

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

% **Date of decision: 26th March, 2021**

+ **W.P.(C) 3617/2020**

**GE CAPITAL MAURITIUS
OVERSEAS INVESTMENTS**

..... Petitioner

Through: Mr. Harish N. Salve, Sr. Adv. with
Ms. Anuradha Dutt, Mr. Sachit Jolly,
Mr. Rohit Garg, Mr. Siddharth Joshi
& Ms. Disha Jham, Advs.

versus

**DEPUTY COMMISSIONER OF
INCOME TAX & ANR.**

..... Respondents

Through: Mr. Sunil Agarwal, Sr. Standing
Counsel & Mr. Tushar Gupta, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE ASHA MENON

RAJIV SAHAI ENDLAW, J.

1. This petition was originally filed, seeking a mandamus, directing the respondents to issue / grant refund due of Rs.249.39 crores, for the assessment year 2018-19 along with interest under Section 244A of the Income Tax Act, 1961, to the petitioner. It was the case of the petitioner, that (i) the petitioner, on 31st October, 2018 filed its Income Tax Return (ITR) for the assessment year 2018-19, claiming refund of Rs.226.72 crores, being the amount of Tax Deducted at Source (TDS) by the payer, from the payments made to the petitioner on account of sale by the petitioner of shares of an Indian company and which payment was not chargeable to tax in India in terms of Article 13(4) of the Double Taxation Avoidance Agreement (DTAA) between India and Mauritius; (ii) the ITR

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of the petitioner was selected for scrutiny assessment and a notice dated 22nd September, 2019, under Section 143(2) of the Act, was received by the petitioner; (iii) on 25th November, 2019, an intimation under Section 143(1) of the Act was issued to the petitioner, determining a refund of approximately Rs.249.39 crores to be due to the petitioner along with applicable interest; and, (iv) however inspite of intimation dated 25th November, 2019 and several reminders of the petitioner, till the date of filing of the petition, refund had not been received by the petitioner.

2. The petition came up before this Court first on 19th June, 2020 and thereafter before this Bench on 23rd June, 2020, when it was the contention of the senior counsel for the petitioner that no order under Section 241A of the Act, for retention of the aforesaid amount, had been passed. Per contra, the counsel for the respondents, appearing on advance notice, stated that it was mentioned in the intimation dated 25th November, 2019 itself that

“The refund determined u/s 143(1) in this intimation, if any, along with interest u/s 244A and subject to adjustment of arrear demand, if any, u/s 245 will be released as per the provisions of Section 241A of the Income Tax Act, 1961 as determined by the Assessing Officer”

and time was sought for filing counter affidavit.

3. On the next date of hearing i.e. 27th July, 2020, the senior counsel for the petitioner stated that the petitioner, on 15th July, 2020 had been served with an order under Section 241A of the Income Tax Act and he had advised for amendment of the writ petition. Per contra, the counsel for the respondents stated that though counter affidavit had already been filed but

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an additional counter affidavit would be required to be filed to the amended petition.

4. The pleadings were accordingly completed. The petitioner, in the amended petition, besides the relief of mandamus directing refund with interest, has also impugned the order dated 15th July, 2020 under Section 241A of the Act.

5. Considering the nature of the controversy, it is not deemed expedient to detail the pleadings at this stage. We may however reproduce hereinbelow the relevant part of the order dated 15th July, 2020 as under:

“1. I have gone through the proposal of the DCIT Circle 1 (3)(1) regarding withholding of refund of M/s GE Capital Mauritius Overseas Investments (PAN- AADCG3823H) for AY 2018-19 vide her application dated 26.6.2020.

2. The assessee is a company registered in Mauritius since 2007. However it never filed its return of income in India before the present return which has resulted in refund of Rs 226,72,06,7201- u/s 143(1) of the I.T. Act 1961 subject to withholding of refund under section 241 A.

3. The assessee company has sold its share holding in SBI Cards and Payment Services Private Limited, a company incorporated in India. This resulted in Long Term Capital gains of Rs 2036.50 crore/-. The assessee has claimed benefit of Indo Mauritian DTAA and has asserted that the Capital gains arising out of sale of shares in Indian Companies were not taxable in India. The case of the assessee for the said assessment year was selected for scrutiny and notice u/s 143(2) was issued on 22/09/2019 i.e. before the order u/s 143(1) which was passed in Dec 2019.

4. The assessee company is a GBLI company registered under the laws of Mauritius. It has no assets or Bank account in India. From the return of income and financial accounts submitted with the return of income it appears that investment in these companies i.e. SBI Cards and Payment Services Private Limited, were the only investment made by the assessee company.

5. Since the Company never filed return of income earlier, the A.O. did not have much information about the assessee company.

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Before issuing the refund of Rs 226 Crore it was the duty of the AO to ascertain the genuineness of the assessee's claim that capital gains was not taxable in India. In view of this the AO sent a mail to the assessee seeking certain information like source of investment in SBI Cards and Payment Services Private Limited, utilization of the sale proceeds and copies of the Copies of Balance sheet & P & L A/c for AY 2015-16, 2016-17, 2017-18 & 2018-19. From the AO's proposal it appears that the assessee did not submit these details but filed a writ petition in Delhi High Court seeking direction for issuance of the refund which is pending. Subsequently, assessee has furnished AFS for the period ending December 2017 and December 2018. On crucial question of source of funds for acquiring the shares and the utilization of sale proceeds of shares, the assessee has questioned the purpose of AO in requiring this information, and has not responded to this query.

6. *The AO has mentioned that the assessee is a company registered in Mauritius holding GBLI license. A GBLI company is regulated by Financial Services Commission (FSC) of Mauritius. It is allowed dealing with residents in a range of 10-15% with prior authorization of FSC for activities connected with business outside Mauritius. Thus it is actually meant for business outside Mauritius. It's a travesty that a person claiming resident of Mauritius can't do business in the resident jurisdiction!. Some prominent features of a GBLI company are*

- it must have at least two directors, resident in Mauritius to avail benefit of treaty network (Corporate Directors are disallowed);*
- Effective tax rate for such a company in Mauritius is 3%;*
- Interest & royalty payments are tax exempt;*
- there is no capital gains tax;*
- annual license fee is payable to RoC & FSC.*
- It must be administered by a management company (MC). Management Companies (MCs) are service providers which act as intermediaries between their clients and the FSC. One of the functions of MCs is to provide directors, secretary and nominee shareholders. How much independence can such a director exercise is a moot question?*

7. *It is therefore clear that a GBLI company cannot do any business in Mauritius, hence purpose of formation of such a company becomes very important. As per the AO's report the parent company of the assessee company which is holding 100% shares of*

the assessee, is a company registered in U.K namely GE Capital International Holdings Limited.

8. If GE Capital International Holdings Limited had directly made investment in shares of SBI Cards and Payment Services Private Limited and would have sold them, the resulting capital gains would have become taxable in India as per Indo U.K. DTAA.

9. As mentioned above as per the AO's report investment in SBI Cards and Payment Services Private Limited was the only investment made by the assessee company. From the P&L account it appears the assessee had no other expenditure other than routine administrative expenditure. Sources of investment in SBI Cards and Payment Services Private Limited have not been provided by the assessee nor the assessee explained utilization of sale proceeds.

10. From the Financial statements of the assessee it appears the assessee has spent US\$ 40,000,000/- out of sale proceeds of shares on buyback of its shares, and further paid dividend of US Dollar 305,000,000/- which means the money must have gone to the parent company i.e. GE Capital International Holdings Limited U.K. Further the proposal of AO states that the assessee company has paid out entire cash inflow on sale of shares immediately after sale. It no longer holds any asset anywhere in the world including India.

11. From these facts prima facie it appears that the parent company, ie GE Capital International Holdings Limited floated the assessee company in Mauritius with the sole purpose of making investment in Indian Companies namely SBI Cards and Payment Services Private Limited and with an objective not to pay any tax in India on Capital Gains which would have arisen on sale of investment in Indian Companies. Thus it appears that the assessee company has been used as a conduit by the parent Company i.e. GE Capital International Holdings Limited U.K.

12. I have carefully examined AO's proposal for withholding refund, in particular, paragraphs 6, 7, 8, 9 and 10. I have myself reviewed the AFS of assessee company for period ending December 2017 and December 2018.

13. I am therefore convinced with the reasons given by the AO in her proposal dated 26/6/2020 that after completion of scrutiny assessment proceedings, income of the assessee i.e. Rs2036,49,93,621/- is likely to be chargeable to tax in India and the tax demand on this income would be approximately Rs226.72 crore. Granting of refund at this stage, when scrutiny assessment

proceedings are yet to be completed, is likely to adversely affect the revenue.

14. In view of the foregoing, this proposal of the AO to withhold the refund u/s 241A till completion of the assessment u/s 143(3) for the said assessment year is, hereby, approved."

6. The claim of petitioner being for refund, the statutory scheme applicable thereto may be noticed at this stage.

7. The ITR for the assessment year 2018-19 filed on 31st October, 2018 by the petitioner claiming refund of TDS, was to be processed in the manner provided in Section 143(1) of the Act. Section 143(1A) of the Act empowers the Central Board of Direct Taxes (CBDT) to make a scheme for centralised processing of ITRs, with a view to expeditiously determine tax payable by or refund due to the assessee and the ITR of petitioner was to be processed as per said scheme. Section 143(1)(d) of the Act provides for an intimation to be generated, under the centralised processing scheme, and sent to the assessee, specifying the sum determined on such processing, to be payable by or the amount of refund due to, the assessee. The second proviso to Section 143(1) provides that no intimation under Section 143(1)(d) shall be sent after expiry of the year from the end of the financial year in which the ITR is made. Section 143(1)(e) of the Act provides for refund due to the assessee to be granted to the assessee. Section 143(2) of the Act empowers the Assessing Officer (AO) to, if considers it necessary to ensure that assessee has not understated the income or not underpaid the tax, serve a notice on assessee requiring him to attend office or produce documents. This is what is generally known as notice of scrutiny assessment. The Proviso to Section 143(2) prohibits issuance of notice under Section 143(2) after the expiry of six months from end of financial

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year in which ITR is furnished. As per Section 143(1D) of the Act, on issuance of notice under Section 143(2), the processing underway of ITR under Section 143(1) shall not be necessary. However vide Proviso to Section 143 (1D), Section 143(1D) does not apply to any ITR furnished from assessment year commencing on or after 1st April, 2017; thus, notwithstanding issuance of notice under Section 143(2), processing of ITR under Section 143(1) continues i.e. intimation under Section 143(1)(d) has to be generated and refund so determined to be granted. However Section 241A, inserted with effect from 1st April, 2017 i.e. at the same time when Proviso aforesaid to Section 143(1D) was inserted, provides as under:

“241A Withholding of refund in certain cases. -- For every assessment year commencing on or after the 1st day of April, 2017, where refund of any amount becomes due to the assessee under the provisions of sub-section(1) of section 143 and the Assessing Officer is of the opinion, having regard to the fact that a notice has been issued under sub-section (2) of section 143 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, withhold the refund up to the date on which the assessment is made.”

Thus, unless order under Section 241A is passed, if an ITR being processed under Section 141(1) of the Act is of refund, as in the present case, and the processing on the basis of figures in ITR determines the refund claimed to be correct, intimation of said refund will be generated and refund paid/granted notwithstanding notice under Section 143(2) of scrutiny assessment having been issued and said assessment being underway.

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8. This Court, in *Vodafone Mobile Services Ltd. Vs. Asst. Commissioner of Income Tax* [2020] 421 ITR 193 (Delhi) held, that the exercise of refund must be undertaken promptly, keeping in mind the time limit under second proviso to Section 143(1) for sending intimation under Section 143(1)(d) i.e. before expiry of one year from the end of the financial year in which the ITR is made.

9. We now apply the aforesaid statutory scheme to the facts of present case. The ITR for assessment year 2018-19 was filed on 31st October, 2018. The time limit for sending intimation under Section 143(1)(d) of the Act thus was, before expiry of one year from end of financial year in which ITR was filed. The ITR filed on 31st October, 2018 was in the financial year 1st April, 2018 to 31st March, 2019 and one year therefrom was to expire on 31st March, 2020. The intimation under Section 143(1)(d) of the Act dated 25th November, 2019 was thus within time. Similarly, notice under Section 143(2) of the Act issued on 22nd September, 2019 was also before expiry of six months from end of financial year in which ITR was filed i.e. 1st April, 2018 to 31st March, 2019 i.e. 30th September, 2019. Section 241A however does not prescribe the time limit within which order thereunder is to be made. The question which thus arises is, whether the order under Section 241A of the Act issued on 15th July, 2020, was within time, inasmuch as if it is beyond time, direction for refund will have to be issued and need to go into challenge to validity thereof will not arise.

10. *Vodafone Mobile Services Ltd.* supra, though does not expressly say so, but from a reading thereof it follows that since intimation under Section 143(1)(d) of refund is to be generated on or before expiry of one year from

end of financial year in which ITR is made, the order under Section 241A also has to be made within the same time. We may add that though the second proviso to Section 143(1) only lays down time limit for intimation and not for refund but since refund is to be made promptly, the grant of refund cannot be beyond that. Axiomatically it follows that order under Section 241A of withholding refund also has to be before the last date for refund.

11. In the facts of the present case, the order under Section 241A thus had to be before 31st March, 2020 and the order dated 15th July, 2020 is beyond that date.

12. The counsels were heard on 23rd September, 2020, 9th October, 2020 and 4th December, 2020, when orders were reserved. The contentions of the counsels are on two aspects. Firstly, on the timing of the order under Section 241A of the Act and secondly qua the reasons stated in the order under Section 241A aforesaid, with:

A. the senior counsel for the petitioner contending, that (i) as per Instruction No.7/2002 dated 1st August, 2002 of the CBDT, the refunds determined, in which administrative approval is necessary before issue of refund, should be issued within 30 days from the date of determination of refunds and all ITRs in which refunds are payable to the assesseees are required to be processed first; (ii) that the Citizens Charter, 2014 of the Income Tax Department itself provides that in case of electronically filed ITRs, refund is to be made within six months from the end of the month in which the ITR is received; thus with respect to the ITR submitted by the petitioner on 31st

October, 2018, the refund should have been made latest by 30th April, 2019; (iii) Supreme Court in ***Vodafone Idea Ltd. v. Assistant Commissioner of Income Tax*** 2020 SCC OnLine SC 418 has also highlighted the changes made in the Act to address the grievance of delay in issuance of refund and held that the exercise of power under Section 241A has to be prior to or simultaneous with the intimation under Section 143(1) and which in the present case is of 25th November, 2019; (iv) the Act of the respondents of withholding tax is violative of Article 265 of the Constitution of India; (v) the petitioner has a statutory right to refund; (vi) though there is no time prescribed for issuance of an order under Section 241A of the Act but it has to be within reasonable time and which reasonable time has to be in the context of the facts of each case; (vii) Section 243 of the Act provides for interest to be paid after three months in case of delay in granting refund to the assessee and which also indicates that the refund has to be made within three months; and, (viii) the issuance of an order under Section 241A of the Act, after illegally withholding the refund, is *mala fide*;

- B. the counsel for the respondents contending, that (i) under Section 241A, the jurisdiction to decide whether refund is to be withheld or not is of the AO; (ii) Section 241A of the Act does not prescribe any time limit within which order thereunder is to be passed and rather permits withholding of refund till the scrutiny assessment is complete; (iii) Section 243 would have no application in the said case; (iv) that paragraphs 21 and 22 of ***Vodafone Idea Ltd.*** supra

support the respondents instead of the petitioner; (v) the time available for issuing the intimation, as issued on 25th November, 2019, was till 31st March, 2020; (vi) the issuance of an order under Section 241A of the Act, so long as issued before the outer limit provided in the second proviso to Section 143(1) of the Act, cannot be challenged on the ground of delay; (vii) because of the national lockdown on 22nd March, 2020, Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 dated 31st March, 2020 extending the time limits, wherever prescribed under the Act, till 30th June, 2020 and thereafter till 31st December, 2020 and yet thereafter till 31st March, 2021 was promulgated; (viii) the petitioner, prior to the ITR for the assessment year 2018-19, had not filed any ITR in India; no ITR was filed even while acquiring shares in the Indian company; that there was/is thus nothing available with the respondents to know the state of affairs of the petitioner and the respondents are in the dark and though asked the petitioner on 16th June, 2019 for annual financial statements of last four years, to verify the source of funds for acquisition of shares and the application of funds after receipt of sale proceeds, for the purposes of assessment, but complete particulars have not been provided; (ix) though no time limit is prescribed for issuing an order under Section 241A of the Act but Supreme Court in *Vodafone Idea Ltd.* supra has held that the last date is the date provided in the second proviso to Section 143(1) of the Act; (x) under the law, the refund can be withheld till 31st March, 2021; (xi) as per the balance sheet of the petitioner, the petitioner has no assets whatsoever and the TDS of which refund is sought is the

only asset; thus in the event of refund being made by the department, the department, if on assessment finds tax to be due, would have no means to recover the same; (xii) *Union of India v. Azadi Bachao Andolan* (2004) 10 SCC 1 and *Vodafone International Holdings BV v. Union of India* (2012) 6 SCC 613 are subject to a caveat that, if it were to be found that the entity in the treaty country is just an agent of a parent company in another country, then the asset will be treated as that of the parent company and the treaty with the country in which the parent company is situated would have application and not the treaty with the country in which the agent company is located; (xiii) in the present case, the parent company of the petitioner is in U.K. and the ultimate holding company is in U.S.A.; (xiv) that neither does the DTAA of India with U.K. nor does the DTAA of India with U.S.A. provide for exemption from long-term capital gains accrued in India; (xv) the order under Section 241A of the Act does not suffer from any jurisdictional error; (xvi) the core issue to be determined in the present case is whether the petitioner is the actual owner of the shares; (xvii) the same question as arises herein arose before the High Court of Bombay in *Aditya Birla Nuvo Ltd. Vs. Deputy Director of Income Tax (International Taxation)* [2012] 342 ITR 308 (DB) as well as before the Authority for Advance Rulings in the matter of *In RE: "AB" Mauritius* (2018) 402 ITR 311 and both lay down the real test for determining whether the entity in the treaty country could be treated as the owner; (xviii) during the assessment proceedings, it will be determined whether the petitioner is merely a puppet of the holding company and if it is

found so, the petitioner would not be entitled to the benefit of the India-Mauritius DTAA; (xix) the petitioner has till date not provided all the documents in spite of asking; (xx) disputed questions of fact cannot be adjudicated in a proceeding under Article 226 of the Constitution of India and the remedy under the subject statute, i.e. the Income Tax Act should be permitted to take course; (xxi) the AO is a Tribunal of exclusive jurisdiction and cannot be prevented from enquiry; reliance is placed on ***Union of India v. Tata Engineering and Locomotive Co. Ltd.*** (1997) 8 SCC 730; (xxii) the refund sought by the petitioner by way of this petition is inextricably linked to the assessment proceedings underway under Section 143(2) of the Act and no refund can be ordered till conclusion of the proceedings; (xxiii) the AO seized of the matter will consider all the arguments as raised by the petitioner here; and, (xxiv) the respondents did not even know of the sale and learnt of it only on ITR being filed by the petitioner.

- C. the senior counsel for the petitioner, in rejoinder arguing, that (i) Section 241A of the Act requires reasons to be recorded in writing; (ii) if the reasons are found to be untenable, the order under Section 241A of the Act can be set aside; (iii) the contention of the counsel for the respondents that the petitioner is not submitting the requisite information is fallacious; the AO can access all the information on the website; (iv) the petitioner has a Residency Certificate of Mauritius; (v) according to the laws of Mauritius, an overseas business corporation can be established and used as a vehicle for

investments with shares parked with the said vehicle; (vi) the U.S. based companies have set up such overseas business corporations for investments in India and once the laws of Mauritius permit such overseas business corporations to be set up, they would be entitled to the benefits of the India-Mauritius DTAA; (vii) the Income Tax Department also has issued circulars to the effect that they will not go behind the Tax Residency Certificate; (viii) thus even if the real owner is not the Mauritian entity but an entity situated in some other country, it is not open to the respondents to say that the India-U.S. DTAA or the India-U.K. DTAA would apply; (ix) such circulars were challenged in *Azadi Bachao Andolan* supra and this Court allowed the petition and struck down the circulars but Supreme Court set aside the judgment of this Court and upheld the circulars; (x) the Central Government also filed an affidavit in the said case supporting the India-Mauritius DTAA; (xi) the reasons given in the order under Section 241A of the Act are in the teeth of what has been held by the Supreme Court in *Azadi Bachao Andolan* supra and the order under Section 241A is liable to be quashed on this ground; (xii) the subject shares were held in the balance sheet of the petitioner since the year 2009 and dividend received with respect thereto was being taxed in the hands of the petitioner; (xiii) the shares held by the petitioner were also recorded in the name of the petitioner in the records of State Bank of India, which was the other JV partner of the company in which the shares were held, as well as in the records of Registrar of Companies; (xiv) the same reasons which did not find favour in *Azadi Bachao Andolan* supra have been made the reasons in the

impugned notice under Section 241A of the Act and form the subject matter of arguments of the counsel for the respondents; (xv) Supreme Court, in *Azadi Bachao Andolan* supra held that the said circulars are binding; (xvi) the said circulars apply the test of residency and not of beneficial ownership; (xvii) the India-Mauritius DTAA has been amended with effect from 19th July, 2016 to bring in the test of effective management but such amendment is prospective and would not apply to the subject sale of shares, accrual of capital gains wherefrom is the subject matter of issue; (xviii) Supreme Court in *Azadi Bachao Andolan* supra rejected the motivation theory; (xix) as per *Azadi Bachao Andolan* supra, merely because the sale proceeds are transferred to another country, would not make the Mauritian entity not the holding entity of the shares; (xx) the tax payer is entitled to arrange its affairs in a manner most beneficial to it; (xxi) the petitioner never showed itself to be carrying on any business in Mauritius and has openly claimed itself to be an overseas business corporation; (xxii) *Azadi Bachao Andolan* supra was specifically in issue in *Vodafone International Holdings BV* supra; (xxiii) in *Vodafone India Ltd.* supra also there was a tier of several companies; (xxiv) the entire attempt of the department is to block the refund admittedly due to the petitioner, by raising a bogey of petitioner having a huge tax liability; (xxv) the respondents admit that the petitioner is incorporated in Mauritius but say that it is not genuinely registered; (xxvi) according to the laws of Mauritius, overseas business corporation is prohibited from doing business in Mauritius, as held in *Azadi Bachao Andolan* supra also; (xxvii)

Azadi Bachao Andolan supra also holds treaty shopping to be legal; (xxviii) India entered into the DTAA on the aforesaid terms with Mauritius, with full knowledge and in view of the relations with Mauritius and acting on the said treaty, Mauritius has allowed overseas business corporations which have made investments in India and the respondents cannot be now permitted to object; (xxix) the Residency Certificate produced by the petitioner from Mauritius is enough for the petitioner to avail all the benefits of the India-Mauritius DTAA; (xxx) a subsidiary and parent company are different tax entities; (xxxi) it is not as if the petitioner was holding the shares since just prior to the sale; the petitioner was holding itself as due as the owner of the shares openly to the knowledge of all; and (xxxii) since the petitioner is unable to carry on any business in Mauritius as per the laws of Mauritius, it had no need of funds in Mauritius and accordingly transmitted the same to its parent company.

- D. the counsel for the respondents in his sur-rejoinder contending, that (i) the arguments of the petitioner go beyond the scope of the writ petition; (ii) the petitioner cannot take any benefit of *Vodafone India Ltd.* supra inasmuch as in that case the writ petition was not against a show cause notice; (iii) a writ petition against a notice is maintainable only when the notice is without jurisdiction; here the petitioner is not challenging the jurisdiction; (iv) the last date for adjudication is 31st March, 2021 and if the department finds all in order, it may drop the proceedings; and, (v) this Court is not sitting in

appeal against the authority issuing the notice under Section 241A of the Act.

- E. the senior counsel for the petitioner in sur-sur-rejoinder contending that the counsel for the respondents has not furnished any explanation whatsoever for the delay in refund and in issuing notice under Section 241A of the Act. 13. We have considered the rival contentions and are of the view:
- I. The time limit, as interpreted by us above, for passing Order under Section 241A of the Act; expiring on 31st March, 2020, was between 20th March, 2020 and 29th June, 2020 and stood extended vide the Taxation & Other Laws (Relaxation of Certain Provisions) Ordinance supra and notification issued thereunder and thus it cannot be said that owing the said order being not issued before 31st March, 2020, any right accrued to the petitioner for receiving refund.
- II. The real question agitated and to be decided is, whether the order under Section 241A of the Act is liable to be quashed.
- III. The challenge by the petitioner to the said order is not premised on the ground of, the order making authority not having jurisdiction/authority to issue such order or on the ground of any other jurisdictional infirmity in the said order or on the ground of grant of such refund not likely to adversely affect the revenue. It is not in dispute that the petitioner, a foreign entity, has no other asset whatsoever from which the tax liability, if any ultimately found due, can be recovered. The petitioner impugns the order on the ground, that the question of grant of refund likely to adversely affect the

revenue does not arise because the petitioner has no tax liability and no tax is recoverable from the petitioner.

- IV. We have wondered, whether in a challenge to an order under Section 241A of the Act, it is open to the writ court to go into the question whether there is likelihood of any tax being found due, inasmuch as the said determination is a matter of assessment proceedings under Section 143(2) of the Act. The language of Section 241A also empowers AO to pass order thereunder, “having regard to the fact that a notice has been issued under sub-Section (2) of Section 143 in respect of such return”. To hold, that in a challenge to an order under Section 241A of the Act, the court, in exercise of writ jurisdiction, would determine the tax liability, would tantamount to this Court, in writ jurisdiction, entertaining a challenge to the assessment underway.
- V. In our view, in the garb of a challenge to an order under Section 241A of the Act, a challenge to assessment underway cannot ordinarily be adjudicated. The scrutiny thereunder has to be confined to, whether grant of refund is likely to adversely effect the revenue i.e. whether there is no basis whatsoever for the opinion formed that if refund is granted today, tax if any found due on completion tomorrow of assessment underway of the ITR claiming refund, will not be recoverable. Of course, in a gross case, where it is found that though a notice under Section 143(2) has been issued but there is nothing to controvert the ITR, the Court would be entitled to quash the Section 241A order. However, in the facts of the present case, not

only have detailed reasons, as set out above, been given in the Section 241A order but otherwise also lengthy arguments have been addressed and we are of the view that this case does not fall in the said category.

- VI. We must however admit that the argument of the senior counsel for the petitioner that the reasons given by the AO and the Principal Commissioner in the order under Section 241A are in the teeth of *Azadi Bachao Andolan* supra and *Vodafone India Ltd.* supra, is attractive and temptS us, to examine further and if indeed find so, nip the proceedings in the bud, instead of going through the rigmarole of assessment, appeals etc. However, what is beyond our jurisdiction is beyond our jurisdiction and howsoever well intended the said thought may be, cannot be allowed to have a free run.
- VII. For the writ Court to quash the order under Section 241A of the Act on the ground that no tax is due and thus question of refund likely to adversely affect the revenue does not arise, this Court has to conclusively hold that the petitioner has no tax liability in India. Once it is so held, there will be nothing left to be determined in the assessment underway pursuant to notice under Section 143(2) of the Act.
- VIII. The AO and the Principal Commissioner, in exercise of powers under Section 241A, are required to take a *prima facie* view of the outcome of the assessment pursuant to notice under Section 143(2). They are also the authorities vested with the power of assessment. The authority vested with the power of final determination is the best

authority to take a *prima facie* view. Moreover, the statute provides statutory remedies in the form of appeals, against the final determination by such authority. In such statutory scheme, under Section 260A, appeal lies to the High Court against orders of the Income Tax Appellate Tribunal. A determination of tax liability in a challenge to an order under Section 241A would set at naught the entire statutory scheme of assessment and appeals, ultimately to this Court, opening the doors to every assessee to whom a notice under Section 143(2) of the Act is issued, to approach this Court contending that the ITR filed and being processed under Section 143(1) of the Act admits / permits of no scrutiny and should be accepted. This Court would then be appropriating to itself the entire statutory mechanism of assessment, First Appeals and Appeals to Income Tax Appellate Tribunal and thereafter to this Court.

- IX. Section 241A of the Act, though in the nature of attachment before judgment, but owing to the determination of tax liability being not in the domain of this Court, save under Section 260A, but in the domain of the statutory scheme under the Income Tax Act, this Court in writ jurisdiction, while entertaining a challenge to an order under Section 241A of the Act, will ordinarily not enter into the correctness of reasons given for holding that the assessee may be ultimately found liable for tax. The Courts, when in exercise of powers of attachment before judgment, go into the question of *prima facie* merits of the claim of the party seeking attachment before judgment, are empowered to do so because the ultimate decision in the said respect

also rests in the Court. However the Court does not have jurisdiction qua the determination of tax and which jurisdiction is exercised by this Court only in exercise of powers under Section 260A of the Act, on a substantial question of law arising and not otherwise. When this Court has not been empowered to assess tax liability in the first instance, it would ordinarily not form a *prima facie* view even, of what it is not finally empowered to do.

- X. Rather, the AO and Principal Commissioner also, in exercise of powers under Section 241A, are concerned largely with the question of grant of refund likely to adversely affect revenue i.e that the tax, if ultimately found due, being not recoverable; though the AO and Principal Commissioner have in the impugned order given detailed reasons, but in our view were not required to, as the same is likely to prejudice the assessment underway. We thus clarify that the same will have no bearing in the final assessment.
13. The petition is accordingly dismissed.

RAJIV SAHAI ENDLAW, J.

ASHA MENON, J.

MARCH 26, 2021

‘gsr’..