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

Date of Decision: 18.02.2020

\+ **W.P.(C) 10373/2019**

ERICSSON INDIA PRIVATE LIMITED ..... Petitioner
Through: Mr.Vishal Kalra and Mr.S.S.Tomar, Advocates.

versus

ADDITIONAL COMMISSIONER OF INCOME TAX, SPECIAL RANGE-3, NEW DELHI & ANR. ..... Respondents
Through: Mr.Ruchir Bhatia, Senior Standing Counsel with Ms.Madhura M.N. and Mr.Achal Dubey, Advocates.

\+ **W.P.(C) 10374/2019**

ERICSSON INDIA PRIVATE LIMITED ..... Petitioner
Through: Mr.Vishal Kalra and Mr.S.S.Tomar, Advocates.

versus

ADDITIONAL COMMISSIONER OF INCOME TAX, SPECIAL RANGE-3, NEW DELHI & ANR. ..... Respondents
Through: Mr.Ruchir Bhatia, Senior Standing Counsel with Ms.Madhura M.N. and Mr.Achal Dubey, Advocates.

\+ **W.P.(C) 10375/2019**

ERICSSON INDIA PRIVATE LIMITED ..... Petitioner
Through: Mr.Vishal Kalra and Mr.S.S.Tomar, Advocates.

versus

ADDITIONAL COMMISSIONER OF INCOME TAX, SPECIAL RANGE-3, NEW DELHI & ANR. ..... Respondents

Through: Mr.Ruchir Bhatia, Senior Standing Counsel with Ms.Madhura M.N. and Mr.Achal Dubey, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

SANJEEV NARULA, J (Oral):

1. All the three writ petitions seek directions to the revenue for refund of Rs. 48,361,57,240/-, Rs. 421,18,02,760/- and Rs. 349,41,45,020/- stated to be lying with the Department in respect of Assessment Year (AY) 2017-18; 2016-17 and 2018-19. Since the petitions raise similar grievance and the issues are interlinked, the same are being disposed of by this common order.

Brief facts:

2. The fact scenario in all the three petitions is similar and thus for the sake of convenience, the relevant facts of W.P.(C) No. 10373/2019 are being discussed in extenso, as follows:

2.1 Petitioner is a company engaged in the business of trading, manufacturing/assembly of telecommunication carrier equipment for sale to independent customers, providing implementation, commissioning and

support services related to telecommunication systems. Petitioner is regularly assessed to tax. For the AY 2017-18, Petitioner filed its return of income declaring loss of Rs.1,21,82,59,981/- and claim refund of Rs.4,69,12,90,300/-. The return was revised on 28.03.2018 under Section 139(5) of the Act, for claiming higher TDS credit and refund of Rs.4,83,61,57,240/-. The return was selected for scrutiny by issuing notice dated 27.08.2018 under Section 143(2) of the Act. Petitioner filed its revised return for the second time in response to communication dated 29.01.2018 issued by CPC, Bengaluru, under Section 143(1)(a) of the Act. Thereafter, Petitioner filed an application on 13.04.2016 under Section 197 of the Act for obtaining lower tax deduction certificates @3.12%. Pursuant thereto, the revenue issued a certificate on 04.07.2016 asking the deductors to deduct tax @5% on payments to be made to the Petitioner. As a result of delay in issuance of the certificate, TDS of Rs.4,89,54,62,680/- was deducted by the deductors. Petitioner states that it has reported taxable loss in the income tax return for the AY 2017-18 and has claimed refund of Rs.4,83,61,57,240/-. It is asserted that the refund is primarily on account of issuance of tax deduction certificates at considerably higher rate of 5%, in comparison to Petitioner's request of 3.12%. Besides, the delay in issuance of the certificates is also cited as a factor that has resulted in refund claim.

3. Complainant made a litany of requests to Respondent No.1 for grant of refund. It started with filing of representation on 30.10.2018, followed with personal visits and, making grievance with CPGRAM, explaining that the huge refund claim was causing acute shortage of funds to the Petitioner. Eventually, the revenue disposed of the grievance application on 12.03.2019

stating that the processing of return is in progress and further intimation would be sent in this regard. Despite this assurance, the department did not process the return and issue the necessary refund. The Petitioner then submitted other grievance applications and continued to follow up with respondents. Communications were also sent to DGIT (Systems) on 14.06.2019 requesting for expeditious processing of tax return. Petitioner's grievance still remains unresolved. In these compelling circumstances, it has now approached this Court seeking directions to the respondent for grant of refund for the assessment year in question.

W.P. (C) No. 10374/2019

4. This petition pertains to the AY 2016-17 for which Petitioner filed return of income on 30.11.2016 declaring total income of Rs.395,24,48,020, claiming TDS credit of Rs. 601,30,24,216 and refund of Rs. 421,18,02,670. Before filing of the return of income for the subject assessment year, on 14.04.2015, petitioner made an application for obtaining lower withholding tax certificates at 3.65% rate. The certificates under section 197 were issued on 16.12.2015 directing vendors to deduct tax @ 5.5% on payments to be made to the petitioner. As a result of delay in issuance of the certificates, TDS of Rs. 601,30,24,216 was deducted by deductors during the year.

5. The return filed by the Petitioner was transferred by the Centralized Processing Cell ("CPC"), Bengaluru to Respondent no. 1 on 22.01.2017. The return was selected for scrutiny by issuance of notice dated 06.07.2017 under section 143(2) of the Act. The time limit to process the return for this year under proviso to section 143(1) of the Act was 31.03.2018. Petitioner

paid several personal visits to the office of Respondent no.1 enquiring about the status of processing of the return. All efforts were in vain. No refund was granted and as a result, Petitioner submitted a representation to Respondent No.1 / AO on 03.01.2018, continued to visit his office and follow up with his staff. This also did not yield any positive outcome.

6. Petitioner, after having exhausted the remedy of following up with the Respondents, filed a grievance with CPGRAM on 4.09.2018, requesting to issue directions to process the tax return and issue the refund at the earliest. The grievance of the Petitioner was disposed of on 27.09.2018 stating that the tax return has been transferred to Respondent No. 1 on 22.01.2017. Petitioner was finally to follow up with him for further clarification. After orally discussing the resolution of the above CPGRAM, Petitioner filed a fresh grievance with CPGRAM on 12.10.2018 requesting to direct Respondent No. 1 to process the return and issue the refund at the earliest. The above grievance application was disposed on 25.10.2018, stating that since the return has been selected for scrutiny under section 143(2) of the Act, necessary refund would be issued only after completion of assessment proceedings. Petitioner again filed e-Nivaran application on 06.06.2019 for grant of necessary refund. The same was disposed of stating since the tax return has been picked up for scrutiny, refund will be released after scrutiny assessment.

<u>W.P. (C) No. 10375/2019</u>

7. This petition pertains to the AY 2018-2019 for which Petitioner filed return of income on 30.11.2018 declaring loss of Rs. 257,67,46,869,

claiming TDS credit and refund of Rs. 349,43,13,330. For this year as well, Petitioner filed application under section 197 of the Act, for obtaining lower tax withholding certificates at 2.23% rate on 07.04.2017. The certificates under section 197 were issued on 04.05.2017, directing deductor to deduct tax @ 3.5% from payments to be made to the Petitioner. As a result of the higher withholding tax rate in the certificates issued, a TDS of Rs. 349,41,45,016 was deducted by the deductors during the year in question. This has resulted in huge refund claims.

Proceedings in the present petition:

8. Looking at the unsettling facts of the case noted above, at the stage of admission, we had directed the Respondents to examine the claims and grant refunds, if found due. In the event the Respondents were to contest the petition, they were to file a counter affidavit giving explanation for denying the fund to the extent the same was disputed. The Respondents have not filed any counter affidavit to the petition and we have, accordingly, heard submissions and proceed to dispose of the present petitions on the basis of the submissions advanced by Mr. Bhatia on the instructions given by Mr. Achal Dubey, ACIT Circle 8 (1), who is present in Court today. Mr. Bhatia explained that in respect of 2016-17, the assessment has not been completed and the draft order dated 30.12.2019-and the objections thereto filed by the Petitioner, are pending before DRP. Since there is no final order passed as on date, the refund could not be processed. Mr. Bhatia also apprised the court that with respect to the assessment year 2011-12, the refund has been processed and the same would be released. In respect of assessment years 2017-18, 2018-19, it is submitted that the claim for refund could not be

issued, on account of the fact that there was an order passed against Petitioner under Section 241A of the Income Tax Act. During the course of arguments, the proposal seeking approval for withholding the refund under Section 241A issued by Assistant Commissioner of Income Tax, Circle-8(2), New Delhi along with the approval accorded by the office of Principal Commissioner of Income Tax-3, were handed over and the same were taken on record.

Analysis and Findings

9. There are four assessment years that form the subject matter of the present order, viz. AY 2011-12, AY 2016-17, AY 2017-18 and AY 2018-19. Although AY 2011-12 is not the subject matter of any of the petitions, yet we are issuing directions for refund for the reasons given hereinafter. Revenue has informed that an amount of Rs. 84 crores is due as refund by virtue of the judgment passed by this Court dated 25.09.2018, whereby penalty under Section 271G has been deleted. Petitioner contends that the tax officer has not passed an order giving effect to the order of this Court and the refund has not been issued. Mr. Bhatia, on instructions, assures this Court that the refund order has now been processed and the same would be issued. Taking his statement on record, we direct that the revenue shall, within a period of 30 days from today, issue the refund for AY 2011-12 along with applicable interest.

10. This brings us to AY 2016-17 in W.P.(C) 10374/2019, in relation to which Petitioner claims refund of Rs.4,21,18,02,760/-. In the subject year, the Petitioner filed income tax return in November, 2016 and claimed a

refund. The Petitioner has been regularly following up with the Assessing Officer for processing of the aforesaid return and grant of refund. Despite repeated follow ups, Petitioner's return has not been processed. Revenue has contended that the tax return could not be processed, since revenue had issued a notice under Section 143(2) of the Act and Petitioner's case is under scrutiny. The return cannot be processed and the same can be done once the scrutiny assessment is complete. Mr. Bhatia further submits that the draft order is ready, however, since objections have been filed by the assessee the same are pending consideration by the DRP. In these circumstances, the refund has been withheld. He submits that the proceedings before the DRP would be completed shortly and, thereafter, the refund would be processed. Mr. Bhatia further submits that though the proceedings are not complete, yet on the basis of the draft assessment order, Revenue is likely to have a tax claim of nearly 120 crores. He suggests that the Court can issue directions to DRP to proceed to deal with the objections and frame the final assessment order so that the refund can be processed forthwith. Mr. Bhatia fairly states that though such proceedings normally take time, but if the Court were to issue directions, the case can be taken up on priority basis and processed expeditiously.

11. We have considered this option. Issuing directions for giving precedence to Petitioner is one possible approach to follow. However, adopting this course of action would not correct Revenue's erroneous perspective that is evident from its apathetic attitude in processing of return, which is contrary to its own circulars as also the judgment of this Court. We had very recently- in the case of ***Maple Logistics Private Limited and Another vs. Principal***

Chief Commissioner of Income Tax and Others in WP (C) No. 7003/2019 decided on 4.11.2019, dealt with the legal position governing processing of returns and refunds. It seems that revenue has either chosen to ignore the said decision, or is oblivious of the same. We would now recapitulate and fortify the same. In respect of AY 2016-17, Section 241A may not be relevant, as the said provision was introduced by the Finance Act, 2017 with effect from 1.04.2017. For the subject assessment year, the relevant provision would be Section 143(1D) of the Act which existed prior to the amendment introduced by the Finance Act, 2017. Nonetheless, it does not mean that for the relevant assessment year, revenue could withhold the processing of return and refuse refunds, solely on the ground that the scrutiny assessment had been initiated pursuant to the notice under Section 143(2) of the Act. This Court in ***TATA Tele Services vs. CBTD (2016) 386 ITR 30 (Delhi)*** and Bombay High Court in the case of ***Group M.Media India (P) Ltd. vs. Union of India 2016 388 ITR 594 (Bombay)*** have examined the position that existed prior to 01.04.2017. In ***TATA Tele Services Ltd. (supra)*** the court was considering the challenge to an Instruction no. 1 of 2015 dated 13.01.2015 issued by Central Board of Direct Taxes (CBDT), whereby the Board sought to issue Instructions to clarify doubts expressed in view of the words "*shall not be necessary*" used in Section 143(1D) of the Act, interpreting the language of the said section as "preventing" the issue of refund once notice is issued under Section 143(2) of the Act. On the strength of the said Instructions, revenue on the basis of notices issued under Section 143(2) of the Act declined to issue the refund. In that context, the Court examined the legislative history relating to the introduction of Section 143(1) of the Act and held that the impugned

Instructions were unsustainable in law, and consequently, quashed the same. The Court observed that the question whether return should be processed in cases where notices have been issued under Section 143(2) of the Act would have to be decided by the Assessing Officer concerned exercising his discretion in terms of Section 143(1D) of the Act. The relevant portion of the said judgment reads as under:

> *"**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."*

12. From the above extract, it is clear that the Court has interpreted the law to mean that in a case where notice under Section 143(2) of the Act has been issued, that, by itself, does not prevent the revenue from processing the returns. Thus, notice under Section 143(2) is not a limiting factor to the issue of refund under Section 143(1). In fact, the judgment relied upon by the revenue in the case of ***Vodafone Mobile Services Ltd. vs. Assistant Commissioner of Income Tax [2019] 260 Taxman 417 (Delhi)*** is also in the same vein. Mr.Bhatia has argued that the decision in ***Vodafone*** (supra) distinguishes the decision of ***TATA Tele Services (Ltd.)*** and the decision of the Bombay High Court in ***Group M Media India (P) Ltd. (supra).*** We do not find the interpretation sought to be propounded by Mr. Bhatia to be correct. In ***Vodafone Mobile Services Ltd. vs. Assistant Commissioner of Income Tax (supra,)*** the Court has essentially stressed that it is up to the Assessing Officer to process the refund, wherever the possibility of issuing a notice under Section 143(2) exists, or where such notice has been issued. This necessarily means that the AO has to apply his mind and decide whether, given the nature of the return and the potential or likely liability, the refund can be given. The relevant portion of the said judgment reads as under:

> *"44. Now in this case, acknowledgement or intimation had not been sent by the AO. There is no doubt that the period of one year indicated in the second proviso to Section 143(1). However, Section 143(1D) begins with a non-obstante clause that overbears that provision.* ***Tata Teleservices (supra) and***

the Bombay High Court ruling in Group M Media India (supra) state that the fact that a regular assessment is resorted to, does not ipso facto mean that in every case, the AO has to refuse refunds or there is an automatic bar to refunds. The AO has to apply his mind and make an order keeping in perspective the facts of the case.

45. In this case, the revenue has relied on an order dated 28-7-2018, which inter alia, stated that "Considering pending special audit, pending scrutiny, opening demands of amount more than 4500 crore, it will be prejudicial to the interest of the revenue to process the returns without completion of the pending scrutiny cases. Therefore, exercising powers under section 143(1) and under section 241A of the Act, the undersigned decline the processing of returns under section 143(1)." The senior counsel for Vodafone had attacked the reliance on this order, stating that it was made later. However that is an aspect this court cannot go into. Facially, the order contains reasons. Therefore, unlike Tata Teleservices, a reasoned order was made; that decision was based on a circular, which fettered the AO's discretion. Therefore, the CBDT circular was set aside.

46. In the facts of the present case, for the AYs in consideration, for AY 2014-15, the petitioner has approached the AAR and for AYs 2015-16 and 2017-18, scrutiny assessments are pending before the AO. The AO has exercised discretion under Section 143(1D) not to process the returns considering the fact that substantial demand has been raised on completion of scrutiny assessment of earlier years.

47. The petitioner has undertaken two schemes of amalgamation involving merger of certain group companies in order to restructure its business operations and increase operational efficiencies. In light of the above fact, assessments for the AY 2012-13 and 2013-14 are under special audit and any demand that would arise from the processing of the said assessment years are to be allowed to be adjusted against the refund claims. The petitioner's position is that it is not in a good financial condition.

48. There is some merit in the revenue's argument that

substantial outstanding demand are pending against the petitioner. Further, the likelihood of substantial demands upon the assessee after the scrutiny for the AYs is completed, cannot be ruled out. The Revenue should have the right to adjust the demands against the refunds that may arise but have not yet been determined due to ongoing scrutiny proceedings.

49. As far as the argument that the expiry of the one year period, per second proviso to Section 143(1) resulting in finality of the intimation of acceptance, this court is of opinion that the deeming provision in question, i.e. Section 143(1)(d) only talks of two eventualities: "shall be deemed to be the intimation in a case where no sum is payable by, or refundable to, the assessee under clause (c), and where no adjustment has been made under clause (a)." Secondly, that intimation or acknowledgement cannot confer any greater right than for the assessee to ask the AO to process the refund and make over the money; it is up to the AO-wherever the possibility of issuing a notice under Section 143(2) exists, or where such notice has been issued, to apply his mind, and decide whether given the nature of the returns and the potential or likely liability, the refund can be given. It does not mean that when an assessment-pursuant to notice under Section 143(2) is pending, such right to claim refund can accrue. This court also recollects the decision of the Supreme Court in Deputy Commissioner of Income Tax v. Zuari Estate Development & Investment Co. Ltd., (2015) 15 SCC 248 which held that an intimation under Section 143(1) is not to be considered as an assessment."

*(*Emphasis Supplied*)*

13. In ***Vodafone Mobile Services Ltd. vs. Assistant Commissioner of Income Tax (supra)***, the Court has also considered the effect of ***TATA Tele Services Ltd. (supra)*** and not disagreed with or distinguished the same. This is evident from the observation in Para 41 of the said judgment wherein it has been held that in cases where the assessee claims refund and the one year period is over, the revenue cannot be inactive and the AO must apply

his mind to consider whether the facts and circumstances of the case warrant the refund of asseesee's claim. This to our mind is the approach which ought to have been adopted by the respondents. After the expiry of the one year period, the revenue ought to have undertaken the processing of the return promptly, and the AO should not have sat idle over the petitioner's request for refund. The revenue has conveniently chosen to decline the refund solely on the basis of the issuance of a notice under Section 143(2) of the Act. In our view, the AO should have undertaken expeditious disposal of petitioner's request for refund, and taken a decision on the same having regard to the views expressed by this Court in ***TATA Tele Services (supra)*** and that of the Bombay High Court in the case of ***Group M Media Ltd. (supra)*** and also the view of the Gujarat High Court in ***Kortek International (P) Ltd. vs. DCIT 2017 251 taxman 48 (Gujarat).*** We also do not find any prudence in the manner the respondents have acted by withholding the petitioner's refund. Indisputably, petitioner is a regular taxpayer being assessed by the department year after year. We are not able to discern any application of mind by the revenue in declining the refund. It is an unjust and arbitrary approach to withhold refunds-in anticipation of additions/disallowances that may be made after completion of assessment proceedings, particularly, since in the facts of the present case, there is no history of high tax demand. This becomes evident from the fact that for the subject assessment year 2016-17 in which the petitioner has a refund claim of Rs.4,21,18,02,760/-, the draft assessment order - though not finalised, raises a demand of not more than 120 crores. In these circumstances, the AO ought to have exercised his discretion objectively in good faith, by considering the relevant material and basing his decision thereon in a logical

manner. The respondents have failed to process the returns amounting to more than Rs.1300 crores due to the petitioner from the department accumulated over the years. On these refunds, interest costs under Section 244A of the Act are also being incurred by the revenue at the cost of the public exchequer. In addition to the above, we cannot lose sight of the fact that the petitioner would be facing fund shortage, taking into account the refunds that are withheld by the respondents. The revenue authorities cannot become a stifling force and a stumbling block for trade and commerce. They should realize and be sensitive to the fact that by their acts and omissions, they are impeding the growth of trade and commerce. They are filing the very hen that lays the golden egg. If businesses are not permitted to operate - by clocking the fund flow due to unjustified acts and omissions of the revenue authorities in not granting refunds where due, the very source of revenue generation i.e. taxable income would fall. The revenue authorities have to be mindful of this. They cannot take a fool hardy and short sighted approach by withholding refunds where due. Revenue's failure to perform its duty mandated by the Act cannot be countenanced and we disapprove the same.

14. Mr.Bhatia is unable to demonstrate any cogent reasoning for withholding the refunds, except for arguing that since the regular assessment was pending, the department was not obliged to issue the refund. For the reasons discussed above, we do not find the stand of the respondent to be reasonable. We direct the respondent to forthwith process the return of the petitioner and pass consequential orders. The AO while passing the order will take into consideration the views expressed by us in the present

judgment, as also take into account the dicta of this Court in the judgments referred above. The above exercise should be completed within a period of 6 weeks from today.

15. With respect to the AY 2018-19, the legal position is clearly in favour of the petitioner. The refund mechanism for the subject year would be governed by Section 241A as, in terms of the proviso inserted to Section 143(1D), the said section is not to apply to any return furnished for the assessment year commencing on or after 01.04.2017. On this aspect, we would like to reiterate the views expressed by us in the case of ***Maple Logistics Private Limited and Another vs. Principal Chief Commissioner of Income Tax and Others (supra),*** wherein relying upon the observations made by the Gujarat High Court in ***Kortek International (P) Ltd. (supra),*** we had observed that Section 241A enjoins the AO to process the determined refunds and the discretion vested in him has to be exercised judiciously. The relevant portion of the said judgment read as under:

> *"28. With this backdrop, we now consider the situation at hand. Here the return has been filed on 25.10.2017 for AY 2017-2018 and, therefore, the amended provisions would be applicable. In our considered opinion, the AO has completely misunderstood the refund mechanism and the import of Section 241A of the Act. The legislative intent is clear and explicit. The processing of return cannot be kept in abeyance, merely because a notice has been issued under section 143(2) of the Act. Post amendment, sub-section (1D) of section 143 is inapplicable to returns furnished for the AY commencing on or after 1st Day of April 2017. The only provision that empowers the AO to withhold the refund in a given case presently, is section 241A. Now the refunds can be withheld only in accordance with the*

said provision. The aforesaid provision is applicable to such cases where refund is found to be due to the Assessee under the provisions of Sub-Section (1) of Section 143, and also a notice has been issued under Sub-Section (2) of Section 143 in respect of such returns. However, this does not mean that in every case where a notice has been issued under Sub-Section (2) of Section 143 and the case of the Assessee is selected for scrutiny assessment, the determined refund has to be withheld.

29. The legislature has not intended to withhold the refunds just because scrutiny assessment is pending. If such would have been the intent, Section 241A would have been worded so. On the contrary, section 241A enjoins the AO to process the determined refunds, subject to the caveat envisaged under Section 241A. The language of section 241A envisages that the aforesaid provision is not resorted to merely for the reason that the case of the assessee is selected for scrutiny assessment. Sufficient checks and balances have been built in under the said provision and same have to be given due consideration and meaning. An order under section 241A should be transparent and reflect due application of mind.

30. The AO is duty bound to process the refund where the same are determined. He cannot deny the refund in every case where a notice has been issued under Sub-Section (2) of Section 143. The discretion vested with the AO has to be exercised judiciously and is conditioned and channelized. Merely because a scrutiny notice has been issued should not weigh with the AO to withhold the refund. The AO has to apply his mind judiciously and such application of mind has to be found in the reasons which are to be recorded in writing. He must make an objective assessment of all the relevant circumstances that would fall within the realm of "adversely affecting the revenue".

31. In the present case, the AO has completely lost sight of the words in the provision to the effect that, "the grant of the refund is likely to adversely affect the revenue". The reasons that are relied upon by the Revenue to justify the witholding of the refund in the present case, are abysmally lacking in reasoning. Except for reproducing the wordings of Section

241A of the Act, they do not state anything more. The entire purpose of Section 241A would be negated, in case the AO was to construe the said provision in the manner he has sought to do. It would be wholly unjust and inequitable for the AO to withhold the refund, by citing the reason that the scrutiny notice has been issued. Such an interpretation of the provision would be completely contrary to the intent of the legislature. The AO has been completely swayed by the fact that since the case of the assessee has been selected for scrutiny assessment, he is justified to withhold the refund of tax.

32. The power of the AO has been outlined and defined in terms of the Section 241A and he must proceed giving due regard to the fact that the refund has been determined. The fact that notice under section 143(2) has been issued, would obviously be a relevant factor, but that cannot be used to ritualistically deny refunds. The AO is required to apply its mind and evaluate all the relevant factors before deciding the request for refund of tax. Such an exercise cannot be treated to be an empty formality and requires the AO to take into consideration all the relevant factors. The relevant factors, to state a few would be the prima facie view on the grounds for the issuance of notice under section 143(2); the amount of tax liability that the scrutiny assessment may eventually result in vis-a-vis the amount of tax refund due to the assessee; the creditworthiness or financial standing of the assessee, and all factors which address the concern of recovery of revenue in doubtful cases.

33. Therefore, merely because a notice has been issued under section 143(2), it is not a sufficient ground to withhold refund under section 241A and the order denying refund on this ground alone would be laconic. Additionally, the reasons which are to be recorded in writing have to also be approved by the Principal Commissioner, or Commissioner, as the case may be and this should be done objectively.

34. Thus in view of the foregoing discussion, the entire exercise under Section 241A has not been correctly undertaken by the respondents. The petition is disposed of and the directive portion of the judgment as recorded in the order dated as dictated in the open Court must be duly adhered by the

parties."

16. The revenue has denied the refunds on the ground that there is an order passed under Section 241A of the Act. The proposal and the approval for withholding of refund submitted in this behalf by the ACIT read as under:

"To,

The Pr. Commissioner of Income Tax
Delhi-03,
New Delhi

(Through Proper Channel)

Sir,

Sub: Proposal seeking approval to withhold the refund under Section 241A of the Income Tax Act, 1961 in the case of the assessee company M/s Ericsson India Pvt. Ltd. for the A.Y. 2017-18- reg.

Kind reference is invited to the above.

2. In this regard, it is submitted that the case of the assessee company M/s Ericsson India Pvt. Ltd. has been selected for scrutiny under CASS for the AY 2018-19. The assessee company's case has issues which led to huge additions in past including TP additions. ***The assessee company has claimed a refund of Rs.349,41,45,020/- which could not be issued as of now having regard to the fact that a notice under section 143(2) of the Act has already been issued to the assessee company and the grant of refund is likely to adversely affect the revenue.***

3. In view of the above facts, you are requested to kindly grant approval to withhold the refund for the AY 2018-19 in the case of the above mentioned assessee company under Section 241A of the Income Tax Act, 1961 till the date on which the assessment is made.

4. Submitted for your kind approval and further necessary

directions please."

Sd/-

"To,

The Pr. Commissioner of Income Tax
Delhi-03,
New Delhi

(Through Proper Channel)

Sir,

Sub: <u>Proposal seeking approval to withhold the refund under Section 241A of the Income Tax Act, 1961 in the case of the assessee company M/s Ericsson India Pvt. Ltd. for the A.Y. 2017-18- reg.</u>

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3. In view of the above facts, you are requested to kindly grant approval to withhold the refund for the AY 2018-19 in the case of the above mentioned assessee company under Section 241A of the Income Tax Act, 1961 till the date on which the assessment is made.

4. Submitted for your kind approval and further necessary directions please."

Sd/-

17. The aforesaid orders, are legally unsustainable and not in consonance

with the observations made by us in ***Maple Logistics Private Limited and Another vs. Principal Chief Commissioner of Income Tax and Others (supra)***. We are unable to discern any reasons for denying the refunds, except for the reproduction of the phraseology of section 241A. Such orders, in light of the observations made in ***Maple Logistics Private Limited and Another vs. Principal Chief Commissioner of Income Tax and Others (supra)*** cannot be sustained and, accordingly, the said orders are set aside.

18. The refund of amounts claimed – where they appear justified, by itself cannot be said to be adverse to the interest of the revenue. The interest of revenue lies in collecting revenue in a legal and justified manner. It does not lie in retaining the collected taxes in excess of what is justified, since the excess collection cannot even be properly termed as "revenue". The excess collection of tax is a liability of the State and it lies in the interest of the revenue of the State to discharge its interest bearing liability without any delay. The sovereign cannot, but, be seen as fair, honest and credible in its dealings with its subjects. Any lapse in this regard tarnishes the image and credibility of the sovereign. It certainly cannot act like any unscrupulous businessman, who is seen to dodge his liabilities by resort to frivolous excuses and devious ways.

19. In absence of any cogent reasons justifying withholding of the refund due to the petitioner under Section 143(1) for AY 2017-18, 2018-19, we find that the proposal as well as the approval granted by Principal Commissioner of Income Tax lacks consideration of the relevant and germane conditions. We, accordingly, set aside the order and direct the respondents to undertake

the exercise afresh and pass an order under Section 241A. We, therefore, grant six weeks' time to the respondents to consider the aspect whether the amount found due to be refunded, or any part thereof, is liable to be withheld under Section 241A. While doing so, the Assessing Officer shall, firstly, with reasons, make a prima facie estimation of the probability that additions would be made in the Scrutiny Assessment Proceedings; secondly, he shall make an estimation of the quantum of additions/disallowances, if any, that may be made to the income returned, and the likely tax effect that such additions/disallowances may have, thirdly; he should consider the financials, and financial standing of the petitioner with regard to its ability to meet and service any demand for tax that may be raised as a result of the Scrutiny Proceedings; and, also take into consideration such other factors eg. past demands, any outstanding litigation and the past conduct of the assessee etc. All the aforesaid aspects should be examined to ascertain if the payment of the refund, or any part thereof, are likely to have adverse affect on the Revenue. The order must reflect due application of mind of the Assessing Officer while making a proposal whether, or not, to withhold any part of the refund amount. Such a proposal should be examined by the Principal Commissioner of Income Tax with due application of mind on all the aforesaid aspects. The entire consideration, with the approval of the Principal Commissioner of Income Tax to the withholding of the refund amount, or any part thereof, should be completed within six weeks from today, failing which, we direct that without awaiting any further orders, the respondents shall transmit the amount of Rs. 48,361,57,240/- (for AY 2017-18), Rs. 421,18,02,760/- (for AY 2016-17) and Rs. 349,41,45,020/- (for AY 2018-19) with interest to the petitioner. In the eventuality of the respondents

recording any reasons for withholding a part of, or the entire amount due for refund to the petitioner under Section 143(1), the reasons thereof as approved by the Principal Commissioner of Income Tax shall be provided to the petitioner forthwith. It shall be open to the petitioner to take remedial steps in respect of any orders for withholding of refund that may be passed. Needless to state that the reasons recorded for withholding of refund under section 241A would only amount to a tentative view and would not come in the way of the Assessing Officer to frame the assessment under section 143(3) of the Act.

20. The petitions stand disposed of.

SANJEEV NARULA, J

VIPIN SANGHI, J

FEBRUARY 18, 2020/v