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

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\+ **W.P.(C) 12304/2015 & CM 32604/2015**

TATA TELESERVICES LIMITED ..... Petitioner
Through: Mr. Tarun Gulati, Mr. Sparsh Bhargava, Ms. Rachana Yadav, Mr. Shashi Mathews, Mr. Ankit Sachdeva, Advocates.

versus

CENTRAL BOARD OF DIRECT TAXES & ANR..... Respondents
Through: Mr.Ashok K Manchanda, Senior Standing counsel.

**CORAM:**
**JUSTICE S. MURALIDHAR**
**JUSTICE VIBHU BAKHRU**

**O R D E R**

**% 11.05.2016**

**Dr.S.Muralidhar,J.**:

1. The challenge in this writ petition by Tata Teleservices Ltd. is to an Instruction No. 1 of 2015 dated 13th January 2015 issued by the Central Board of Direct Taxes ('CBDT') (Respondent No.1) and the consequential letter dated 8th September 2015 issued by the Deputy Commissioner of Income Tax ('DCIT') Circle 25(1) ('Respondent No.2') denying refund of the Petitioner under Section 143(1) of the Act for three assessment years (AYs) 2012-13, 2013-14 and 2014-15. The refunds were declined for the reason that the case was pending scrutiny and that in the light of Section 143(ID) of the Income Tax Act, 1961 ('Act') and the Instructions of the CBDT, refund could not be processed for the said AYs.

2. The facts in brief are that the Petitioner is engaged in the business of providing telecom services. It is stated that the Petitioner has over the years accumulated losses in excess of Rs. 31,000 crores. As such in the returns of income filed for the AYs 2012-13 to 2015-16, the Petitioner claimed refund. A tabular depiction of the losses and the corresponding claims for refund for the aforementioned AYs is as under:

| Assessment year | Date of filing return | Losses for the year(Rs.) | Refund Amount (Rs.) |
|---|---|---|---|
| 2012-13 | 27.09.2012 | 4709,13,65,986 | 124,68,14,550 |
| 2013-14 | 28.11.2013 | 4603,27,58,892 | 186,65,37,090 |
| 2014-15 | 25.11.2014 | 4725,77,13,003 | 245,58,74,460 |
| 2015-16 | 26.11.2015 | 3676,14,81,626 | 176,81,67,453 |
| Total | | | 733,73,93,553 |

3. It is pointed out that the refunds arose mainly on account of the tax deducted at source ('TDS') by the payers and deposited with the Government towards an anticipated income tax liability of the Petitioner. It is pointed out that the payers continued to deduct TDS despite the fact that the Petitioner has been incurring losses year after year. It is pointed out that the Petitioner is an eligible undertaking under Section 80IA(2A) of the Act and is eligible for 100 percent deduction of its profits for the first five assessment years commencing any time during the block of 15 years from the year of launch of commercial services and 30% of its profit for next consecutive five years. However, on account of the enormous losses incurred by the Petitioner, it had no occasion to claim the Section 80IA deduction. It is further pointed out that the Petitioner is not expected to have any tax liability even if it is assessed at profits in any of the AYs in question.

4. Section 143(1) of the Act states that every return made under Section 139 of the Act or filed in response to a notice under Section 142 (1) of the Act, would be processed in the following manner:

> "143. (1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:—
>
> (a) the total income or loss shall be computed after making the following adjustments, namely:—
>
> (i) any arithmetical error in the return; or
>
> (ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;
>
> (b) the tax and interest, if any, shall be computed on the basis of the total income computed under clause (a);
>
> (c) the sum payable by, or the amount of refund due to, the assessee shall be determined after adjustment of the tax and interest, if any, computed under clause (b) by any tax deducted at source, any tax collected at source, any advance tax paid, any relief allowable under an agreement under section 90 or section 90A, or any relief allowable under section 91, any rebate allowable under Part A of Chapter VIII, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest;
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> (d) an intimation shall be prepared or generated and sent to the assessee specifying the sum determined to be payable by, or the amount of refund due to, the assessee under clause (c); and
>
> (e) the amount of refund due to the assessee in pursuance of the determination under clause (c) shall be granted to the assessee:
> Provided that an intimation shall also be sent to the assessee in a case where the loss declared in the return by the assessee is adjusted but no tax or interest is payable by, or no refund is due to, him:
>
> **Provided** further that no intimation under this sub-section shall be

sent after the expiry of one year from the end of the financial year in which the return is made."

5. Relevant to the present case is Section 143 (1) (e) which states that the amount of refund due to the Assessee, pursuant to the determination of the tax under sub-clause (c) computed "shall be granted to the Assessee".

6. By the Finance Act, 2012, with effect from 1st July 2012, sub-section (1D) was inserted in Section 143 and it reads as under:

> "(1D) Notwithstanding anything contained in sub-section (1), the processing of a return shall not be necessary, where a notice has been issued to the assessee under sub-section (2)".

7. The Memorandum to the Finance Bill, 2012 gives the following explanation for insertion of the above provision:

> "**Processing of return of income where scrutiny notice issued**
>
> Under the existing provisions every return of income is to be processed under sub-section (1) of Section 143 and refund, if any, due is to be issued to the taxpayer. Some returns of income are also selected for scrutiny which may lead to raising a demand for taxes although refunds may have been issued earlier at the time of processing.
>
> It is therefore proposed to amend the provisions of the income-tax Act to provide that processing of return will not be necessary in a case where notice under sub-section (2) of Section 143 has already been issued for scrutiny of the return.
>
> This amendment will take effect from the 1st day of July, 2012."

8. It is evident that Section 143 (1D) in the manner it is worded gives a discretion to the Assessing Officer ('AO') to decide whether the return of

income has to be processed where a notice has been issued under Section 143 (2) of the Act. It is significant that sub-section (1D) was inserted in Section 143 subsequent to the insertion of sub-section (1A) which provides for centralised processing of returns. Under the Scheme framed by the CBDT in 2011 in terms of Section 143(1A), there is a computerized random selection of returns which might be taken up for scrutiny. Thus the discretion regarding picking up a return for scrutiny is no longer left with the AO. Section 143(1D), however, continues the element of discretion in the AO when it states that the processing of return "shall not be necessary". In other words, it does not expressly state that the return shall not be processed where a notice has been issued to the Assessee under Section 143(2) of the Act.

9. However, despite terming the language of Section 143(1D) to be "unambiguous" the CBDT felt that it required clarification. This led to the CBDT issuing the impugned Instruction dated 13th January 2015 under Section 119 of the Act. The said instruction *inter alia* states that some doubts have been expressed in view of the words "shall not be necessary" used in Section 143(1D) of the Act and that in the light of the explanatory note in the Finance Act, 2012 (which has been referred to hereinbefore) "the legislative intent is to **prevent** the issue of refund after processing as scrutiny proceedings may result in demand for taxes on finalisation of the assessment subsequently" (emphasis supplied). The circular then proceeds to state as under:

> "4. Considering the unambiguous language of the relevant provision and the intention of law as discussed above, the Central Board of

> Direct Taxes, in exercise of the powers conferred on it under section 119 of the Act hereby clarifies that the processing of a return cannot be undertaken after notice has been issued under sub-section (2) of section 143 of the Act. It shall, however, be desirable that scrutiny assessments in such cases are completed expeditiously.
>
> 5. This may be brought to the notice of all concerned for strict compliance."

10. The impugned Instruction therefore interprets the language of Section 143(1D) as 'preventing' the issue of refund once notice is issued under Section 143(2) of the Act. It is as a result of the above impugned instruction and with the notices having been issued to the Petitioner under Section 143(2) of the Act by the Respondent No.2 in relation to the returns filed by it for the AYs in question where it had claimed refund, that the Respondent No. 2 declined to issue the refund by the impugned communication dated 8th September 2015.

11. While directing notice to be issued in the present petition on 23rd December 2015, the Court *inter alia* noted that as far as the AY 2015-16 is concerned no notice under Section 143(2) of the Act had been issued till that date and therefore directed that the returns for the said AYs should be processed "at the earliest". The Court also expected the assessments in relation to the returns for the other AYs, namely 2013-14 to 2014-15, to be expedited.

12. A further detailed order was passed by this Court on 14th March 2016, in which *inter alia* it was noticed that against the order dated 23rd December

2015, the Revenue had filed Special Leave Petition (Civil) No. 6525 of 2016 in which the following order was passed by the Supreme Court on 9th March 2016:

> "We do not find any ground to interfere with the interim order passed by the High Court. The special leave petition is, accordingly, dismissed.
>
> However, we request the High Court to dispose of the writ petition expeditiously, preferably with a period of three months from the date of production of copy of this order before the High Court.
>
> The time stipulated by the High Court for completing the assessments, as directed by the High Court, for the years for which notices under Section 143 (2) of the Income Tax Act, 1961 (in short 'the Act') have already been issued, is extended by a month from today.
>
> Needless to say that in case the time for issuing notice under Section 143 (2) of the Act has not expired; it will be open for the Revenue to decide whether notice should be issued at all.
>
> Pending applications, if any, stand disposed of."

13. Further directions were issued by the Court regarding completion of the assessment for the remaining AYs.

14. Today Mr. Tarun Gulati, learned counsel for the Petitioner, informs the Court that the assessments have been completed for AYs 2012-13, 2013-14 and 2014-15 and the refunds for each of those AYs have also been computed. He points out that there is a slight discrepancy in the actual refund figures but the Petitioner has filed a rectification application under Section 154 of the Act. To the extent that the Petitioner's returns have now been processed and the assessment orders have been passed for the

aforementioned AYs, one of the grievances of the Petitioner in the present writ petition stands redressed.

15. Nevertheless, the Petitioner seeks to pursue with its challenge to the impugned Instruction No.1 of 2015 since it is pointed out that despite the Petitioner incurring substantial losses year after year and representing to the Department to issue a lower withholding certificate under Section 197 of the Act, that request has not been acceded to by the Department. This has compelled the Petitioner to seek refund year after year and those refunds have been unnecessarily delayed. It is submitted that on the strength of the impugned Instruction, notices under Section 143(2) of the Act in respect of the returns filed by the Petitioner were issued as a matter of routine thus, obviating the need for the Department to process its returns. The net result is that the refund would be either denied or delayed and this is hurting the Petitioner since its losses are mounting year after year.

16. Indeed, as already noticed at the time the present petition was filed, a aggregate figure of the refund that the Petitioner was owed for the four AYs i.e. 2012-13 to 2015-16 was to the tune of Rs.733.73 crores. This is a very substantial figure considering the huge losses that the Petitioner has been suffering over the years. Section 119 of the Act, on the strength of which the impugned Instruction has been issued by the CBDT, no doubt enables the CBDT to issue "such orders, instructions and directions" to the income tax authorities "for the proper administration of this Act". However, this power of the CBDT is hedged in by certain limitations. One such limitation is provided in a proviso to Section 119(1) of the Act. The other limitation is

under Section 119(2) of the Act where it is mentioned that the direction or instructions issued by the CBDT should not be "prejudicial to assessees".

17. The idea of vesting the CBDT with the above power is to ensure that there is an ease of administration of the Act and that ambiguities in the practice and procedure may get clarified. At the same time it has to be ensured that such instructions or orders do not add to the difficulties of the tax payers. Circulars, orders and instructions issued by the CBDT under Section 119 of the Act, to the extent they are beneficial to the Assessees are binding on the Department. If they are prejudicial to the tax payer, then they cannot prevail over the statute, which does not envisage such harsher measure.

18. In ***UCO Bank v. Commissioner of Income Tax (1999) 237 ITR 889 (SC),*** the Supreme Court interpreted one such circular issued by the CBDT regarding inclusion of the interest accruing on 'sticky' loans, the recovery of which was doubtful, in the Assessee's taxable income. The Supreme Court clarified the legal position as regards the nature of such circular issued in terms of Section 119(1) of the Act as under:

> "In *Keshavji Ravji and Co. v. Commissioner of Income Tax (1990) 183 ITR 1 (SC)*, a Bench of three judges of this Court has also taken the view that circulars beneficial to the assessee which tone town the rigour of the law and are issued in exercise of the statutory powers under Section 119 are binding on the authorities in the administration of the Act. The benefit of such circulars is admissible to the assessee even though the circulars might have departed from the strict tenor of the statutory provision and mitigated the rigour of the law. This Court, however, clarified that the Board cannot pre-empt a judicial

> interpretation of the scope and ambit of a provision of the Act. Also a circular cannot impose on the tax-payer a burden higher than what the Act itself, on a true interpretation, envisages. The task of interpretation of the laws is the exclusive domain of the courts. However, the Board has the statutory power under Section 119 to tone down the rigour of the law for the benefit of the assessee by issuing circulars to ensure a proper administration of the fiscal statute and such circulars would be binding on the authorities administering the Act."

19. It was reiterated that:

> ".... to mitigate the rigours of the application of a particular provision of the statute in certain situations by applying a beneficial interpretation to the provision in question so as to benefit the assessee and make the application of the fiscal provision, in the present case, in consonance with the concept of income and in particular, notional income as also the treatment of such notional income under accounting practice."

20. The Constitution Bench of the Supreme Court in ***Commissioner of Central Excise, Bolpur, v. Ratan Melting & Wire Industries (2008) 13 SCC 1*** was interpreting the circulars/instructions issued by the Central Board of Excise and Customs under the corresponding provision of the Central Excise Act, 1944. The Court observed as under:

> "7. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the

> statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."

21. It is sought to be explained by Mr. Ashok K. Manchanda, learned Senior Standing counsel for the Revenue, that what has been issued by the CBDT on 13th January 2015 is only an 'instruction' and not a 'circular' and that the impugned instruction was only for the internal guidance of the officers of the Department.

22. The Court finds that it is this very impugned instruction which is being relied upon by the Department to deny refund, where notice has been issued under Section 143(2) of the Act. This is evident from the impugned letter dated 8th September 2015, addressed to the Petitioner. The power of the CBDT to issue such instructions can be traced only to Section 119 of the Act. Therefore, such 'instruction' also has to adhere to the discipline of Section 119 of the Act.

23. The real effect of the instruction is to curtail the discretion of the AO by 'preventing' him from processing the return, where notice has been issued to the Assessee under Section 143(2) of the Act. If the legislative intent was that the return would not be processed at all once a notice is issued under Section 143 (2) of the Act, then the legislature ought to have used express language and not the expression "shall not be necessary". By the device of issuing an instruction in purported exercise of its power under Section 119 of the Act, the CBDT cannot proceed to interpret or instruct the income tax

department to 'prevent' the issue of refund. In the event that a notice is issued to the Assessee under Section 143 (2) of the Act, it will be a matter the discretion of the concerned AO whether he should process the return.

24. Consequently, the Court is of the view that the impugned Instruction No.1 of 2015 dated 13th January 2015 issued by the CBDT is unsustainable in law and it is hereby quashed. It is directed that the said instruction shall not hereafter be relied upon to deny refunds to the Assessees in whose cases notices might have been issued under Section 143(2) of the Act. The question whether such return should be processed will have to be decided by the AO concerned exercising his discretion in terms of Section 143 (1D) of the Act.

25. The petition and the application are disposed of in the above terms.

**S. MURALIDHAR, J**

**VIBHU BAKHRU, J**

**MAY 11, 2016**
**mg**