NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1992 OF 2020
(Arising out of Special Leave Petition(Civil) No.23705 of 2019)

COGNIZANT TECHNOLOGY SOLUTIONS
INDIA PVT. LIMITED …Appellant

VERSUS

DEPUTY COMMISSIONER OF INCOME TAX
LARGE TAX PAYER UNIT 1 …Respondent

O R D E R

Uday Umesh Lalit, J.

1. Leave granted.

2. This appeal arises out of the final judgment and order dated 06.09.2019[1] passed by the High Court[2] in Writ Appeal No.2063 of 2019.

3. The appellant is engaged in the business of development of computer software and related services. In the Financial Year 2016-17, the appellant approached the High Court with a Scheme of Arrangement and Compromise under Sections 391 to 393 of the Companies Act, 1956 to

1 Corrected vide further order dated 12.09.2019
2 The High Court of Judicature at Madras

buy-back its shares. The High Court sanctioned the Scheme on 18.04.2016 in Company Petition No.102 of 2016, pursuant to which the appellant purchased 94,00,534 shares at a price of Rs.20,297/- per share from its four shareholders and made a total remittance of Rs.19,080 crores approximately. The details in that behalf were:-

Shareholder	Shares Purchased (No. of Shares)	Consideration (Amount in Rs.)	Tax deducted at Source (Amount in Rs.)
Cognizant Technology Solutions Corporation ("CTS USA")	37,00,747	7511,40,61,859	810,73,37,402
MarketRx Inc (USA)	2,38,521	484,12,60,737	52,33,24,388
Cognizant (Mauritius) Limited (Mauritius)	53,01,778	10761,03,91,036	0 (Treaty benefit claimed)
CSS Investments LLC, Delaware (USA)	1,59,478	323,69,24,966	34,95,01,528
Total	94,00,534	19080,26,38,598	898,01,63,318

According to the appellant, this buy-back of shares was effected in May 2016.

4. Thereafter, the appellant made statutory filing under Form 15 CA (under Rule 37BB of the Income Tax Rules, 1962) after obtaining requisite certificate from a Chartered Accountant in Form 15CB furnishing details of remittances made to non-residents.

5. On 21.11.2017 a letter was received by the appellant from the

Deputy Commissioner of Income Tax, Large Taxpayer Unit-1, Chennai in connection with non-payment of tax on the remittances made to the non-residents, in Financial Years 2015-16 and 2016-17. The letter stated:-

> "… …On verification of 15CA data available with the department, it is noticed that your company has made the following remittances to non-residents during the financial years 2015-16 and 2016-17.

Date of Remittance	Name of the non-resident company receiving the remittance	Amount remitted (Rs.)	Tax made on remittance (Rs.)
17.02.2016	Cognizant (Mauritius) Ltd.	335,36,38,361	Nil
19.05.2016	Cognizant (Mauritius) Ltd.	10761,03,91,036	Nil
19.05.2016	Cognizant Technology Solutions Corporation, USA	7511,40,61,859	810,73,37,402
19.05.2016	Market Rx Luc, USA	484,12,60,737	52,33,24,388
19.05.2016	CSS investment LLC, USA	323,69,24,966	34,95,01,528
	Total	19415,62,76,959	898,01,63,318

> The data available with the department shows that you have not deducted/paid any tax on the remittances made to M/s Cognizant (Mauritius) Ltd. on 17.02.2016 and 19.05.2016 whereas in the case of remittances to the concerns in USA, you have only deducted/paid tax @ 10% (plus surcharge & cess).
>
> In this regard, I request you to kindly furnish the following information:
>
> a) The dates and amounts of remittances to the non-residents during the FYs. 2015-16 & 2016-17, along with their

residential status.

b) The nature and purpose of the said remittances. Copies of the documents submitted to the RBI for obtaining the permission and remitting the amounts.

c) Whether the above remittances are in accordance with any agreement, scheme etc.? If so, please furnish the copies of the same.

d) Dates and amounts of taxes deducted/paid into govt. account, along with evidences, and the sections under which the said tax was deducted and/or claimed exempt, as the case may be.

e) The rate(s) at which the above tax is deducted/paid into the govt. account, in each case; and reasons for deviation from the statutory requirement of tax, if any, or non-deduction/non-payment, as the case may be."

6. The requisite details were furnished by the appellant vide letters dated 01.12.2017 and 05.12.2017 whereafter meetings were held between the officials of the appellant and the officers of the Department. Later, a communication was addressed by the Department to the appellant on 22.03.2018. After referring to the remittances made by the appellant to its four shareholders, it was stated:-

"2. The company has not remitted any tax u/s. 115-O of the Act till date, even though the tax @ 15% u/s. 115-O is to be remitted into the central Govt. Account within 14 days from the date of payment to the shareholders.

3. The assessee company was under the impression that since its scheme of "arrangement and compromise" between the shareholders and the company, was in accordance with

sec.391 to 393 of the Companies Act, and approved by the Court, the provisions of section 115-QA, 115-O or 2(22) of Income Tax Act are not applicable to its case. During the personal discussion between the company and the AO/JCIT/CIT (LTU), it was brought to the notice of the Company that:

- Provisions of sections 115-QA of the IT Act, which were introduced w.e.f. 01.06.2013, defines the 'buy-back', as the one done in accordance with sec.77A of the Companies Act (valid upto 31.05.2016). W.e.f. 01.06.2016, any buy-back of own shares will attract 115-QA.

- Provisions of sec.2(22)(d), clearly postulates that any distribution on reduction of capital, to the extent of accumulated profits will amount to dividends. The only exception to this is the buy-back u/s. 77A of the Companies Act. Provisions of sec.2(22)(d) are:

  S.2(22)(d): any distribution to its shareholders by a company on the reduction of its capital, to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not:

- Even otherwise, provisions of sec. 2(22)(a) of the Act, which stipulate that any distribution to the shareholders is a dividend, if it is contended that it was not a case of reduction of capital. Provisions of sec.2(22)(a) are:

  S.2(22)(a): any distribution by a company of accumulated profits whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company;

- Once, the provisions of sec.2(22)(d) or 2(22)(a) are

applicable, the distributor is required to pay tax u/s.115-O of the Act.

- In the present case, the assessee's purchase of its own shares, which is not in accordance with sec.77A of the Companies Act, will amount to dividends within the meaning of sec.2(22)(d) or 2(22)(a) of the Act, and consequently, liable for tax u/s. 115-O of the Act in the hands of the assessee company."

After considering factual aspects it was stated :-

"11. This clearly shows that, to the extent of face value (issued price), the paid-up share capital will be utilized and the balance will be paid from the reserves, which are nothing but accumulated profits in the present case. Here the payment from the paid-up shares capital is nothing but reduction of capital and the latter (i.e. payment from the reserves being accumulated profits) is distribution of profits.

12. When any company reduces the 'share capital' as per the provisions of the Companies Act, by way of reducing the face value of shares or by way of paying off part of the share capital, it amounts to extinguishment of the rights of the shareholder to the extent of reduction of share capital. Therefore, it is regarded as transfer under section 2(47) of the IT Act and would be chargeable to tax."

Finally, it was concluded:-

"18. Thus, the payments made to the shareholders, under purchase of shares through the scheme of "arrangements and compromise", is a dividend within the meaning of section 2(22)(d)/2(22)(a) of the Act, requiring to remit the taxes in to the government account u/s. 115-O of the Act. Further, since the company has failed to remit the taxes within the stipulated period, the company is 'deemed to be an assessee in default', u/s. 115-Q of the Act. Therefore the

> assessee company is required to remit the taxes (calculated @ 15% of the total payments of Rs.19415,62,77,269/- to the shareholders, and surcharge etc as per the Act) along with the interest payable u/s. 115-P of the Act, immediately, failing which the department will proceed with the collection and recovery of the taxes, including coercive steps, as per the provisions of the Act."

7. Said communication dated 22.03.2018 was received by the appellant on or about 26.03.2018 and soon thereafter the bank accounts of the appellant were attached by the Department.

8. It must be stated here that while the meetings between the officials of the appellant and the officers of the Department were going on, an application was preferred by the appellant on 20.03.2018 before the Authority for Advance Ruling (AAR) under Section 245Q of the Act[3] seeking a ruling on the issue whether the appellant was liable to pay tax on buy-back of its shares under Section 115QA or Section 115-O or any other provision of the Act.

9. The appellant challenged the communication dated 22.03.2018 by filing Writ Petition No.7354 of 2018 in the High Court submitting *inter alia* that while the issue was pending before the AAR under Section 245Q of the Act, in view of the bar provided under Section 245RR of the Act, the matter could not have been considered. It was also submitted that the

3 The Income Tax Act, 1961

appellant was never put to notice whether it would be liable under Section 115-O of the Act. It was further submitted that all the while the Department was only soliciting information which the appellant had readily furnished and at no stage the appellant was put to notice that its liability would be determined in any manner.

10. The Writ Petition came up before a Single Judge of the High Court on 03.04.2018 when following interim directions were issued:-

> "**11**. In my considered view the impugned proceedings has crystallized in the form of a demand for payment of tax, and if the petitioner has to be granted an interim protection till the writ petition is finally heard, the same has to be conditional and cannot be unconditional. Assuming without admitting the petitioner had to avail an appellate remedy under the Act and prays for appropriate interim orders before an appellate authority, then the appellate authority is entitled to grant an order of stay, which is invariably conditional on account of guidelines issued by the Central Board of Direct Taxes (CBDT) with a view to maintain uniformity in the matter of grant of interim orders. As per the latest guidelines prescribed by CBDT, it has recommended that 20% of the demand, which has been made shall be directed to be remitted by the assessee for grant of stay of the remaining demand. Though this cannot be a universal rule, invariable in most cases, the authorities have adopted the 20% formula. However, in certain cases, this Court has interfered with such orders and reduced the amounts payable by the assessee and in certain other cases, where no stay has been granted by the authority and the assessee has approached the Court for grant of interim stay, the Court has imposed condition by directing payment of more than 20% of the demand. Therefore, the facts of each case have to be considered while granting interim order bearing in mind the interest of the assessee as well as

safeguarding the interest of the Revenue.

12. Thus, considering the facts and circumstances of the case, there will be an order of interim stay of the impugned proceedings subject to the condition that the petitioner pays 15% of the tax demanded and furnishes a Bank Guarantee or security by way of Fixed Deposits for the remaining taxes (only), to be paid. For the purpose of complying with the above condition, the attachment of the Bank account in JP Morgan Chase Bank N.A., J.P. Morgan Tower, 8th Floor, Off C.S.T Road, Kalina, Santacruz East, Mumbai – 400 098 shall stand lifted forthwith. However, the attachment in respect of other Bank accounts viz.,

(a) State Bank of India, CAG Branch, Chennai.

(b) Deutsche Bank, Ground Floor,
Door No.4 & 4A,
Western Tower,
Sunny Side, Shafi Mohammed Road,
Thousand Lights, Chennai – 600 006.

(c) Corporation Bank, Corporate Banking Branch,
38 & 39 Whites Road, Chennai-600 014.

(d) City Bank N.A., No.163, Anna Salai,
Chennai-600 002.

(e) HDFC Bank, No.115, Dr. Radhakrishnan Salai,
9th Floor, Mylapore, Chennai-600 004,

shall continue till the compliance of the above direction. Similarly, the attachment of the nine Bank deposits viz., (1) HDFC Limited, (ii) HDFC Limited, (iii) HDFC Limited, (iv) HDFC Limited, (v) HDFC Limited, (vi) HDFC Limited, (vii) Bajaj Finance Limited, (viii) Bajaj Finance Limited, (ix) Bajaj Finance Limited shall also continue subject to the lien being created for the remaining amount of taxes. The remittance of 15% of the tax demanded shall be retained in a separate account and shall abide by the orders to be passed in the writ petition."

11. The Single Judge by his decision dated 25.06.2019 dismissed the Writ Petition as not being maintainable and relegated the appellant to avail the remedy before the Appellate Authority under the Act. However, during the course of his decision, the Single Judge concluded that there was no need for issuance of any notice before making a demand under Section 115-O of the Act and the notice issued on 21.11.2017 calling for details whereafter meetings were convened, was quite adequate. He rejected the submission that there would be a bar in terms of Section 245RR of the Act. The Single Judge did not find any merit in the contention that the shares purchased pursuant to the order of the Company Court could not be treated as dividend. While relegating the appellant to avail the remedy before the Appellate Authority it was observed:-

> "**33**. … … the Appellate Authority shall take into account the amount deposited in pursuance of the order referred supra, while entertaining the appeal. With regard to Fixed Deposits, the respondent shall maintain *status-quo* as on date for a period of two weeks. … …"

12. The appellant, being aggrieved, challenged the aforesaid view by filing Writ Appeal No.2063 of 2019. While discussing the issues that came up for consideration, the Division Bench observed that the Single Judge

after having found the Writ Petition to be not maintainable, ought not to have gone into merits. As regards the nature of the communication dated 22.03.2018 and maintainability of an appeal challenging the same, it was observed:-

> "**11.** The learned Senior Counsel appearing for the appellant would submit that it is not known as to whether the impugned order dated 22.03.2018 is a show cause notice or final order. Though there appears to be some element of contradiction in the counter affidavit filed, the said order appears to be a final one. Now it is also the contention of the learned Additional Solicitor General that it is only a final order. We are also of the view that the further action taken would also indicate that the order under challenge was a final one. If it is only a show cause notice, then there is no need to challenge it and instead the consequential freezing alone requires to be questioned. The further question as to whether the order under challenge violates the principles of natural justice or requisite procedure contemplated under the Act is a matter for consideration before the Appellate Authority. The learned Single Judge has rightly observed that the appeal can be entertained and decided on merit as the appellant has already deposited a sum of Rs.495 crores."

13. The view taken by the Division Bench of the High Court is presently under appeal. On 04.10.2019, an affidavit of undertaking, filed on behalf of the appellant was taken on record in which it was submitted:-

> "In the event this Hon'ble Court is gracious to pass an order that the fixed deposits over which a lien has been created, pursuant to the Interim Order passed by the Learned Single Judge (continued by the Division Bench), is

> vacated as an interim measure to enable the Petitioner Company to run its business and operations, the Petitioner undertakes that in the event this Hon'ble Court is satisfied that any security must be offered by the Petitioner *ex debito justitiae* at the time of the disposal of the Special Leave Petition, the Petitioner will unqualifiedly, without demur, furnish such security/fixed deposits to the satisfaction of the Registrar of the Hon'ble Court as this Hon'ble Court may be so pleased to direct."

However, by order dated 14.10.2019, this Court observed:-

> "It is a matter of record that pursuant to order dated 03.04.2018 passed by the Single Judge of the High Court of Judicature at Madras in Writ Petition No.7354 of 2018, a sum of Rs.2806,40,15,294/- stands deposited and invested in the form of fixed deposit receipts."

It was then directed:-

> "Pending further consideration, the amount which is presently lying in deposit shall be maintained in the same form."

14. We heard Mr. Gopal Subramanium, learned Senior Advocate for the appellant and Mr. Zoheb Hossain, learned advocate for the Department.

15. It was submitted by Mr. Subramanium, learned Senior Advocate that the instant transaction would not come within the scope of Section 115-O of the Act. It was submitted that the appellant was never put to notice about the proposed determination in terms of Section 115-O of the Act; that the communication dated 22.03.2018 could not be said to have

determined the liability of the appellant under Section 115-O of the Act and consequently the appellant could not have been relegated to the appellate remedy as directed. It was submitted that the communication dated 22.03.2018 could, at best be treated as an intimation of the action proposed to be taken resort to by the Department. These submissions were countered by Mr. Zoheb Hussain, learned Advocate. According to him, the matter would come within the ambit of Section 115-O of the Act. He also relied upon Section 115-Q of the Act to submit that in case the assessee-company had not paid tax on distributed profits in accordance with the provisions of Section 115-O, the assessee-company would be deemed to be "an assessee in default" in respect of the amount of tax and all provisions relating to collection and recovery of income tax would apply. As an extension of the concept, it was submitted that the Department was justified in issuing the communication dated 22.03.2018 followed by attachment of the accounts of the appellant.

16. On the issue whether communication dated 22.03.2018 was in the nature of determination of the liability, both the learned counsel were heard at considerable length, at the end of which it was agreed by Mr. Zoheb Hossain, learned Advocate for the Department, that the communication

dated 22.03.2018 could be treated as a show cause notice and the Department be permitted to conclude the issue within a reasonable time, provided the interim order passed by the Single Judge of the High Court on 03.04.2018 was continued. The course suggested by the learned counsel for the Department was acceptable to the learned Senior Counsel for the appellant.

17. It was, therefore, suggested that the appellant may file an affidavit of undertaking to withdraw the proceedings initiated by it before the AAR and the Department may also file an appropriate affidavit stating that it was willing to treat the communication dated 22.03.2018 as a show cause notice. An appropriate affidavit of undertaking to withdraw the proceedings initiated before the AAR has since then been filed by the appellant. An affidavit has also been filed on behalf of the Department stating:-

> "The communication dated 22.03.2018 may be treated as a show cause notice and the assessee will be given an opportunity of being heard and a fresh order will be passed within two months from the date of the judgment of this Hon'ble Court."

18. In the peculiar facts and circumstances of the present case, while disposing of this Appeal, we direct:-

a) The communication dated 22.03.2018 shall be treated as a show cause notice calling upon the appellant to respond with regard to the aspects adverted to in said communication;

b) The appellant shall be entitled to put in its reply and place such material, on which it seeks to place reliance, within 10 days from today;

c) The appellant shall thereafter be afforded oral hearing in the matter;

d) The matter shall thereafter be decided on merits by the concerned authority within two months from today;

e) Pending such consideration, as also till the period to prefer an appeal from the decision on merits is not over, the interim order passed by the Single Judge of the High Court on 03.04.2018 and as affirmed by this Court vide its order dated 14.10.2019, shall continue to be in operation; and

f) The amount of Rs.495,24,73,287/- deposited towards payment of tax and the amount of Rs.2806,40,15,294/- which stands deposited and invested in the form of Fixed Deposit Receipts shall be subject to the decision to be taken by the concerned Authority on merits or to such directions as may be issued by the Appellate Authority.

19. We have stated the facts of the present case only by way of narration of events and explaining the chronology. We shall not be taken to have dealt with merits or demerits of the rival contentions of the parties. The merits of the matter shall be gone into independently by the concerned authorities without being influenced, in any way, by any of the observations made by the High Court and this Court.

20. The Appeal is disposed of in aforesaid terms and the judgment and order presently under appeal shall stand modified accordingly. No costs.

.....J.
[UDAY UMESH LALIT]

.....J.
[INDU MALHOTRA]

.....J.
[HEMANT GUPTA]

New Delhi;
March 04, 2020.