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

% Date of Decision: **8th December, 2011**

\+ W.P.(C) 6915/2011

M/S GENPACT INDIA ..... Petitioner
Through: Mr. S. Ganesh, Sr. Adv. with
Ms. Anuradha Dutt, Ms. Ekta Kapil,
Mr. Pawan Sharma, Mr. Vinayak
Srivastava, Ms. Roohina Dua, Advs.

versus

ASST. COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Sanjeev Sabharwal, Adv.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, ACTING CHIEF JUSTICE:

The factual matrix of this writ petition need no elaborate narration as the issue involved is in a narrow compass. Without going into the details of the assessment proceedings in respect of assessment year 2003-04, suffice it to state that the assessing officer had passed the assessment order determining the income after making certain additions. In the process, deduction to the petitioner was also granted under Section 10A of the Income Tax Act, 1961 (hereinafter referred to as the Act). It was on the

basis that the petitioner company is engaged in the business of rendering IT enabled services and it had established undertakings under Software Technology Park Scheme (STPS) in various areas notified under the said scheme to carry out IT enabled services and was accordingly held eligible for the deduction under Section 10A of the Act. However, this assessment was re-opened by issuing notice under Section 148 of the Act on the ground that the computation of aforesaid deduction was wrongly made inasmuch as computation of deduction under Section 10A of the Act was to be done by reducing telecommunication expenses incurred in foreign currency from export turnover. The petitioner challenged the validity and legality of this notice initiating re-assessment proceedings which was not accepted by the assessing officer who re-calculated the deduction by reducing telecommunication expenses incurred in foreign currency from export turnover. As a result, the assessing officer also issued notice of demand directing the petitioner to pay a sum of Rs.17,46,25,334/- (comprising of tax amounting to Rs.8,97,81,662/- and an interest of Rs.8,48,43,672/-). The petitioner challenged this order of the AO by preferring appeal before the CIT(A). Application for stay was also preferred. While the aforesaid stay application as well as appeal before the CIT(A) against the re-assessment order was pending, the return of the assessee for the assessment year 2010-2011 was processed under Section 143(1) of the Act. On passing assessment order under Section 143(1) of the Act, substantial amount of tax became refundable to the petitioner. However, while doing so, the Assessing Officer made the adjustment of Rs.17,98,64,094/- payable for the assessment year 2003-04 against the

amount of refund due to the petitioner for the assessment year 2010-2011. The Assessing Officer also adjusted demand of Rs.6,56,14,927/- pertaining to the assessment year 2007-08, with which we are not concerned as the petitioner has accepted and not pressed challenge to the same. In nutshell, in respect of assessment year 2003-04, a demand of Rs.17.98 crores was raised on the petitioner only because the Assessing Officer declined to follow the ITAT order in the petitioner's own case for assessment year 2004-05 with respect to the computation of benefit under Section 10A of the Act.

2. The writ petition was filed on the ground that the aforesaid amount of Rs.17,98,64,094/- for the assessment year 2003-04 could not be adjusted against refund of assessment year 2010-2011. It was illegal as this was done without any notice to the petitioner and affording any opportunity of hearing though it is mandatory requirement under Section 245 of the Act.

3. It is not in dispute that no such notice under Section 245 of the Act was issued. It was also conceded by learned counsel for the respondent at the time of hearing that the procedure prescribed under Section 245 of the Act, namely, advance intimation and opportunity of hearing, is mandatory. It, therefore, clearly follows that the impugned adjustment was made in violation of the provisions of Section 245 of the Act and this adjustment is liable to be quashed on this ground itself.

4. In normal course, in such an eventuality, matter would have been remitted back to the assessing officer to pass fresh orders after following the procedure contained in Section 245 of the Act. However, certain

developments have taken place during the pendency of the writ petition which clearly suggest that no such course is even needed now and the petitioner would be entitled to the refund of the aforesaid amount. We may mention that same view was taken by the revenue while making computation under Section 10A of the Act, namely, computation was done by reducing telecommunication expenses incurred in foreign currency from export turnover in respect of assessment year 2004-05 as well. This decision was set aside by the Tribunal and against the order of the Tribunal, revenue had preferred ITA No.1076/2011. That appeal has been dismissed by this Court vide orders dated 16.11.2011 accepting the contention of the petitioner that the export turnover as defined in Section 10A of the Act specifically excludes telecommunication charges and that it is a component of total turnover, consequently when the telecommunication charges have been specifically excluded from export turnover and it being a component of total turnover, it stands to reason that telecommunication charges have also to be excluded from total turnover. While holding this view, this Court concurred with the decision rendered by Bombay High Court in ***CIT v. Gem Plus Jewellery India Ltd.,*** *[2011] 330 ITR 175 (Bom)* and that of Karnataka High Court in ***CIT v. Tata Elxsi Ltd.***, *ITA No.70/2009 decided on 30.8.2011*.

5. The position which emerges is that the said adjustment/recovery was of an amount of demand relating to an issue which was decided in favour of petitioner by the ITAT order and also the judgment of this court in petitioner's own case for the assessment year 2004-05. Such a recovery of demand relating to an issue covered by the judgment in favour of the

petitioner is directly contrary to CBDT Circular No.1914 of 1993 which provides that a stay of demand could be granted in the following situations:

> "a. if the demand in dispute relates to issues that have been decided in assessee's favour by an appellate authority or court earlier; or
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> b. if the demand in dispute has arisen because the Assessing Officer had adopted an interpretation of law in respect of which there exist conflicting decisions of one or more High Courts (not of the High Court under whose jurisdiction the Assessing Officer is working); or
>
> c. if the High Court having jurisdiction has adopted a contrary interpretation but the Department has not accepted that judgment."

Such a recovery is also contrary to the judgments of the Supreme Court in the case of ***Gopal Sugar v. ITO***, *40 ITR 618* and ***Union of India v. Kamalakshi***, *AIR 1992 SC 711*.

5. As per the aforesaid position in law, the demand made by the assessing officer on re-assessment in respect of assessment year 2003-04 itself becomes invalid and, therefore, no question of adjustment thereof arises. It is for this reason that we have observed that no purpose would be served in remitting the case back to the assessing officer.

6. We, thus, allow this writ petition and direct the assessing officer to release the aforesaid amount to the petitioner within a period of four weeks from today in case any outstandings are due and payable by the

petitioner and the revenue has right to adjust this amount against such other dues, if payable. In that eventuality, it would be open to the assessing officer to issue notice under Section 245 of the Act and proceed with the matter.

ACTING CHIEF JUSTICE

RAJIV SAHAI ENDLAW, J

DECEMBER 08, 2011
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