IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3442 OF 2022

Fcbulka Advertising Pvt Ltd. … Petitioner
4th Floor Nirmal, Nariman Point,
Mumbai - 400 021.

Versus

1. **Assistant Commissioner of Income Tax Circle 16(1)** … Respondents
   Aayakar Bhavan, Maharishi Karve Road, Mumbai 400 020
2. **Principal Commissioner of Income Tax-8**
   Aayakar Bhavan, Maharishi Karve Road, Mumbai 400 020
3. **Union of India**
   through the Secretary,
   Department of Revenue, Ministry Of Finance, 2nd Floor, Aayakar Bhavan, M.K.Marg,Mumbai 400020

Mr J. D. Mistri, Senior Advocate a/w Mr Gautam Thakkar and Mr Sameer Dalal, for Petitioner.
Mr Tejinder Singh, Special Counsel a/w Mr Suresh Kumar, for Respondents/Revenue.

CORAM : M.S. Sonak &
Jitendra Jain, JJ.

RESERVED ON: 23 April 2025
PRONOUNCED ON : 7 May 2025

Judgment (*Per Jitendra Jain, J.*):-

1. Rule. By consent, and since the pleadings are complete, this petition was taken for a final hearing at the admission stage itself.

2. By this petition under Article 226 of the Constitution of India, the Petitioner is challenging the communication dated 16 June 2022 issued by Respondent No.1, which refused the Petitioner's request to implement the communication dated 29 November 2018 relating to the refund. The present petition pertains to assessment year (AY) 2018–2019.

Brief facts: -

(i) The Petitioner engages in advertising and marketing communications in India and is a wholly owned subsidiary of Advertisement and Communication Services (Mauritius) Limited (ACSL Mauritius). Additionally, the Petitioner serves as the holding company of FCB Interface Communications Private Limited, which is incorporated in India.

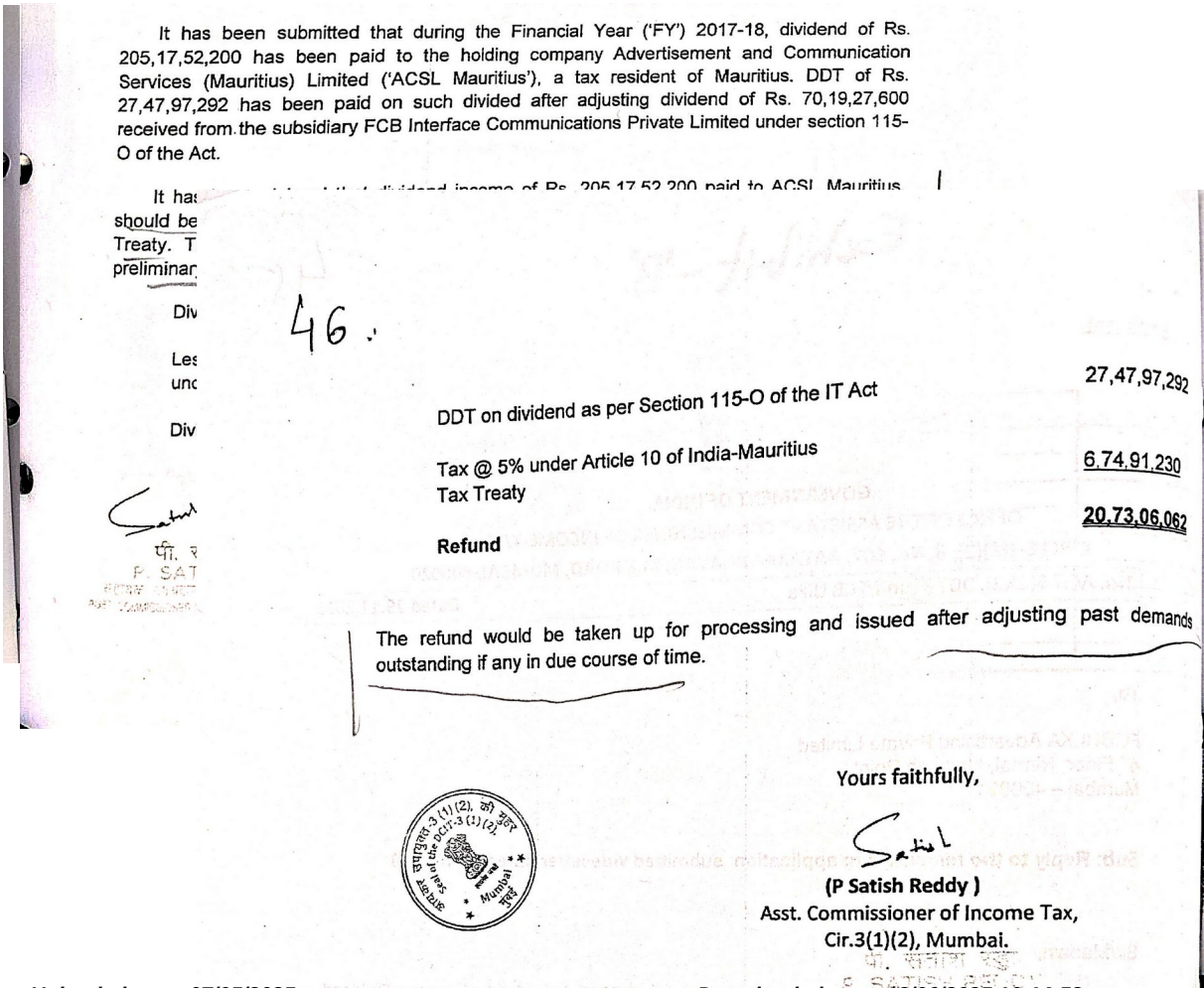
(ii) During the previous year relevant to the AY 2018-2019, Petitioner declared and paid a dividend of Rs . 205,17,52,200/- to its shareholder ACSL Mauritius. The Petitioner paid Dividend Distribution Tax (DDT) of Rs. 27,47,97,292/- under Section 115-O of the Income Tax Act, 1961 (the Act) at an effective rate of 20.358%.

(iii) Subsequently, the Petitioner claims to have realized that DDT paid at 20.358% was erroneous since, as per Article 10(2) of the Treaty between India and Mauritius, they should have paid tax @ 5% only.

(iv) Therefore, on 10 October 2018, claim for refund of excess DDT was made by a letter addressed to

Respondent No.1. In the said letter, the Petitioner submitted that they were liable to pay DDT as per India-Mauritius Tax Treaty @ 5% only, however, they have paid DDT @ 20.358% and, therefore, they are entitled to claim refund of the excess DDT of Rs.20,73,06,062/-. The Petitioner also stated that Form ITR-VI does not have any provision for a claim of refund of excess DDT; therefore, the claim is made by way of said letter. The Petitioner also requested the opportunity for a hearing in the said letter.

(v) On 29 November 2018, Respondent No.1 replied to the Petitioner's aforesaid refund claim. The claim for grant of refund in the present petition is based on the said letter and, therefore, for convenience, is reproduced herein: -



It has been submitted that during the Financial Year ('FY') 2017-18, dividend of Rs. 205,17,52,200 has been paid to the holding company Advertisement and Communication Services (Mauritius) Limited ('ACSL Mauritius'), a tax resident of Mauritius. DDT of Rs. 27,47,97,292 has been paid on such divided after adjusting dividend of Rs. 70,19,27,600 received from the subsidiary FCB Interface Communications Private Limited under section 115-O of the Act.

It ha... dividend income of Rs. 205,17,52,200 paid to ACSL Mauritius ... should be ... Treaty. T... preliminar...

Div...

Les... unc...

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46.

DDT on dividend as per Section 115-O of the IT Act	27,47,97,292
Tax @ 5% under Article 10 of India-Mauritius Tax Treaty	6,74,91,230
Refund	**20,73,06,062**

The refund would be taken up for processing and issued after adjusting past demands outstanding if any in due course of time.

Yours faithfully,

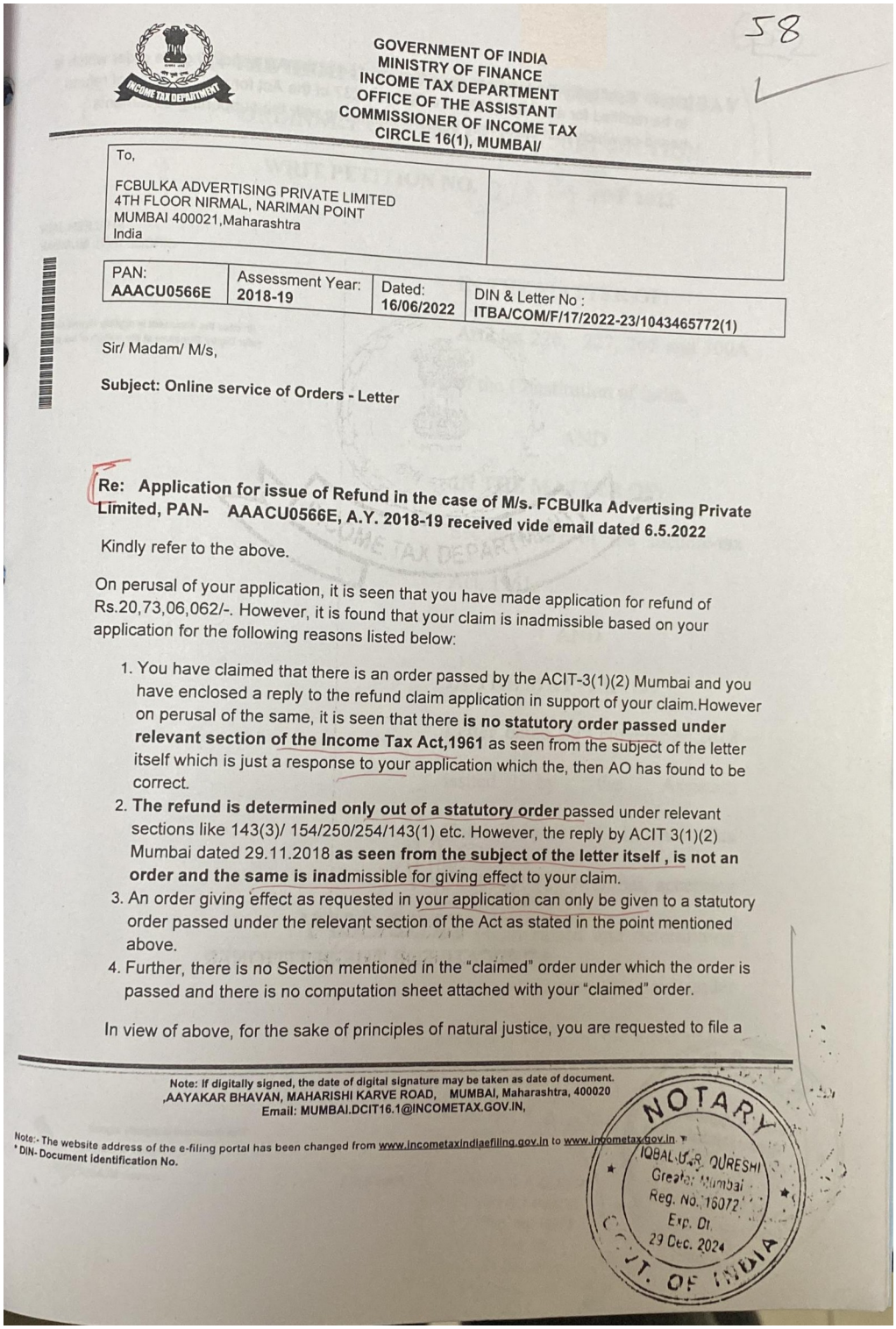
(P Satish Reddy)
Asst. Commissioner of Income Tax,
Cir.3(1)(2), Mumbai.

(vi) Thereafter, the Petitioner vide various letters requested and reminded Respondent No.1 to grant the refund along with interest based on the above communication dated 29 November 2018. However, there was no reply to these letters.

(vii) However, on 16 June 2022, Respondent No.1 replied to the aforesaid request of the Petitioner and rejected the claim of the refund on the ground that reply dated 29 November 2018, based on which the refund is requested, is not a statutory order passed under the relevant Section of the IT Act and, therefore, effect cannot be given to such communication of 29 November 2018. It further states that no section is mentioned in the communication dated 29 November 2018 under which the same is passed, and no computation sheet is attached.

(viii) The said communication of 16 June 2022, which is impugned in the present petition, requested the Petitioner to file rectification application under Section 154 of the IT Act specifying the order which is to be rectified for arriving at the refund or to claim the refund under Section 237 of the IT Act along with supporting documents.

(ix) For the sake of convenience, the impugned communication dated 16 June 2022 is scanned hereunder: -



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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE ASSISTANT
COMMISSIONER OF INCOME TAX
CIRCLE 16(1), MUMBAI/

To,

FCBULKA ADVERTISING PRIVATE LIMITED
4TH FLOOR NIRMAL, NARIMAN POINT
MUMBAI 400021,Maharashtra
India

PAN:	Assessment Year:	Dated:	DIN & Letter No :
AAACU0566E	**2018-19**	**16/06/2022**	**ITBA/COM/F/17/2022-23/1043465772(1)**

Sir/ Madam/ M/s,

Subject: Online service of Orders - Letter

Re: Application for issue of Refund in the case of M/s. FCBUlka Advertising Private Limited, PAN- AAACU0566E, A.Y. 2018-19 received vide email dated 6.5.2022

Kindly refer to the above.

On perusal of your application, it is seen that you have made application for refund of Rs.20,73,06,062/-. However, it is found that your claim is inadmissible based on your application for the following reasons listed below:

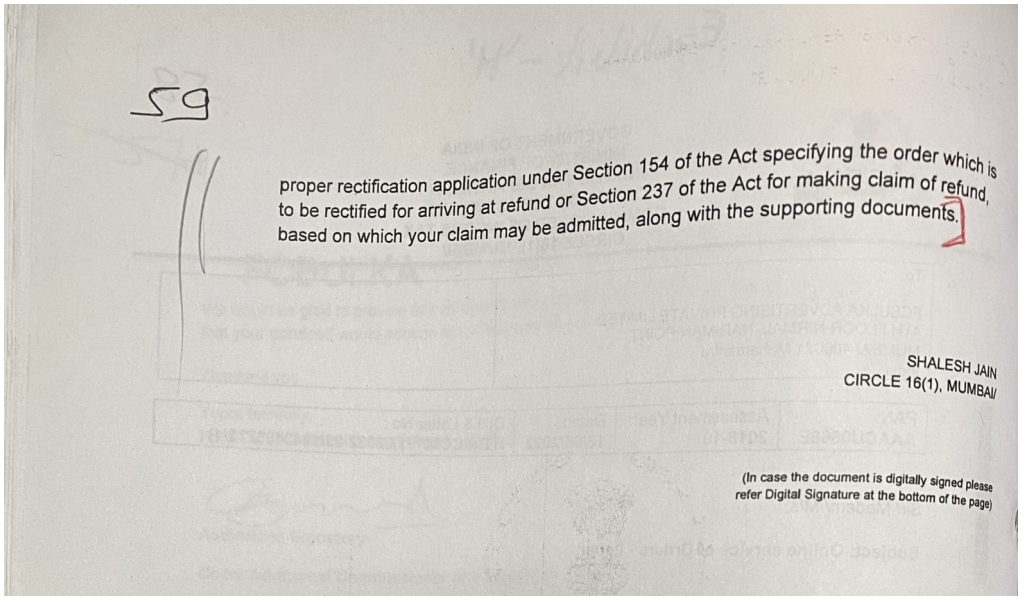
1. You have claimed that there is an order passed by the ACIT-3(1)(2) Mumbai and you have enclosed a reply to the refund claim application in support of your claim.However on perusal of the same, it is seen that there **is no statutory order passed under relevant section of the Income Tax Act,1961** as seen from the subject of the letter itself which is just a response to your application which the, then AO has found to be correct.
2. **The refund is determined only out of a statutory order** passed under relevant sections like 143(3)/ 154/250/254/143(1) etc. However, the reply by ACIT 3(1)(2) Mumbai dated 29.11.2018 **as seen from the subject of the letter itself , is not an order and the same is inad**missible for giving effect to your claim.
3. An order giving effect as requested in your application can only be given to a statutory order passed under the relevant section of the Act as stated in the point mentioned above.
4. Further, there is no Section mentioned in the "claimed" order under which the order is passed and there is no computation sheet attached with your "claimed" order.

In view of above, for the sake of principles of natural justice, you are requested to file a

Note: If digitally signed, the date of digital signature may be taken as date of document.
,AAYAKAR BHAVAN, MAHARISHI KARVE ROAD, MUMBAI, Maharashtra, 400020
Email: MUMBAI.DCIT16.1@INCOMETAX.GOV.IN,

Note:- The website address of the e-filing portal has been changed from www.incometaxindiaefiling.gov.in to www.incometax.gov.in
* DIN- Document Identification No.

NOTARY
IQBAL U.R. QURESHI
Greater Mumbai
Reg. No. 16072
Exp. Dt.
29 Dec. 2024
GOVT. OF INDIA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proper rectification application under Section 154 of the Act specifying the order which is to be rectified for arriving at refund or Section 237 of the Act for making claim of refund, based on which your claim may be admitted, along with the supporting documents.

SHALESH JAIN
CIRCLE 16(1), MUMBAI

(In case the document is digitally signed please refer Digital Signature at the bottom of the page)

3. Being aggrieved by the communication dated 16 June 2022, the Petitioner has instituted the present petition challenging its correctness and further seeking direction to the Respondents to grant a refund in terms of the communication dated 29 November 2018, along with interest.

Submissions of the Petitioner:-

4. Mr. Mistri, learned senior counsel for the Petitioner, submitted that the communication dated 29 November 2018 constitutes satisfaction of Respondent No.1 in terms of Section 237 of the IT Act, in which Respondent No.1 has determined the refund of Rs. 20,73,06,062/-. He submits that this communication is an order determining the refund. The communication dated 29 November 2018 still holds the field since it is neither withdrawn nor revised by any authority. He

challenges the communication dated 16 June 2022 on the ground that no statutory orders are required for determining refund under Section 237 of the IT Act. He strongly refuted the grounds mentioned in the impugned communication for denying the implementation of the communication dated 29 November 2018. He submitted that Respondent No.1 cannot direct the Petitioner to make an application under Section 154 of the IT Act for rectification of the letter dated 29 November 2018. He submitted that the letter dated 10 October 2018 is an application for Section 237 of the IT Act or, alternatively, Article 265 of the Constitution of India.

5. Mr. Mistri also submitted that the Petitioner is entitled to the refund since under the Treaty between India and Mauritius, the Petitioner was required to pay DDT @ 5% only and not @ 20.358%. He submitted that the submission on merits is being made only in response to the Respondents' reply during the hearing. He, however, maintains that it is too late for the revenue to challenge the entitlement of the Petitioner after having determined the refund by letter dated 29 November 2018. He submitted that the revenue today cannot contend in the teeth of the refund determination on 29 November 2018 that the Petitioner is not entitled to claim the refund.

6. Mr. Mistri also submitted that filing the return of income is not required for DDT refunds, and the Petitioner specifically brought this to the attention of Respondent No.1 while claiming a refund of excess DDT. In any case, the claim

made by a letter dated 10 October 2018 must be treated as an application under Section 237 of the IT Act.

7. The learned senior counsel submitted that the prayer for refund is based on Article 265 of the Constitution of India and the communication dated 29 November 2018. He submitted that the amount is being retained without any authority of law and therefore seeks appropriate relief in the present petition. He further submitted that the Respondents are not justified in the present petition to deny the refund based on the India-Mauritius Tax Treaty. He submitted that the grounds raised in the reply did not constitute the basis of the communication dated 16 June 2022, which is impugned in the present proceedings. He further submitted that the issue on the merits is pending before various forums in the case of various other assesses. Therefore, he submitted that it would not be appropriate for this Court to adjudicate the issue on the merits, more so when the same does not constitute the basis of the impugned letter dated 16 June 2022. Mr. Mistri, learned senior counsel, relied upon the decision of the Gujarat High Court in the case of ***Torrent (P.) Ltd. Vs Commissioner of Income-tax***[1]

Submissions of the Respondents:-

8. Mr. Singh learned special counsel for the Respondents vehemently opposed the petition and submitted that *sine-qua-non* for claiming a refund is that the assessee should file its return and make a claim in the said returns. He relied upon

[1] (2013) 35 taxmann.com 300 (Gujarat)

Section 239 read with Rule 41 to support this submission. He submitted that the Petitioner in their return of income did not make any claim for the refund of the DDT. He further submitted that the Petitioner did not protest the intimation under Section 143(1) and assessment order under Section 143(3) of the IT Act by raising a plea that the Respondents have not granted the refund of DDT based on the communication dated 29 November 2018. Mr. Singh further placed reliance on Article 10 of the India-Mauritius Tax Treaty and Commentaries to submit that the Petitioners are not entitled to the refund of the excess DDT by taking recourse to the Treaty.

9. Mr Singh placed reliance on the decision of ***Godrej & Boyce Mfg. Co. Ltd. vs DCIT***[2] in support of his submissions on the Petitioner's disentitlement to claim such a refund. Mr. Singh also relied upon the decision of the Hon'ble Supreme Court in the case of ***Union of India Vs Azadi Bachao Andolan***[3] and Karnataka High Court's decision in the case of ***CIT Vs R.M. Muthaiah***[4]. Mr. Singh also placed reliance on the Commentaries on the Interpretation of the Treaty and submitted that the Petitioners are not entitled to claim a refund of the DDT. Mr. Singh also relied upon the decision of this Court in the case of ***Tata Communications Transformation Services Ltd. Vs Assistant Commissioner of Income-tax***[5] and

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2 (2010) 194 taxman 203 (Bombay)

3 (2003) 132 Taxman 373 (SC)

4 (1993) 202 ITR 508 (KAR)

5 (2022) 137 taxmann.com 2 (Bombay)

submitted that since the claim is not made in the return as per the requirement of Section 239 of the IT Act, the Petitioner is not entitled to the refund of the DDT.

10. Mr Singh further submitted that the communication dated 29 November 2018 is not an order but a reply to the refund application dated 10 October 2018 filed by the Petitioner. He submitted that the letter states that the refund is due upon preliminary verification and will be taken up for further processing. He submitted that the letter is more like an opinion and not a conclusive refund determination. He defended the Respondents' action and prayed for the petition's dismissal.

11. We have heard the learned counsel for the Petitioner and Respondents and, with their assistance, have perused the documents that were brought to our attention. Other than what is recorded above, no other submissions have been made by the parties.

Analysis and Conclusion: -

12. Based on the rival contentions and pleadings, broadly the following three issues arise for determination in this Petition: -

(i) The validity of the impugned communication dated 16 June 2022;

(ii) The legal status of the communication dated 29 November 2018; and

(iii) Whether a case is made out for the issue of a writ of mandamus to the Respondents for the grant of a refund of Rs. 20,73,06,062/- solely based on the communication dated 29 November 2018?

13. The impugned communication dated 16 June 2022 rejects the Petitioner's claim for refund *inter alia* on the ground that previous communication dated 29 November 2018 is not a statutory order of refund made under any of the provisions of the IT Act but it is just the expression of the tentative opinion in response to Petitioner's application for refund which was not even made in the statutory form or after complying the statutory procedures under Sections 237 and 239 of the IT Act. This impugned communication rejects the refund claim on the ground that the earlier communication dated 29 November 2018 was not some order under Sections 143(3)/154/250/254/143(1), etc. The impugned communication also reasons that the communication dated 29 November 2018 did not specify the Sections under which it was issued, nor was any computation sheet annexed thereto. The impugned communication finally directs the Petitioner to file a rectification application under Section 154 or to take out proceedings under Section 237 of the IT Act, claiming a refund.

14. Apart from the above reasons reflected in the impugned communication dated 16 June 2022, Mr. Tejinder Singh urged that refund was rejected because the Petitioner failed to file a return of income and claim such refund, which according to

him, was the only mode allowable under Section 237 read with Sections 237 and 239 read with Rule 41 of the Income Tax Rules. He submitted that even on merits, the Petitioner was not entitled to any refund under the Double Tax Avoidance Agreement between India and Mauritius. He emphasised Article 10 of the India-Mauritius Tax Treaty and relied on the decisions of Godrej & Boyce Mfg. Co. Ltd. (supra) and Azadi Bachao Andolan (supra) in support of his contentions.

15. At the outset, we are unsure whether it is open to the Revenue or Mr. Singh to urge reasons or grounds other than those reflected in the impugned communication dated 16 June 2022 to support the said impugned communication. Normally, the validity of such communications would have to be tested on the grounds or reasons reflected therein and not by grounds added or supplemented through affidavits or oral contentions when a challenge is raised to such communications.

16. We state our uncertainty because an argument was made on behalf of the revenue that even the impugned communication dated 16 June 2022 may not be a statutory order rejecting the Petitioner's claim for refund. Furthermore, the impugned communication is more of a response to the Petitioner's reminders concerning the implementation of the communication dated 29 November 2019. Mr. Mistri, however, maintained that the impugned communication was

a statutory order and that the reasons provided could not be supplemented when a challenge was presented against it.

17. In any event, upon considering the matter from the two different perspectives presented before us, for reasons discussed later, we are satisfied that the Petitioner's refund claim cannot be said to have been finally rejected or the Respondents cannot finally reject the Petitioner's refund claim based on the grounds in the impugned communication dated 16 June 2022 the grounds attempted to be supplemented later. In either event, the impugned communication is vulnerable and warrants interference.

18. Firstly, the principles of natural justice and fair play were not complied with before the issuance of the impugned communication dated 16 June 2022. The petitioner was not heard prior to the issuance of the impugned communication dated 16 June 2022. The tentative reasons why the respondents believed that no refund was due to the petitioner were not disclosed to her. The petitioner was not given an effective opportunity to address these tentative grounds or reasons. This constitutes a valid basis for setting aside the impugned communication dated 16 June 2022.

19. Secondly, nothing in the impugned communication suggests that the rejection was based on the Respondents' belief that no refund was due and payable to the Petitioner. As discussed later in the context of the communication dated 29 November 2018, there is nothing conclusive regarding the

Petitioner's entitlement to such a refund after the authority verified the Petitioner's status regarding the claim made and the provisions of the treaty.

20. The impugned communication mainly states that the communication dated 29 November 2019 was not a statutory order; therefore, based on the same, any claim for refund cannot be allowed. This means that even the impugned communication does not examine the Petitioner's claim for refund on merits and takes any stand that the petitioner was dis-entitled to a refund on merits.

21. Thus, the impugned communication, while rejecting the Petitioner's contention that the issue of refund stood concluded by the communication dated 29 November 2018, does not independently decide one way or the other on the merits of the Petitioner's claim for refund. Even the supplemented grounds urged in the revenue's affidavit or by Mr. Singh during the arguments mainly concern alleged non-compliance with procedural requirements or the non-citation of statutory provisions. But there is no examination of the refund claim on merits by adverting to the transaction and the corresponding provisions of the treaty by which they were governed.

22. At this stage, considering the order we propose to make, we refrain from delving deeply into contentious issues affecting the merits or demerits of the refund claim. Such issues, according to us, must initially be examined by the fact-

finding authorities under the IT Act and not this Court exercising judicial review. When exercising powers of judicial review, this Court is mainly concerned with the decision-making process rather than the decision itself.

23. Therefore, examining the matter from the above perspectives, and for the reasons discussed above, we are satisfied that the impugned communication dated 16 June 2022 must be set aside. We answer the first issue accordingly.

24. The next issue that needs consideration concerns the legal status of the communication dated 29 November 2018.

25. Admittedly, on a perusal of the communication dated 29 November 2018, there is no mention of any Section under which it was issued. However, merely because there is no reference to the Section under which the said communication was issued cannot be reason enough to conclude that it is not a statutory order. The reference to a section or provision is also inconclusive on such an issue. Neither did the Petitioner quote any specific section, article or legal provision when applying for a refund, nor does the communication dated 29 November 2018 quote any in response.

26. Mr. Mistri contended that the Petitioner's application seeking a refund was not required to be made in any specified format. He reasoned that under Article 265 of the Constitution, no tax could be levied without the authority of law. Therefore, if the Petitioner had paid tax that was not due and payable, the retention of such amount would amount to a

levy, collection, or retention of tax without the authority of law. He submitted that the right to secure the refund of such tax, which the Revenue was not entitled to retain, could never be fettered by some procedural requirements. He submitted that there was no requirement to file a return of income under such circumstances. By reference to the prescribed forms, he submitted that there was no provision in the forms to seek a refund in the situation in which the Petitioner was placed.

27. Since both the Counsel advanced arguments on the provisions in Sections 237, 240 and 246 (A)(1)(i) of the IT Act in the context of the communication dated 29 November 2018, we refer to them:

> *"237. If any person satisfies the [Assessing] Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess.*
>
> *240. Where, as a result of any order passed in appeal or other proceedings under this Act, refund of any amount becomes due to the assessee, the Assessing Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf.*
>
> *Provided that where, by the order aforesaid-*
>
> *a) An assessment is set aside or cancelled and an order of fresh assessment is directed to be made, the refund, if any, shall become due only on the making of such fresh assessment;*
>
> *b) the assessment is annulled, the refund shall become due only of the amount, if any, of the tax paid in excess of the tax chargeable on the total income returned by the assessee.*

> *246A. (1) Any assessee [or any deductor] [or any collector] aggrieved by any of the following orders (whether made before or after the appointed day) may appeal to the Commissioner (Appeals) against -*
>
> *……*
>
> *(i) an order made under section 237;"*

28. Mr Mistri would elevate the communication dated 29 November 2018 to the status of a statutory order recording the AO's satisfaction under section 237, stating that the refund was conclusively due to the Petitioner, while Mr Singh refutes this altogether.

29. Section 237 of the IT Act provides that if a person "satisfies" the Assessing Officer that the amount of tax paid by him exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess. In the instant case, the Petitioner made the claim for the refund of DDT on 10 October 2018, and it was specifically stated that such a claim is made because there is no provision in Form ITR-VI to claim a refund of DDT. Respondents have neither disputed the non-provision in the ITR form to claim a refund of DDT till the filing of the reply to this petition, nor is it the basis which can be found in the impugned communication dated 16 June 2022.

30. Section 237 of the IT Act requires "satisfaction" of the Assessing Officer that the amount paid is more than what is chargeable under the Act and, therefore, the person is entitled to a refund of the excess. Such an important "satisfaction" must be an unequivocal and final determination

after proper adjudication on the application made by an assessee for the refund. Furthermore, such "satisfaction" must be in writing by way of an order in which the Assessing Officer must give his reasons for either accepting or rejecting the refund claim. This is necessary because there should be no ambiguity on whether the AO was passing some statutory order capable of legal consequences or was merely expressing his tentative opinion or responding to the refund claim application.

31. We say that such satisfaction must be formally expressed because neither party should be kept guessing or be prejudiced in resorting to the remedies that the law provides against such determination. For instance, Section 246A of the IT Act provides for appealable orders before the Commissioner (Appeals) and Section 246A (1)(i) of the IT Act refers to an order made under Section 237 of the IT Act as an appealable order.

32. Therefore, since the adjudication/ determination of the entitlement under Section 237 of the IT Act is an appealable order, it follows that there must be a written communication in which there is a final determination of the entitlement or disentitlement supported by reasoning so that the appellate authority can test it. Therefore, in our view, there must be an "order" under Section 237 of the IT Act. Such an order must be a conclusive and final determination of the entitlement or disentitlement to a refund of the excess amount paid. The emphasis need not be on the form or citation of the relevant

legal provision. But the essential attributes of conclusiveness must be reflected. The parties must know that a formal determination of the refund claim was being considered and dealt with, so that all aspects could be pointed out and considered. In this case, the order at least tentatively supports the Assessee, but the shoe could as well be on the other foot on some other occasion. On perusal of the communication dated 29 November 2018 and on considering the circumstances in which it was made, we find it challenging to elevate it to the status of a statutory order recording the satisfaction contemplated by Section 237 of the IT Act.

33. Article 265 of the Constitution of India also provides that no tax shall be levied or collected except by authority of law. The phrase "authority of law" would mean liability/entitlement as per the Act. This would contemplate that before a person can be entitled to a refund, the Assessing Officer must satisfy that such an entitlement is in accordance with the provisions of the IT Act, and there must be a final determination of the correctness of the claim for refund. Based upon an inconclusive or tentative opinion of an AO, no breach of Article 265 can be alleged or established.

34. The communication dated 29 November 2018 in the first paragraph states that the claim of refund has been considered by Respondent No.1. In paragraph 2, the details of the dividend paid and received are stated. In paragraph 3, Respondent No.1 records that the Petitioner has made a claim that dividend income paid to ACSL Mauritius "should be

circumscribed @ 5% as per Article 10 of the India-Mauritius Tax Treaty" and such a claim has been examined and found correct. However, after stating so, Respondent No.1 has qualified by stating that the refund "due" is on "preliminary verification determined at Rs . 20,73,06,062/-" and further the refund would be taken up for "processing" and issued after adjustment of past demands, if any. This is hardly conclusive.

35. If the communication dated 29 November 2018 is an order, it being like a preliminary, prima facie, or interlocutory order and not a final order, the Petitioner cannot base their claim on this communication to allege breach of Article 265 of the Constitution. The communication dated 29 November 2018 is based on preliminary verification and is subject to processing, and therefore, it is in the nature of a preliminary/prima facie/interlocutory order. Respondent No.1 should and ought to have passed a final order so that there would be no ambiguity on the issue, and such a determination would be capable of legal consequences, including resort to remedies under the law. Article 265 cannot be invoked relying almost entirely on such communication, which is based on preliminary verification and further processing.

36. An "order" to be treated as such must decide matters affecting the valuable rights of an Assessee and should satisfy the requirement of finality, which is absent in the communication dated 29 November 2018. The said

communication dated 29 November 2018 is not a command or direction authoritatively given for the grant of a refund. An order based on which a claim for refund is made should conclusively find that the refund is "due," thereby putting the issue of entitlement to rest. Suppose the claim relies entirely on a document based on preliminary verification and further processing. In that case, it cannot be said that the refund is due to such a claimant, and it is being withheld in breach of Article 265 of the Constitution of India.

37. In our view, the communication dated 29 November 2018 cannot be read by picking up one sentence in isolation, but would have to be read in its entirety, not ignoring the context. On a holistic reading of the entire communication dated 29 November 2018, what appears to have been said by Respondent No.1 is that the determination of refund is based on preliminary verification and is subject to further processing. The communication dated 29 November 2018 appears to be akin to an interlocutory/ preliminary order wherein a prima facie view is expressed by Respondent No.1 on the issue of refund. However, the communication dated 29 November 2018 cannot be treated as a final and conclusive determination of the entitlement of the Petitioner to the refund. This is because Respondent No.1 states that on preliminary verification, the refund is determined at Rs . 20,73,06,062/-, and further it states that the same would be taken up for processing.

38. The sentence "the claim has been examined and found correct" cannot be read in isolation de hors the subsequent statement, which states that the refund due on preliminary verification is determined at Rs . 20,73,06,062/- and the same would be taken up for processing.

39. Communication dated 29 November 2018 should have been followed up by Respondent No.1 by issuing a final and conclusive order. In this instance, Respondent No.1 has not taken any steps after the communication dated 29 November 2018 to verify the refund claim. The delay on the part of Respondent No.1 in carrying out the verification and passing a final and conclusive determination through an order cannot be attributed to the Petitioner. However, because such an exercise was not performed by Respondent No.1, the communication dated 29 November 2018 cannot be regarded as a final determination culminating in an order as contemplated under Section 237 read with 246a of the IT Act. If, upon final determination, a refund is found conclusively due, surely interest can be awarded to the Petitioner.

40. Section 237 of the IT Act refers to the phrase "satisfied". The phrase satisfaction means fully and conclusively satisfied and not a prima facie satisfaction. On a reading of communication dated 29 November 2018, it cannot be said that Respondent No.1-Assessing Officer was fully satisfied with the entitlement of the Petitioner to the refund. This is so because the said communication specifically states that it is

based on preliminary verification and is subject to further processing. Therefore, in our view, the communication dated 29 November 2018 cannot be treated as meaning that the Assessing Officer is satisfied as contemplated under Section 237 of the IT Act to the entitlement of the refund. Furthermore, since it is in the form of interlocutory/ preliminary/prima-facie communication, the same also cannot be considered an "order". The reading of the communication dated 29 November 2018 would only mean that prima facie, Respondent No.1 found the claim to be correct on preliminary verification.

41. There is no dispute that Respondent No.1 has the authority to pass a final order granting a refund. This would encompass preliminary, or prima facie, orders, and such orders are subject to verification and statutory limitations. The initial or prima facie orders are provisional and tentative but do not constitute final adjudication and can be modified upon detailed examination. This communication, dated 29 November 2018, cannot be construed as a final adjudication order accepting the Petitioner's plea for the refund claim.

42. In our view, therefore, since the communication dated 29 November 2018 does not specify conclusively the entitlement of the Petitioner to the refund claim, it cannot be considered as a final determination culminating in a final "order" under Section 237 of the IT Act admitting the entitlement to a refund of the excess DDT. However, we disagree with the reasoning in the impugned communication

dated 16 June 2022 which states that since there is no mention of the Section in the communication dated 29 November 2018, the same does not constitute an order. Mere non-mentioning of any section would not mean that a communication finally determining the rights and liabilities of an Assessee cannot be treated as an order. However, there is no final determination in the instant case, and therefore, the essential attribute of a conclusive order is missing.

43. We agree with Mr. Mistri, learned counsel for the Petitioner, that the issue of whether DDT is covered by the provisions of the Double Taxation Avoidance Agreement is pending in the cases of other Assessee before various forums across the country, including this Court. Therefore, it would not be appropriate for us to delve into this issue for the first time and embark upon deciding the issues of eligibility or entitlement to a refund under the treaty for the first time.

44. We have not dealt with case laws relied upon by both parties since, in the present factual scenario, keeping in mind the controversy before us and our view, they are not applicable. The case laws mainly relate to the merits of the entitlement to a refund, which is an issue we are not presently deciding on.

45. The second issue concerning the status of communication dated 29 November is decided in the above terms. The said communication cannot be regarded or

elevated to the status of some statutory order conclusively or finally determining the issue of refund entitlement.

46. Finally, the question is whether the Petitioner has made out a case for the issue of a writ of mandamus for the grant of a refund of Rs. 20,73,06,062/- solely based on the communication dated 29 November 2018.

47. Having regard to the legal status of the communication dated 29 November 2018, obviously, based on the communication dated 29 November 2018, no mandamus can be immediately issued directing refund of the amount of Rs . 20,73,06,062/-. Some Competent Authority would have to conclusively determine issues of eligibility and entitlement for refund, examine the merits of the contention based upon which the refund is applied, and pass an appropriate order on the refund issue. Such an order will no doubt have to be made after giving the Petitioner full opportunity and considering all relevant material, including the transactions and the treaty's provisions. Since in this case, there is no final determination that refund was indeed due and payable to the Petitioner, no case is made out for the issue of writ of mandamus to direct the Respondents to refund the amount of Rs . 20,73,06,062/- to the Petitioner based solely on the communication dated 29 November 2018.

48. Though, for reasons discussed earlier, we are inclined to quash and set aside the impugned communication dated 16 June 2022, a writ of mandamus cannot issue as a corollary to

such quashing. The quashing of the impugned communication dated 16 June 2022 does not revive the communication dated 29 November 2018 or in any event does not confer upon the communication dated 29 November 2018 some statutory character of a refund order or some communication finally determining that refund of Rs.20,73,06,062/- was due and payable to the Petitioner without the necessity of any further verification or adjudication.

49. In exercising discretionary jurisdiction under Article 226, we must remember that discretion is exercised on equitable principles. If, upon quashing an impugned order, another illegal order, ultra vires, or inequitable revives, then the Court is not bound to exercise its discretion and permit such illegal, ultra vires, or inequitable order to prevail or revive. While we do not suggest that the impugned communication dated 29 November 2018 is unlawful or ultra vires, we are satisfied that the communication dated 29 November 2018 is neither a statutory order nor a final determination on the refund issue. Therefore, upon quashing of the impugned communication dated 16 June 2022, we cannot immediately issue a writ of mandamus for refund by relying entirely on the communication dated 29 November 2018.

50. The third issue is determined accordingly in the above terms.

51. Therefore, the communication dated 16 June 2022 must be quashed and set aside for all the above reasons. However, the communication dated 29 November 2018 cannot be treated or elevated to the status of a final and conclusive determination of the Petitioner's entitlement to a refund. No mandamus can be issued based entirely or solely on the said communication.

52. Therefore, we dispose of this petition by passing the following order: -

ORDER

(i) Communication dated 16 June 2022 is quashed and set aside

(ii) Communication dated 29 November 2018 cannot be treated or elevated to the status of a final and conclusive determination of the Petitioner's entitlement to a refund.

(iii) The first Respondent is now directed to pass a final order determining the refund claim of the Petitioner, within eight weeks from today, after giving the Petitioner the opportunity of hearing and by passing a speaking order. All contentions on merits are left open.

(iv) If the Petitioner is found to be entitled to the claim of refund, interest at the appropriate rate must be granted to the Petitioner from 10 October 2018 till the grant of refund, and the time taken for not passing the final order would not be attributable to the Petitioner.

53. The Rule in this Petition is disposed of in the above terms with no order regarding costs.

54. All concerned must act on an authenticated copy of this order.

(Jitendra Jain, J) **(M.S. Sonak, J)**