

TAX FLASH NEWS

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Supreme Court's decision on the granting of refund when scrutiny proceedings have been initiated

Recently, the Supreme Court in the case of Vodafone Idea Ltd¹ (the taxpayer) dealt with an issue of processing of return and granting of tax refund when the scrutiny proceedings have been initiated. The Supreme Court held that till Assessment Year (AY) 2016-17, if a scrutiny assessment notice² was issued, it was not necessary to process the tax return³ for grant of refund to the taxpayer. The requirement to process the return shall stand overridden. Section 143(1D) of the Income-tax Act, 1961 (the Act) does not contemplate either issuance of any intimation or further application of mind. The issuance of notice under Section 143(2) of the Act is enough to trigger the required consequence.

The Supreme Court observed that, from AY 2017-18, a different regime was prescribed under Section 241A of the Act. It requires separate recording of satisfaction by the Assessing Officer (AO) having regard to the issue of scrutiny notice. Accordingly, as per the new regime, the AO can withhold the refund only with the prior approval⁴ and by recording the reasons in writing.

Facts of the case

The taxpayer is engaged in providing telecommunication services in different circles. By virtue of amalgamation effective from 1 April 2011, four group entities merged with the taxpayer. By second scheme of amalgamation, two other group entities got merged with the taxpayer effective from 1 April 2012. While the proceedings in the instant case were pending, under a scheme of arrangement between the taxpayer and another company, the amalgamated/transferee company (hereafter referred as the taxpayer) assumed all the rights and liabilities of the amalgamating/transferor companies. The taxpayer

filed tax returns of different assessment years⁵ and claimed tax refunds. Subsequently, scrutiny notices were issued by the AO for the said assessment years without processing tax returns.

The taxpayer filed a writ petition before the High Court contending that there was complete inaction on the part of the AO for processing the returns and in issuing appropriate refund. The taxpayer contended that the AO should be directed to process the returns and grant refunds along with due interest⁶.

The tax department contended that the returns raised multiple issues like transfer pricing adjustment, capitalisation of licence fees, 3G spectrum fees, asset restoration cost obligation including the effect of amalgamation of group entities which required thorough scrutiny and determination.

The taxpayer relied on various decisions⁷ where it was held that the return should be processed within a year and only if the AO was of the view that issuance of refund would be detrimental to collection of demands, he may invoke Section 143(1D) of the Act (whereby the processing of a return shall not be necessary in case scrutiny notice has been issued). It was contended that after the lapse of one-year⁸, the right to claim refund was vested in the taxpayer.

The tax department contended that Section 143(1D) of the Act starts with a non-obstante clause. It provides that tax return shall be processed before the issuance of an order under Section 143(3) of the Act. Therefore, Section 143(1D) overrides Section 143(1) of the Act. Therefore, under Section 143(1D) of the Act, the processing of return shall not be necessary, where scrutiny notice has been issued under Section 143(2) of the Act.

¹ Vodafone Idea Ltd v. ACIT (SLP(Civil) No.1169 of 2019) – Taxsutra.com

² Under Section 143(2) of the Act

³ Under Section 143(1) of the Act

⁴ Principal Commissioner of Income Tax

⁵ AY 2014-15, AY 2015-16, AY 2016-17, AY 2017-18

⁶ Under Section 244A of the Act

⁷ Tata Teleservices Limited v. CBDT [2016] 386 ITR 30 (Del) and Group M Media India (P) Ltd v. Union of India [2017] 289 CTR 622 (Bom)

⁸ By reason of second proviso to Section 143(1) of the Act

The High Court observed that assessment provision empowers the AO to issue notice to the taxpayer to produce documents or other evidence, to prove the genuineness of the income tax return. As per Section 143(1D)⁹ of the Act processing of a return under Section 143(1) was not necessary where a scrutiny notice was issued. However, this provision has been amended with effect from AY 2017-18 to provide that if a scrutiny notice is issued, processing of a return shall not be necessary before the expiry of one year from the end of the financial year in which return is submitted. The High Court held that wherever the possibility of issuing a scrutiny notice exists, or where such notice has been issued, AO has 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 scrutiny notice is pending, such right to claim refund can accrue.

Aggrieved, the taxpayer filed the appeal before the Supreme Court.

Supreme Court decision

The inter-relation between the erstwhile provisions of Section 143 of the Act, was subject matter of discussion in the case of Gujarat Electricity Board¹⁰ which in turn referred the decision in the case of Gujarat Poly Avx Electronics Ltd.¹¹. The Court in the case of Gujarat Poly Avx Electronics Ltd. had held that once regular assessment proceedings have commenced¹², it is a limitation on the jurisdiction of the AO to commence proceedings under Section 143(1)(a) of the Act. There was no dispute that Section 143(1)(a) of the Act enacts a summary procedure for quick collection of tax and quick refunds. Under the scheme if there was a serious objection to any of the orders made by the AO determining the income, it is open to the taxpayer to ask for rectification¹³.

Section 143(1) of the Act stands modified and now specifies with clarity the nature of adjustments. The Finance Act, 2016 substituted¹⁴ certain provision effective from 1 April 2017. The Finance Act, 2017 also inserted provision of Section 241A¹⁵ in the Act. The intimation under Section 143(1) of the Act to be generated was on the basis of such exercise and if any refund was due, the same has to be granted. Thus, at

⁹ As introduced by the Finance Act, 2012

¹⁰ CIT v. Gujarat Electricity Board [2003] 260 ITR 84 (SC)

¹¹ Gujarat Poly Avx Electronics Ltd. v. DCIT [1996] 222 ITR 140 (Guj)

¹² Under Section 143(2) of the Act

¹³ Under Section 154 of the Act

¹⁴ Notwithstanding anything contained in Section 143(1), the processing of a return shall not be necessary before the expiry of the period specified in the second proviso to sub-section (1), where a notice has been issued to the taxpayer under sub-section (2) provided that such return shall not be processed before the issuance of an order under sub-section (3).

¹⁵ Section 241A of the Act provides that for every assessment year commencing on or after the 1 April 2017 where refund of any amount becomes due to the taxpayer under the provisions of Section 143(1) and the AO is of the opinion, having regard to the fact that a notice has been issued under Section 143(2) 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, withheld the refund up to the date on which the assessment is made

every stage in processing the return submitted by the taxpayer forms the foundation, with respect to which, if any of the inconsistencies, appropriate adjustments are to be made.

The basic distinction between the two is that the procedure under Section 143(1) of the Act was summary in nature designed to cause adjustments which are apparent from the return. However, under scrutiny assessment, the AO has to scrutinise the return and cause deeper probe to arrive at the correct determination of the liability of the taxpayer.

The exercise of power under the scrutiny provision was thus premised on non-acceptance of what was evident from the return itself and to ensure that there was no avoidance of tax in any manner. The dimension of such power is far greater and deeper than mere adjustments to be made in respect of what is available from the return. Once such scrutiny is undertaken and proceedings are initiated, it would be anomalous and incongruent that while such proceedings so initiated are pending, the return be processed, which may in a given case, entail payment of refund. If the return itself is under probe and scrutiny, such return cannot be the foundation to sustain a claim for refund till such scrutiny is not complete.

Considering the nature of power exercisable under these two limbs of Section 143, the inescapable conclusion is that the processing of return must await the further exercise of power of scrutiny assessment. If the power under Section 143(2) of the Act is initiated in a manner known to law, there cannot be any insistence that the processing be completed, and refund be made before the scrutiny pursuant to notice under Section 143(2) is over.

The aforesaid conclusion is fortified and strengthened by clear stipulation to that effect in Section 143(1D) of the Act. Irrespective of some change in the text of said provision which was introduced by the Finance Act, 2016 and not accepted by the Finance Act, 2017, the legislative intent is clear from the expression¹⁶, and by use of non-obstante clause. Though the period for which it would not be necessary to process the return was sought to be specified by the Finance Act, 2016, mere absence of such period in the provision as it stands today, makes no difference.

The use of non-obstante clause in Section 143(1D) provide sufficient clarity that in cases where scrutiny notice is issued, and proceedings are initiated, the processing of a return shall not be necessary. The expression 'shall not be necessary' is used in various statutes and even in the Constitution of India. As against the general principle which mandates an action

¹⁶ The processing of a return shall not be necessary, where a notice has been issued to the assessee under Section 143(2)

in a particular manner, when an exception is to be carved out, the relevant provisions stipulate 'it shall not be necessary' to adhere to and follow the manner mandated by such general principle; and if the contingency contemplated by such exception arises, the general principle is to stand overridden.

The intent to have the general principle emanating from Section 143(1) overridden, in case where the proceedings are initiated pursuant to scrutiny notice, gets more pronounced and emphasised by use of non-obstante clause¹⁷.

The Supreme Court held that in respect of AYs ending on 31 March 2017 or before, if a notice was issued in conformity with the requirements stated in Section 143(2) of the Act, it shall not be necessary to process the refund under Section 143(1) of the Act and that the requirement to process the return shall stand overridden.

Once deeper scrutiny is undertaken, and the matter is being considered from the perspective whether there is any avoidance of tax in any manner, issuance of scrutiny notice is sufficient indication. Section 143(1D) of the Act does not contemplate either issuance of any intimation or further application of mind. Therefore, it would not be proper to read into said provision the requirement to send a separate intimation. In our view, issuance of notice under Section 143(2) of the Act is enough to trigger the required consequence.

Insofar as returns filed in respect of AY commencing on or after the 1 April 2017, a different regime has been contemplated by the Parliament. Section 241A of the Act requires a separate recording of satisfaction on part of the AO that having regard to the fact that a scrutiny notice has been issued, the grant of refund is likely to adversely affect the revenue; where after, with the previous approval of the senior tax officer and for reasons to be recorded in writing, the refund can be withheld. Since the statute now envisages exercise of power of withholding of refund in a particular manner, it goes without saying that for AY commencing after 1 April 2017, the requirements of Section 241A of the Act must be satisfied.

In the present case, the exercise of power was not only after issuance of scrutiny notice and after recording due satisfaction in terms of Section 241A of the Act but was also well within the period contemplated by the provision of Section 143(1) of the Act for causing due intimation. The Supreme Court was satisfied that there was nothing in the exercise of power that led to the passing of the assessment order which could be said to have violated any statutory requirements.

¹⁷ In Section 143(1D) of the Act

Our comments

The issue of granting of refund by processing of return under Section 143(1) of the Act where scrutiny notice was sent has been a subject matter of litigation before the Courts.

Some of the Courts¹⁸ have held that refund to the taxpayer could not be denied merely due to issuance of notice for scrutiny under Section 143(2) of the Act. The Bombay High Court¹⁹ had held that under Section 143(1D) of the Act, the tax officer is ought to apply his mind and grant a refund, if any, expeditiously.

In order to address the grievance of delay in issuance of refund in genuine cases which are routinely selected for scrutiny assessment, provisions of Section 143(1D) were ceased to apply in respect of returns furnished for AY 2017-18 and onwards by the Finance Act, 2017. Simultaneously, to address the concern of recovery of revenue in doubtful cases, a new Section 241A was introduced to provide that, for the returns furnished for AY commencing on or after 1 April 2017, where refund of any amount becomes due to the taxpayer under Section 143(1) and the AO is of the opinion that grant of refund may adversely affect the recovery of revenue, the AO with the previous approval of the Principal Commissioner or Commissioner, withhold the refund upto the date on which the assessment is made.

The Supreme Court in the present case has held that till Assessment Year (AY) 2016-17, if a scrutiny notice is issued, the tax return is not required to be processed for grant of refund to the taxpayer. However, from AY 2017-18, a different regime was prescribed under Section 241A of the Act. It requires separate recording of satisfaction by the AO having regard to the issue of scrutiny notice. Accordingly, as per the new regime, the AO can withhold the refund only with the prior approval and by recording the reasons in writing.

¹⁸ Group M. Media India (P) Ltd. v. UOI [2016] 388 ITR 594 (Bom), Tata Projects Limited v. DCIT [2017] 88 taxmann.com 325 (Bom), Corrttech International (P) Ltd. v. DCIT [2018] 401 ITR 355 (Guj), Tata Teleservices Limited v. CBDT [2016] 386 ITR 30 (Del)

¹⁹ Writ Petition No. 2067 OF 2016 – Bombay High Court - bombayhighcourt.nic.in

home.kpmg/in/socialmedia

Ahmedabad

Commerce House V, 9th Floor,
902, Near Vodafone House, Corporate
Road,
Pralhad Nagar,
Ahmedabad – 380 051.
Tel: +91 79 4040 2200

Bengaluru

Embassy Golf Links Business Park,
Pebble Beach, 'B' Block,
1st & 2nd Floor,
Off Intermediate Ring Road, Bengaluru –
560071
Tel: +91 80 6833 5000

Chandigarh

SCO 22-23 (1st Floor),
Sector 8C, Madhya Marg,
Chandigarh – 160 009.
Tel: +91 172 664 4000

Chennai

KRM Towers, Ground Floor,
1, 2 & 3 Floor, Harrington Road,
Chetpet, Chennai – 600 031.
Tel: +91 44 3914 5000

Gurugram

Building No.10, 8th Floor,
DLF Cyber City, Phase II,
Gurugram, Haryana – 122 002.
Tel: +91 124 307 4000

Hyderabad

Salarpuria Knowledge City,
6th Floor, Unit 3, Phase III,
Sy No. 83/1, Plot No 2,
Serilingampally Mandal,
Ranga Reddy District,
Hyderabad – 500 081.
Tel: +91 40 6111 6000

Jaipur

Regus Radiant Centre Pvt Ltd.,
Level 6, Jaipur Centre Mall,
B2 By pass Tonk Road,
Jaipur – 302 018.
Tel: +91 141 - 7103224

Kochi

Syama Business Centre,
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682 019.
Tel: +91 484 302 5600

Kolkata

Unit No. 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata – 700 091.
Tel: +91 33 4403 4000

Mumbai

1st Floor, Lodha Excelus,
Apollo Mills,
N. M. Joshi Marg,
Mahalaxmi,
Mumbai – 400 011.
Tel: +91 22 3989 6000

Noida

Unit No. 501, 5th Floor,
Advant Navis Business Park,
Tower-A, Plot# 7, Sector 142,
Expressway Noida,
Gautam Budh Nagar,
Noida – 201 305.
Tel: +91 0120 386 8000

Pune

9th floor, Business Plaza,
Westin Hotel Campus, 36/3-B,
Koregaon Park Annex,
Mundhwa Road, Ghorpadi,
Pune – 411 001.
Tel: +91 20 6747 7000

Vadodara

Ocean Building, 303, 3rd Floor,
Beside Center Square Mall,
Opp. Vadodara Central Mall,
Dr. Vikram Sarabhai Marg,
Vadodara – 390 023.
Tel: +91 265 619 4200

Vijayawada

Door No. 54-15-18E,
Sai Odyssey,
Gurunanak Nagar Road, NH 5,
Opp. Executive Club, Vijayawada,
Krishna District,
Andhra Pradesh – 520 008.
Tel: +91 0866 669 1000

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