stated to have preferred an appeal before this High Court challenging the order dated 20 December 2018 passed by the ITAT. In their appeal, there is a clear admission by the respondents that a certified copy of the ITAT's order was received on 31 January 2019. That appeal came to be dismissed by this Court on 26 July 2019. Admittedly, the **Special Leave Petition**[7] which came to be preferred against the aforesaid order of the High Court met a similar fate with the Supreme Court dismissing the same on 29 October 2020.

7. Pursuant to the directions framed by the ITAT, the TPO passed an order under Section 92CA of the Act on 30 January 2021. Despite

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[7] SLP

the said order having been duly made and pronounced, it is the case of the writ petitioner that Final Orders of Assessment were not framed by the respondents within the time frame as prescribed under Section 153(3) of the Act. The order of assessment ultimately came to be passed on 13 February 2023. It is this order which is impugned in WP(C) 4550/2023.

8. Taking the Court through the provisions made in Section 153(3) of the Act, Mr. Pardiwalla, learned senior counsel submitted that since the order dated 20 December 2018 passed by the ITAT was received by the respondents on 31 January 2019, the nine month window which stands created in terms of Section 153(3) accorded the respondents the right to frame an order of assessment by 31 October 2019. It was submitted additionally that the aforesaid period would stand further extended by virtue of Section 153(4) of the Act, since undisputedly in the facts of the present case a reference had been made to the TPO under Section 92CA. It is in the aforesaid backdrop that Mr. Pardiwalla submitted that by virtue of Section 153(4), the respondents had time up to 31 October 2020 to pass a final order of assessment.

9. In the meanwhile, the **Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020**[8] came to be promulgated consequent to the outbreak of the COVID-19 pandemic. The time limit for compliances in terms of TOLA which was originally prescribed to be 31 March 2021 was extended from time to time and the extension was to lastly operate up to 30 September 2021. According to Mr. Pardiwalla, 30 September 2021 would thus constitute the terminal

[8] TOLA

date by which an assessment could have been framed.

10. However, and as is manifest from the record, that order of assessment ultimately came to be passed only on 13 February 2023 and thus evidently beyond the time prescribed under Section 153 of the Act.

11. When the writ petition [WP(C) 4550/2023] was initially heard by us on 12 April 2023, the solitary submission which appears to have been made at the behest of the respondents was of the period of limitation being liable to be computed as commencing from the date when the SLP was dismissed by the Supreme Court and consequently from 29 October 2020. We had on that occasion prima facie observed that the submission appeared to be wholly untenable since no stay operated in respect of the order of the ITAT dated 20 December 2018 and that the appeal preferred before this Court had come to be dismissed on the first date of hearing itself. The Court also observed that in light of the plain language of Section 153(3) of the Act, the period of limitation is liable to be computed from the date when the order is received by the concerned statutory authority. Undisputedly, and as we had noticed on that occasion, the CIT(Judicial) had received the order of the ITAT on 31 January 2019. The respondents have failed to address any submission which may compel us to doubt the prima facie opinion that came to be recorded by us on that date. The contention thus stands negated accordingly.

12. In the counter affidavit which subsequently came to be filed by the respondents, a plea has been taken that the order of the TPO dated 30 January 2021 was not communicated to the office of the first respondent. That stand is clearly rendered untenable when one views

the averments made in paragraph 5 of the rejoinder affidavit which has been filed before us. The petitioner discloses in the rejoinder that a copy of the order of the TPO had been duly shared with the respondent vide an email dated 22 February 2021. The fact of the TPO having passed an order in terms of Section 92CA was again disclosed in a communication dated 08 March 2021. The petitioner more significantly contends that notwithstanding the above, all notices, orders and communications are duly uploaded on the Income Tax Department's own portal. According to them, the portal itself reflects that the order of the TPO had been duly uploaded. It is in the aforesaid backdrop that Mr. Pardiwalla contends that the stand of the respondents that they did not have knowledge of the order passed by the TPO is misleading.

13. Before us, Mr. Rai, learned counsel representing the respondents, did not dispute or question the averments taken in the rejoinder affidavit. We thus find ourselves unable to either sustain or countenance the claim of the respondents that the order dated 30 January 2021 of the TPO was either not communicated to them or was not in their knowledge. That stand clearly appears to be wholly incorrect and factually untenable.

14. The period prescribed under Section 153(3) of the Act would thus have to necessarily be computed from the date when the order of the ITAT was received by the respondents. Even if the benefits of TOLA were extended to the respondents, undisputedly, the order of assessment was liable to be framed lastly by 30 September 2021. The respondents have thus abjectly failed to pass an order in terms of the mandatory provisions comprised in Section 153 of the Act. The order

of 13 February 2023 is thus liable to be set aside on this score alone.

15. Insofar as the reliefs sought in WP(C) 17376/2022 are concerned, we note that the respondents proceeded to make adjustments of certain refunds pertaining to AYs 2008-09, 2009-10 and 2010-11 against a perceived demand relating to AY 2011-12. The details of those adjustments stand encapsulated in the letter of the petitioner dated 28 June 2022, and the relevant table in this regard is extracted hereinbelow:

"AY	**Date of adjustment of refund**	**Principal amount of refund**	**Interest under Section 244A**	**Total refund**	**Screenshot of adjustment of refunds**	**Paperbook reference**
2008-09	20 May 2022	1,47,48,512	47,21,478	1,94,69,990	Annexure 2	Page 86
2009-10	02 June 2022	92,03,372	13,45,088	1,05,48,460	Annexure 3	Pages 87 to 90
2010-11	02 June 2022	1,00,00,000	17,30,010	1,17,30,010		
	Total	**3,39,51,884**	**77,96,576**	**4,17,48,460"**		

16. As is manifest from the aforesaid Table, the respondents appear to have adjusted refunds payable against a perceived outstanding demand pertaining to AY 2011-12 on 20 May 2022 and 02 June 2022. The aforesaid adjustments have been made in ignorance of the fact that the demand for AY 2011-12, if any, ceased to exist on 20 December 2018 when the original order of assessment came to be set aside and the matter remanded for fresh adjudication by the ITAT. Thus, on 20 May

2022 and 02 June 2022, no demand for AY 2011-12 existed against which a refund could have been validly adjusted.

17. In any case, and in light of what we have found above, a demand for AY 2011-12 could have been created only on or before 30 September 2021. Undisputedly, no valid demand stood raised against the petitioner prior to that date. We thus find ourselves unable to sustain the action of adjustment which is impugned in this writ petition.

18. We accordingly allow both the writ petitions and quash the impugned order dated 13 February 2023. The respondents are hereby directed to re-compute the refund payable to the writ petitioner along with statutory interest which shall run up to the date of remittance in accordance with law. The order of refund shall also bear in consideration our decision having annuled the adjustments that were made with respect to AYs 2008-09, 2009-10 and 2010-11 against a perceived outstanding demand for AY 2011-12. An order of refund be consequently framed and passed within a period of three weeks from today.

19. The writ petitions shall stand disposed of on the aforesaid terms.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

JANUARY 24, 2024/kk