(2021) 03 DEL CK 0269

Delhi High Court

Case No: Civil Writ Petition No. 3617 Of 2020

GE Capital Mauritius Overseas Investments		APPELLANT
	Vs	
Deputy Commissioner Of Income Tax & Anr.		RESPONDENT

Date of Decision: March 26, 2021

Acts Referred:

- Constitution Of India, 1950 - Article 226, 265
- Income Tax Act, 1961 - Section 141(1), 143(1), 143(1A), 143(1D), 143(1)(d), 143(1)(e), 143(2), 143(3), 241A, 243, 244A, 245, 260A

Hon'ble Judges: Rajiv Sahai Endlaw, J; Asha Menon, J

Bench: Division Bench

Advocate: Harish N. Salve, Anuradha Dutt, Sachit Jolly, Rohit Garg, Siddharth Joshi, Disha Jham, Sunil Agarwal, Tushar GuptaQ

Final Decision: Dismissed

Judgement

Rajiv Sahai Endlaw, J

1. This petition was originally filed, seeking a mandamus, directing the respondents to issue / grant refund due of Rs.249.39 crores, for the assessment

year 2018-19 along with interest under Section 244A of the Income Tax Act, 1961, to the petitioner. It was the case of the petitioner, that (i) the

petitioner, on 31st October, 2018 filed its Income Tax Return (ITR) for the assessment year 2018-19, claiming refund of Rs.226.72 crores, being the

amount of Tax Deducted at Source (TDS) by the payer, from the payments made to the petitioner on account of sale by the petitioner of shares of an

Indian company and which payment was not chargeable to tax in India in terms of Article 13(4) of the Double Taxation Avoidance Agreement

(DTAA) between India and Mauritius; (ii) the ITR of the petitioner was selected for scrutiny assessment and a notice dated 22nd September, 2019,

under Section 143(2) of the Act, was received by the petitioner; (iii) on 25th November, 2019, an intimation under Section 143(1) of the Act was

issued to the petitioner, determining a refund of approximately Rs.249.39 crores to be due to the petitioner along with applicable interest; and, (iv)

however inspite of intimation dated 25th November, 2019 and several reminders of the petitioner, till the date of filing of the petition, refund had not

been received by the petitioner.

2. The petition came up before this Court first on 19th June, 2020 and thereafter before this Bench on 23rd June, 2020, when it was the contention of

the senior counsel for the petitioner that no order under Section 241A of the Act, for retention of the aforesaid amount, had been passed. Per contra,

the counsel for the respondents, appearing on advance notice, stated that it was mentioned in the intimation dated 25th November, 2019 itself that

â€œThe refund determined u/s 143(1) in this intimation, if any, along with interest u/s 244A and subject to adjustment of arrear demand, if

any, u/s 245 will be released as per the provisions of Section 241A of the Income Tax Act, 1961 as determined by the Assessing Officerâ€

and time was sought for filing counter affidavit.

3. On the next date of hearing i.e. 27th July, 2020, the senior counsel for the petitioner stated that the petitioner, on 15th July, 2020 had been served

with an order under Section 241A of the Income Tax Act and he had advised for amendment of the writ petition. Per contra, the counsel for the

respondents stated that though counter affidavit had already been filed but an additional counter affidavit would be required to be filed to the amended

petition.

4. The pleadings were accordingly completed. The petitioner, in the amended petition, besides the relief of mandamus directing refund with interest,

has also impugned the order dated 15th July, 2020 under Section 241A of the Act.

5. Considering the nature of the controversy, it is not deemed expedient to detail the pleadings at this stage. We may however reproduce hereinbelow

the relevant part of the order dated 15th July, 2020 as under:

â€œ1. I have gone through the proposal of the DCIT Circle 1 (3)(1) regarding withholding of refund of M/s GE Capital Mauritius Overseas

Investments (PAN- AADCG3823H) for AY 2018-19 vide her application dated 26.6.2020.

2. The assesse is a company registered in Mauritius since 2007. However it never filed its return of income in India before the present

return which has resulted in refund of Rs 226,72,06,7201-u/s 143(1) of the I.T. Act 1961 subject to withholding of refund under section 241

A.

3. The assesse company has sold its share holding in SBI Cards and Payment Services Private Limited, a company incorporated in India.

This resulted in Long Term Capital gains of Rs 2036.50 crore/-. The assesse has claimed benefit of Indo Mauritian DTAA and has asserted

that the Capital gains arising out of sale of shares in Indian Companies were not taxable in India. The case of the assesse for the said

assessment year was selected for scrutiny and notice u/s 143(2) was issued on 22/09/2019 i.e. before the order u/s 143(1) which was passed

in Dec 2019.

4. The assesse company is a GBL1 company registered under the laws of Mauritius. It has no assets or Bank account in India. From the

return of income and financial accounts submitted with the return of income it appears that investment in these companies i.e. SBI Cards

and Payment Services Private Limited, were the only investment made by the assesse company.

5. Since the Company never filed return of income earlier, the A.O. did not have much information about the assesse company. Before

issuing the refund of Rs 226 Crore it was the duty of the AO to ascertain the genuineness of the assesseeâ€™s claim that capital gains was

not taxable in India. In view of this the AO sent a mail to the assesse seeking certain information like source of investment in SBI Cards and

Payment Services Private Limited, utilization of the sale proceeds and copies of the Copies of Balance sheet & P & L A/c for AY 2015-

16,2016-17,2017-18 & 2018-19. From the AO's proposal it appears that the asessee did not submit these details but filed a writ petition in

Delhi High Court seeking direction for issuance of the refund which is pending. Subsequently, assessee has furnished AFS for the period

ending December 2017 and December 2018. On crucial question of source of funds for acquiring the shares and the utilization of sale

proceeds of shares, the assessee has questioned the purpose of AO in requiring this information, and has not responded to this query.

6. The AO has mentioned that the assesse is a company registered in Mauritius holding GBL1 license. A GBL1 company is regulated by

Financial Services Commission (FSC) of Mauritius. It is allowed dealing with residents in a range of 10-15% with prior authorization of

FSC for activities connected with business outside Mauritius. Thus it is actually meant for business outside Mauritius. It's a travesty that a

person claiming resident of Mauritius can't do business in the resident jurisdiction!. Some prominent features of a GBL1 company are

â€¢ it must have at least two directors, resident in Mauritius to avail benefit of treaty network (Corporate Directors are disallowed);

â€¢ Effective tax rate for such a company in Mauritius is 3%;

â€¢ Interest & royalty payments are tax exempt;

â€¢ there is no capital gains tax;

â€¢ annual license fee is payable to RoC & FSC.

â€¢ It must be administered by a management company (MC). Management Companies (MCs) are service providers which act as

intermediaries between their clients and the FSC. One of the functions of MCs is to provide directors, secretary and nominee shareholders.

How much independence can such a director exercise is a moot question?

7. It is therefore clear that a GBL1 company cannot do any business in Mauritius, hence purpose of formation of such a company becomes

very important. As per the AO's report the parent company of the assesse company which is holding 100% shares of the assesse, is a

company registered in U.K namely GE Capital International Holdings Limited.

8. If GE Capital International Holdings Limited had directly made investment in shares of SBI Cards and Payment Services Private Limited

and would have sold them, the resulting capital gains would have become taxable in India as per Indo U.K. DTAA.

9. As mentioned above as per the AO's report investment in SBI Cards and Payment Services Private Limited was the only investment made

by the assesse company. From the P&L account it appears the assessee had no other expenditure other than routine administrative

expenditure. Sources of investment in SBI Cards and Payment Services Private Limited have not been provided by the assesse nor the

assesse explained utilization of sale proceeds.

10. From the Financial statements of the assesse it appears the assesse has spent US$ 40,000,000/- out of sale proceeds of shares on

buyback of it's shares, and further paid dividend of US Dollar 305,000,000/- which means the money must have gone to the parent

company i.e. GE Capital International Holdings Limited U.K. Further the proposal of AO states that the assessee company has paid out

entire cash inflow on sale of shares immediately after sale. It no longer holds any asset anywhere in the world including India.

11. From these fact prima facie it appears that the parent company, ie GE Capital International Holdings Limited floated the assesse

company in Mauritius with the sole purpose of making investment in Indian Companies namely SBI Cards and Payment Services Private

Limited and with an objective not to pay any tax in India on Capital Gains which would have arisen on sale of investment in Indian

Companies. Thus it appears that the assesse company has been used as a conduit by the parent Company i.e. GE Capital International

Holdings Limited U.K.

12. I have carefully examined AO's proposal for withholding refund, in particular, paragraphs 6, 7, 8, 9 and 10. I have myself reviewed the

AFS of assessee company for period ending December 2017 and December 2018.

13. I am therefore convinced with the reasons given by the AO in her proposal dated 26/6/2020 that after completion of scrutiny assessment

proceedings, income of the assesse i.e. Rs2036,49,93,621/- is likely to be chargeable to tax in India and the tax demand on this income

would be approximately Rs226.72 crore. Granting of refund at this stage, when scrutiny assessment proceedings are yet to be completed, is

likely to adversely affect the revenue.

14. In view of the foregoing, this proposal of the AO to with hold the refund uls 241A till completion of the assessment u/s143(3) for the said

assessment year is, hereby, approved.â€

6. The claim of petitioner being for refund, the statutory scheme applicable thereto may be noticed at this stage.

7. The ITR for the assessment year 2018-19 filed on 31st October, 2018 by the petitioner claiming refund of TDS, was to be processed in the manner

provided in Section 143(1) of the Act. Section 143(1A) of the Act empowers the Central Board of Direct Taxes (CBDT) to make a scheme for

centralised processing of ITRs, with a view to expeditiously determine tax payable by or refund due to the assessee and the ITR of petitioner was to

be processed as per said scheme. Section 143(1)(d) of the Act provides for an intimation to be generated, under the centralised processing scheme,

and sent to the assessee, specifying the sum determined on such processing, to be payable by or the amount of refund due to, the assessee. The

second proviso to Section 143(1) provides that no intimation under Section 143(1)(d) shall be sent after expiry of the year from the end of the financial

year in which the ITR is made. Section 143(1)(e) of the Act provides for refund due to the assessee to be granted to the assessee. Section 143(2) of

the Act empowers the Assessing Officer (AO) to, if considers it necessary to ensure that assessee has not understated the income or not underpaid

the tax, serve a notice on assessee requiring him to attend office or produce documents. This is what is generally known as notice of scrutiny

assessment. The Proviso to Section 143(2) prohibits issuance of notice under Section 143(2) after the expiry of six months from end of financial year

in which ITR is furnished. As per Section 143(1D) of the Act, on issuance of notice under Section 143(2), the processing underway of ITR under

Section 143(1) shall not be necessary. However vide Proviso to Section 143 (1D), Section 143(1D) does not apply to any ITR furnished from

assessment year commencing on or after 1st April, 2017; thus, Not with standing issuance of notice under Section 143(2), processing of ITR under

Section 143(1) continues i.e. intimation under Section 143(1)(d) has to be generated and refund so determined to be granted. However Section 241A,

inserted with effect from 1st April, 2017 i.e. at the same time when Proviso aforesaid to Section 143(1D) was inserted, provides as under:

â€œ241A Withholding of refund in certain cases. -- For every assessment year commencing on or after the 1st day of April, 2017, where

refund of any amount becomes due to the assessee under the provisions of sub-section(1) of section 143 and the Assessing Officer is of the

opinion, having regard to the fact that a notice has been issued under sub-section (2) of section 143 in respect of such return, that the grant

of the refund is likely to adversely affect the revenue, he may, for reasons to be recorded in writing and with the previous approval of the

Principal Commissioner or Commissioner, as the case may be, withhold the refund up to the date on which the assessment is made.â€

Thus, unless order under Section 241A is passed, if an ITR being processed under Section 141(1) of the Act is of refund, as in the present case, and

the processing on the basis of figures in ITR determines the refund claimed to be correct, intimation of said refund will be generated and refund

paid/granted notwithstanding notice under Section 143(2) of scrutiny assessment having been issued and said assessment being underway.

8. This Court, in Vodafone Mobile Services Ltd. Vs. Asst. Commissioner of Income Tax [2020] 421 ITR 193 (Delhi) held, that the exercise of refund

must be undertaken promptly, keeping in mind the time limit under second proviso to Section 143(1) for sending intimation under Section 143(1)(d) i.e.

before expiry of one year from the end of the financial year in which the ITR is made.

9. We now apply the aforesaid statutory scheme to the facts of present case. The ITR for assessment year 2018-19 was filed on 31st October, 2018.

The time limit for sending intimation under Section 143(1)(d) of the Act thus was, before expiry of one year from end of financial year in which ITR

was filed. The ITR filed on 31st October, 2018 was in the financial year 1st April, 2018 to 31st March, 2019 and one year therefrom was to expire on

31st March, 2020. The intimation under Section 143(1)(d) of the Act dated 25th November, 2019 was thus within time. Similarly, notice under Section

143(2) of the Act issued on 22nd September, 2019 was also before expiry of six months from end of financial year in which ITR was filed i.e. 1st

April, 2018 to 31st March, 2019 i.e. 30th September, 2019. Section 241A however does not prescribe the time limit within which order thereunder is to

be made. The question which thus arises is, whether the order under Section 241A of the Act issued on 15th July, 2020, was within time, inasmuch as

if it is beyond time, direction for refund will have to be issued and need to go into challenge to validity thereof will not arise.

10. Vodafone Mobile Services Ltd. supra, though does not expressly say so, but from a reading thereof it follows that since intimation under Section

143(1)(d) of refund is to be generated on or before expiry of one year from end of financial year in which ITR is made, the order under Section 241A

also has to be made within the same time. We may add that though the second proviso to Section 143(1) only lays down time limit for intimation and

not for refund but since refund is to be made promptly, the grant of refund cannot be beyond that. Axiomatically it follows that order under Section

241A of withholding refund also has to be before the last date for refund.

11. In the facts of the present case, the order under Section 241A thus had to be before 31st March, 2020 and the order dated 15th July, 2020 is

beyond that date.

12. The counsels were heard on 23rd September, 2020, 9th October, 2020 and 4th December, 2020, when orders were reserved. The contentions of

the counsels are on two aspects. Firstly, on the timing of the order under Section 241A of the Act and secondly qua the reasons stated in the order

under Section 241A aforesaid, with:

A. the senior counsel for the petitioner contending, that (i) as per Instruction No.7/2002 dated 1st August, 2002 of the CBDT, the refunds determined,

in which administrative approval is necessary before issue of refund, should be issued within 30 days from the date of determination of refunds and all

ITRs in which refunds are payable to the assessees are required to be processed first; (ii) that the Citizens Charter, 2014 of the Income Tax

Department itself provides that in case of electronically filed ITRs, refund is to be made within six months from the end of the month in which the ITR

is received; thus with respect to the ITR submitted by the petitioner on 31st October, 2018, the refund should have been made latest by 30th April,

2019; (iii) Supreme Court in Vodafone Idea Ltd. v. Assistant Commissioner of Income Tax 2020 SCC OnLine SC 418 has also highlighted the

changes made in the Act to address the grievance of delay in issuance of refund and held that the exercise of power under Section 241A has to be

prior to or simultaneous with the intimation under Section 143(1) and which in the present case is of 25th November, 2019; (iv) the Act of the

respondents of withholding tax is violative of Article 265 of the Constitution of India; (v) the petitioner has a statutory right to refund; (vi) though there

is no time prescribed for issuance of an order under Section 241A of the Act but it has to be within reasonable time and which reasonable time has to

be in the context of the facts of each case; (vii) Section 243 of the Act provides for interest to be paid after three months in case of delay in granting

refund to the assessee and which also indicates that the refund has to be made within three months; and, (viii) the issuance of an order under Section

241A of the Act, after illegally withholding the refund, is mala fide;

B. the counsel for the respondents contending, that (i) under Section 241A, the jurisdiction to decide whether refund is to be withheld or not is of the

AO; (ii) Section 241A of the Act does not prescribe any time limit within which order thereunder is to be passed and rather permits withholding of

refund till the scrutiny assessment is complete; (iii) Section 243 would have no application in the said case; (iv) that paragraphs 21 and 22 of Vodafone

Idea Ltd. Supra support the respondents instead of the petitioner; (v) the time available for issuing the intimation, as issued on 25th November, 2019,

was till 31st March, 2020; (vi) the issuance of an order under Section 241A of the Act, so long as issued before the outer limit provided in the second

proviso to Section 143(1) of the Act, cannot be challenged on the ground of delay; (vii) because of the national lockdown on 22nd March, 2020,

Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31st March, 2020 extending the time limits, wherever prescribed

under the Act, till 30th June, 2020 and thereafter till 31st December, 2020 and yet thereafter till 31st March, 2021 was promulgated; (viii) the

petitioner, prior to the ITR for the assessment year 2018-19, had not filed any ITR in India; no ITR was filed even while acquiring shares in the Indian

company; that there was/is thus nothing available with the respondents to know the state of affairs of the petitioner and the respondents are in the

dark and though asked the petitioner on 16th June, 2019 for annual financial statements of last four years, to verify the source of funds for acquisition

of shares and the application of funds after receipt of sale proceeds, for the purposes of assessment, but complete particulars have not been provided;

(ix) though no time limit is prescribed for issuing an order under Section 241A of the Act but Supreme Court in Vodafone Idea Ltd. supra has held that

the last date is the date provided in the second proviso to Section 143(1) of the Act; (x) under the law, the refund can be withheld till 31st March,

2021; (xi) as per the balance sheet of the petitioner, the petitioner has no assets whatsoever and the TDS of which refund is sought is the only asset;

thus in the event of refund being made by the department, the department, if on assessment finds tax to be due, would have no means to recover the

same; (xii) Union of India v. Azadi Bachao Andolan (2004) 10 SCC 1 and Vodafone International Holdings BV v. Union of India (2012) 6 SCC 613

are subject to a caveat that, if it were to be found that the entity in the treaty country is just an agent of a parent company in another country, then the

asset will be treated as that of the parent company and the treaty with the country in which the parent company is situated would have application and

not the treaty with the country in which the agent company is located; (xiii) in the present case, the parent company of the petitioner is in U.K. and the

ultimate holding company is in U.S.A.; (xiv) that neither does the DTAA of India with U.K. nor does the DTAA of India with U.S.A. provide for

exemption from long-term capital gains accrued in India; (xv) the order under Section 241A of the Act does not suffer from any jurisdictional error;

(xvi) the core issue to be determined in the present case is whether the petitioner is the actual owner of the shares; (xvii) the same question as arises

herein arose before the High Court of Bombay in Aditya Birla Nuvo Ltd. Vs. Deputy Director of Income Tax (International Taxation) [2012] 342 ITR

308 (DB) as well as before the Authority for Advance Rulings in the matter of In RE: â€œABâ€ Mauritius (2018) 402 ITR 311 and both lay down the

real test for determining whether the entity in the treaty country could be treated as the owner; (xviii) during the assessment proceedings, it will be

determined whether the petitioner is merely a puppet of the holding company and if it is found so, the petitioner would not be entitled to the benefit of

the India-Mauritius DTAA; (xix) the petitioner has till date not provided all the documents in spite of asking; (xx) disputed questions of fact cannot be

adjudicated in a proceeding under Article 226 of the Constitution of India and the remedy under the subject statute, i.e. the Income Tax Act should be

permitted to take course; (xxi) the AO is a Tribunal of exclusive jurisdiction and cannot be prevented from enquiry; reliance is placed on Union of

India v. Tata Engineering and Locomotive Co. Ltd. (1997) 8 SCC 730; (xxii) the refund sought by the petitioner by way of this petition is inextricably

linked to the assessment proceedings underway under Section 143(2) of the Act and no refund can be ordered till conclusion of the proceedings; (xxiii)

the AO seized of the matter will consider all the arguments as raised by the petitioner here; and, (xxiv) the respondents did not even know of the sale

and learnt of it only on ITR being filed by the petitioner.

C. the senior counsel for the petitioner, in rejoinder arguing, that (i) Section 241A of the Act requires reasons to be recorded in writing; (ii) if the

reasons are found to be untenable, the order under Section 241A of the Act can be set aside; (iii) the contention of the counsel for the respondents

that the petitioner is not submitting the requisite information is fallacious; the AO can access all the information on the website; (iv) the petitioner has a

Residency Certificate of Mauritius; (v) according to the laws of Mauritius, an overseas business corporation can be established and used as a vehicle

for investments with shares parked with the said vehicle; (vi) the U.S. based companies have set up such overseas business corporations for

investments in India and once the laws of Mauritius permit such overseas business corporations to be set up, they would be entitled to the benefits of

the India-Mauritius DTAA; (vii) the Income Tax Department also has issued circulars to the effect that they will not go behind the Tax Residency

Certificate; (viii) thus even if the real owner is not the Mauritian entity but an entity situated in some other country, it is not open to the respondents to

say that the India-U.S. DTAA or the India-U.K. DTAA would apply; (ix) such circulars were challenged in Azadi Bachao Andolan supra and this

Court allowed the petition and stuck down the circulars but Supreme Court set aside the judgment of this Court and upheld the circulars; (x) the

Central Government also filed an affidavit in the said case supporting the India-Mauritius DTAA; (xi) the reasons given in the order under Section

241A of the Act are in the teeth of what has been held by the Supreme Court in Azadi Bachao Andolan supra and the order under Section 241A is

liable to be quashed on this ground; (xii) the subject shares were held in the balance sheet of the petitioner since the year 2009 and dividend received

with respect thereto was being taxed in the hands of the petitioner; (xiii) the shares held by the petitioner were also recorded in the name of the

petitioner in the records of State Bank of India, which was the other JV partner of the company in which the shares were held, as well as in the

records of Registrar of Companies; (xiv) the same reasons which did not find favour in Azadi Bachao Andolan supra have been made the reasons in

the impugned notice under Section 241A of the Act and form the subject matter of arguments of the counsel for the respondents; (xv) Supreme Court,

in Azadi Bachao Andolan supra held that the said circulars are binding; (xvi) the said circulars apply the test of residency and not of beneficial

ownership; (xvii) the India-Mauritius DTAA has been amended with effect from 19th July, 2016 to bring in the test of effective management but such

amendment is prospective and would not apply to the subject sale of shares, accrual of capital gains wherefrom is the subject matter of issue; (xviii)

Supreme Court in Azadi Bachao Andolan supra rejected the motivation theory; (xix) as per Azadi Bachao Andolan supra, merely because the sale

proceeds are transferred to another country, would not make the Mauritian entity not the holding entity of the shares; (xx) the tax payer is entitled to

arrange its affairs in a manner most beneficial to it; (xxi) the petitioner never showed itself to be carrying on any business in Mauritius and has openly

claimed itself to be an overseas business corporation; (xxii) Azadi Bachao Andolan supra was specifically in issue in Vodafone International Holdings

BV supra; (xxiii) in Vodafone India Ltd. supra also there was a tier of several companies; (xxiv) the entire attempt of the department is to block the

refund admittedly due to the petitioner, by raising a bogey of petitioner having a huge tax liability; (xxv) the respondents admit that the petitioner is

incorporated in Mauritius but say that it is not genuinely registered; (xxvi) according to the laws of Mauritius, overseas business corporation is

prohibited from doing business in Mauritius, as held in Azadi Bachao Andolan supra also; (xxvii) Azadi Bachao Andolan supra also holds treaty

shopping to be legal; (xxviii) India entered into the DTAA on the aforesaid terms with Mauritius, with full knowledge and in view of the relations with

Mauritius and acting on the said treaty, Mauritius has allowed overseas business corporations which have made investments in India and the

respondents cannot be now permitted to object; (xxix) the Residency Certificate produced by the petitioner from Mauritius is enough for the petitioner

to avail all the benefits of the India-Mauritius DTAA; (xxx) a subsidiary and parent company are different tax entities; (xxxi) it is not as if the

petitioner was holding the shares since just prior to the sale; the petitioner was holding itself as due as the owner of the shares openly to the

knowledge of all; and (xxxii) since the petitioner is unable to carry on any business in Mauritius as per the laws of Mauritius, it had no need of funds in

Mauritius and accordingly transmitted the same to its parent company.

D. the counsel for the respondents in his sur-rejoinder contending, that (i) the arguments of the petitioner go beyond the scope of the writ petition; (ii)

the petitioner cannot take any benefit of Vodafone India Ltd. supra inasmuch as in that case the writ petition was not against a show cause notice; (iii)

a writ petition against a notice is maintainable only when the notice is without jurisdiction; here the petitioner is not challenging the jurisdiction; (iv) the

last date for adjudication is 31st March, 2021 and if the department finds all in order, it may drop the proceedings; and, (v) this Court is not sitting in

appeal against the authority issuing the notice under Section 241A of the Act.

E. the senior counsel for the petitioner in sur-sur-rejoinder contending that the counsel for the respondents has not furnished any explanation

whatsoever for the delay in refund and in issuing notice under Section 241A of the Act. 13. We have considered the rival contentions and are of the

view:

I. The time limit, as interpreted by us above, for passing Order under Section 241A of the Act; expiring on 31st March, 2020, was between 20th

March, 2020 and 29th June, 2020 and stood extended vide the Taxation & Other Laws (Relaxation of Certain Provisions) Ordinance supra and

notification issued thereunder and thus it cannot be said that owing the said order being not issued before 31st March, 2020, any right accrued to the

petitioner for receiving refund.

II. The real question agitated and to be decided is, whether the order under Section 241A of the Act is liable to be quashed.

III. The challenge by the petitioner to the said order is not premised on the ground of, the order making authority not having jurisdiction/authority to

issue such order or on the ground of any other jurisdictional infirmity in the said order or on the ground of grant of such refund not likely to adversely

affect the revenue. It is not in dispute that the petitioner, a foreign entity, has no other asset whatsoever from which the tax liability, if any ultimately

found due, can be recovered. The petitioner impugns the order on the ground, that the question of grant of refund likely to adversely affect the

Â revenue does not arise because the petitioner has no tax liability and no tax is recoverable from the petitioner.

IV. We have wondered, whether in a challenge to an order under Section 241A of the Act, it is open to the writ court to go into the question whether

there is likelihood of any tax being found due, inasmuch as the said determination is a matter of assessment proceedings under Section 143(2) of the

Act. The language of Section 241A also empowers AO to pass order thereunder, â€œhaving regard to the fact that a notice has been issued under

sub-Section (2) of Section 143 in respect of such returnâ€. To hold, that in a challenge to an order under Section 241A of the Act, the court, in

exercise of writ jurisdiction, would determine the tax liability, would tantamount to this Court, in writ jurisdiction, entertaining a challenge to the

assessment underway.

V. In our view, in the garb of a challenge to an order under Section 241A of the Act, a challenge to assessment underway cannot ordinarily be

adjudicated. The scrutiny thereunder has to be confined to, whether grant of refund is likely to adversely effect the revenue i.e. whether there is no

basis whatsoever for the opinion formed that if refund is granted today, tax if any found due on completion tomorrow of assessment underway of the

ITR claiming refund, will not be recoverable. Of course, in a gross case, where it is found that though a notice under Section 143(2) has been issued

but there is nothing to controvert the ITR, the Court would be entitled to quash the Section 241A order. However, in the facts of the present case, not

only have detailed reasons, as set out above, been given in the Section 241A order but otherwise also lengthy arguments have been addressed and we

are of the view that this case does not fall in the said category.

VI. We must however admit that the argument of the senior counsel for the petitioner that the reasons given by the AO and the Principal

Commissioner in the order under Section 241A are in the teeth of Azadi Bachao Andolan supra and Vodafone India Ltd. supra, is attractive and

temptS us, to examine further and if indeed find so, nip the proceedings in the bud, instead of going through the rigmarole of assessment, appeals etc.

However, what is beyond our jurisdiction is beyond our jurisdiction and howsoever well intended the said thought may be, cannot be allowed to have a

free run.

VII. For the writ Court to quash the order under Section 241A of the Act on the ground that no tax is due and thus question of refund likely to

adversely affect the revenue does not arise, this Court has to conclusively hold that the petitioner has no tax liability in India. Once it is so held, there

will be nothing left to be determined in the assessment underway pursuant to notice under Section 143(2) of the Act.

VIII. The AO and the Principal Commissioner, in exercise of powers under Section 241A, are required to take a prima facie view of the outcome of

the assessment pursuant to notice under Section 143(2). They are also the authorities vested with the power of assessment. The authority vested with

the power of final determination is the best authority to take a prima facie view. Moreover, the statute provides statutory remedies in the form of

appeals, against the final determination by such authority. In such statutory scheme, under Section 260A, appeal lies to the High Court against orders

of the Income Tax Appellate Tribunal. A determination of tax liability in a challenge to an order under Section 241A would set at naught the entire

statutory scheme of assessment and appeals, ultimately to this Court, opening the doors to every assessee to whom a notice under Section 143(2) of

the Act is issued, to approach this Court contending that the ITR filed and being processed under Section 143(1) of the Act admits / permits of no

scrutiny and should be accepted. This Court would then be appropriating to itself the entire statutory mechanism of assessment, First Appeals and

Appeals to Income Tax Appellate Tribunal and thereafter to this Court.

IX. Section 241A of the Act, though in the nature of attachment before judgment, but owing to the determination of tax liability being not in the domain

of this Court, save under Section 260A, but in the domain of the statutory scheme under the Income Tax Act, this Court in writ jurisdiction, while

entertaining a challenge to an order under Section 241A of the Act, will ordinarily not enter into the correctness of reasons given for holding that the

assessee may be ultimately found liable for tax. The Courts, when in exercise of powers of attachment before judgment, go into the question of prima

facie merits of the claim of the party seeking attachment before judgment, are empowered to do so because the ultimate decision in the said respect

also rests in the Court. However the Court does not have jurisdiction qua the determination of tax and which jurisdiction is exercised by this Court only

in exercise of powers under Section 260A of the Act, on a substantial question of law arising and not otherwise. When this Court has not been

empowered to assess tax liability in the first instance, it would ordinarily not form a prima facie view even, of what it is not finally empowered to do.

X. Rather, the AO and Principal Commissioner also, in exercise of powers under Section 241A, are concerned largely with the question of grant of

refund likely to adversely affect revenue i.e that the tax, if ultimately found due, being not recoverable; though the AO and Principal Commissioner

have in the impugned order given detailed reasons, but in our view were not required to, as the same is likely to prejudice the assessment underway.

We thus clarify that the same will have no bearing in the final assessment.

13. The petition is accordingly dismissed.