



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

WRIT PETITION NO.1455 OF 2013

UPS Worldwide Forwarding Inc. ]  
a Company incorporated in the United ]  
States of America having its principal place ]  
of business at No.55, Glenlake Parkway ]  
N. E., Atlanta, Georgia, 30328, United ]  
States of America. ] .. Petitioner.

V/s.

1 UPS Jetair Express Private Limited ]  
a company incorporated in India ]  
having its Principal place of business ]  
at Plot No. 6A, Shyam Nagar, ]  
Jogeshwari Vikhroli Link Road, ]  
Majas Village, Jogeshwari, ]  
Mumbai 400 060. ]

2 Union of India ]  
Ministry of Law, Ayakar Bhavan, ]  
M. K. Road, Mumbai 400 020. ]

3 Assistant Director of Income-tax ]  
(International Taxation) -2 (2), ]  
Mumbai, Room No.116, 1<sup>st</sup> floor, ]  
Scindia House, N. M. Road, ]  
Mumbai 400 038. ]

4 Director of Income Tax ]  
(International Taxation), Mumbai -I ]  
Room No.107, 1<sup>st</sup> floor, Scindia ]  
House, N. M. Road, Mumbai 400 038 ] .. Respondents.

Mr. Percy Pardiwala, Sr. Advocate with Ms. Aarti Sathe and Mr. Kalpesh Turalkar, for the Petitioner  
Mr. Vimal Gupta, Sr. Advocate with Mr. Tejveer Singh and Mrs. S. V. Bharucha, for the Respondents.

**CORAM: MOHIT S. SHAH, C.J. &  
M.S.SANKLECHA, J.**  
**PRONOUNCED ON : 30 SEPTEMBER 2013.**  
**RESERVED ON : 25 OCTOBER 2013**

**JUDGMENT (Per M. S. Sanklecha, J.):-**

**RULE**, returnable forthwith and by consent of the parties, taken up for final disposal.

2 By this petition under Article 226 of the Constitution of India, the petitioner challenges the order dated 21 March 2013 passed by the Director of Income Tax (International Taxation) (respondent No.4) under Section 264 of the Income Tax Act, 1961 (“the Act”). By the impugned order dated 21 March 2013, the Director of Income Tax (International Taxation) has upheld the order, rejecting the petitioner's application dated 29 March 2010 for NIL Tax Withholding certificate under Section 197 of the Act passed by Assistant Director of Income Tax (International Taxation) (respondent No.3).

3 Briefly, the facts leading to the present petition are:-

(a) The petitioner is a Company incorporated in United States of America (USA) and is also a tax resident of USA. The petitioner is admittedly eligible to the benefit under the Double Taxation Avoidance Agreement (DTAA) entered into between USA and India;

(b) The petitioner is engaged in the business of International Express Delivery and has developed an international network of transporting documents, parcels and other items from one country to another. In accordance with the agreement entered into with one UPS Jetair Express Pvt. Ltd., (respondent No.1), the petitioner renders services to respondent no.1 in respect of delivering documents/parcels outside India having originated in India, while respondent No.1 renders services to the petitioner in respect of documents/parcels to be delivered in India having originated outside India. For the services rendered for outbound documents, the petitioner receives compensation (forwarding fees) and in respect of inbound documents, the petitioner pays to respondent No.1 delivery compensation;

(c) The petitioner has been filing its return of income in India under the Act. However, the the petitioner has taken a stand that the income which it earns under the agreement entered into with respondent No.1 and from its overseas customers in respect of parcels/documents to be delivered in India are not taxable. The taxing authorities in India viz: respondent Nos.2 to 4 have not yet accepted the same;

(d) In accordance with Article 27 of the DTAA entered into between USA and India, a Mutual Agreement Procedure (MAP) has been established whereby a tax payer can approach the competent authority of the Contracting State of which he is the resident in case the tax payer is of a view that the action of the other Contracting State is not in accordance with the provisions of DTAA. The tax payer is entitled to approach the competent authority of the State of which he is resident (in this case, the

petitioner is resident of USA), notwithstanding that he has remedies available under the domestic laws of the other Contracting State i.e. India. Under the MAP proceedings provided under Article 27 of DTAA, the authorities of both India and USA endeavor to resolve the dispute raised by the individual tax payer by Mutual Agreement;

(e) In accordance with the provisions of Article 27 of the DTAA, the petitioner on 13 November 2006 preferred an application before the competent authority of USA, seeking its assistance in respect of its stand that its income received from respondent No.1 is not taxable in India for fiscal years 2001 to 2007 (i.e. Assessment Year 2001-02 to 2007-08). For subsequent Assessment Years 2008-09 to 2009-10 also the petitioner requested the competent authority of USA to include them in the pending MAP proceedings. On 3 November 2009, the petitioner made an application for inclusion of Assessment Year 2010-11 in the pending MAP proceedings;

(f) Keeping in view the hardship faced by the tax payer during pendency of the MAP proceedings, the competent authorities of India and USA under the DTAA entered into “Memorandum of Understanding regarding Deferment of Assessment and/or Suspension of Collection of Taxes during Mutual Agreement Procedure” (MOU). Under the aforesaid MOU, the authorities in USA and India have agreed to defer assessment and/or suspend collection of tax including Withholding taxes on income that are subject to MAP proceedings for prior, current or future taxable years. However, during the pendency of the MAP proceedings, the assessee is required to furnish a bank guarantee securing the dues of the

revenue of the Contracting State in which the income is the subject matter of tax to which the MAP procedure relate;

(g) Consequent to the application made by the petitioner to respondent No.3 on 28 March 2007, 6 November 2007 and 5 February 2009, respondent No.3 issued Certificates under Section 197 of the Act for the Assessment Years 2007-08 to 2009-10. By the above certificates, it directed that there would be no obligation on the part of the respondent No.1 to deduct any tax while making payment to the petitioner in respect of services rendered by the petitioner to respondent No.1 i.e. Nil Tax Withholding orders;

(h) On 29 March 2010, the petitioner filed an application under Section 197 of the Act with respondent No.3 and requested him to issue Nil Tax Withholding order for Assessment Year 2010-11. In the above letter, the petitioner pointed out that NIL Tax Withholding order/certificate were issued for earlier years and also its application dated 3 November 2009 to the Competent Authority to include Assessment Year 2010-11 in the pending MAP proceeding. In view of the above, it sought a direction from respondent No.3 to respondent No.1 not to deduct any tax in respect of any payment made to petitioner for Assessment Year 2010-11.

(i) On 30 March 2010, the petitioner submitted a bank guarantee of Rs.6,07,55,238/- in favour of respondent No.3, securing the revenue in respect of its legitimate tax dues in case the MAP proceedings fail. This guarantee was submitted in terms of the MOU so as to enable an order under Section 197 of the Act for the Assessment Year 2010-11;

(j) On 15 December 2010, respondent No.3 passed an order rejecting the petitioner's application for Nil Tax Withholding order/certificate under Section 197 of the Act in respect of Assessment Year 2010-11. This was on the ground that petitioner's request for inclusion of financial Year 2010-11 is not pending before the MAP authorities as informed by the Foreign Tax Division (FTD) of the Central Board of Direct Taxes (CBDT). (At the hearing, Mr. Vimal Gupta, learned Senior Counsel for the revenue informs us that there is a typographical error and should be read as financial Year 2009-10). Consequently, respondent No.3 directed respondent No.1 to deduct tax at 8.6094% in respect of all payments made by respondent No.1 to the petitioner;

(k) On 17 December 2010, the competent authority of USA under the DTAA issued a certificate confirming that Withholding tax application in respect of Assessment Year 2010-11 i.e. financial Year 2010 is being considered under the MAP proceedings. Consequent to the aforesaid communication dated 17 December 2010 from the competent authority of USA, the petitioner made an application on 28 December 2010 to respondent No.3. By the above application, a modification of order dated 15 December 2010 was sought by seeking the grant of necessary certificate of Nil Withholding tax under Section 197 of the Act in respect of Assessment Year 2010-11. However, no order on the same was passed;

(l) On 31 May 2011, the petitioner filed a Revision Application under Section 264 of the Act with respondent No.4. By the above application, revision of the order dated 15 December 2010 dismissing the application

under Section 197 of the Act passed by respondent No.3 was sought;

(m) On 15 January 2013, the petitioner appeared before respondent No.4 in support of its above revision application. At the hearing, the petitioner pointed out that it understands that in November 2012, respondent No.4 had received a communication from FTD, stating that the competent authority of USA has invoked fresh MAP proceedings inter alia in respect of Assessment Year 2010-11. Thus seeking a direction to the Authorities under the MOU to suspend assessment and collection of taxes i.e. Withholding for Assessment Year 2010-11.

(n) On 21 March 2013, respondent No.4 rejected the petitioner's application for revision of the order dated 15 December 2010 passed under Section 197 of the Act by respondent No.3. The respondent No.4 held that no MAP proceedings for the Assessment Year 2010-11 was pending at the time the petitioner filed an application under Section 197 of the Act with respondent No.3 nor when the order dated 15 December 2010 of respondent No.3 was passed, rejecting the application for issuance of Nil Tax Withholding order/certificate. The respondent No.4 reached the above conclusion on the ground that MAP proceedings for Assessment Year 2010-11 was admitted only on 21 September 2012 as informed by the FTD. Thus, holding that the order dated 15 December 2010 of respondent No.4 cannot be faulted. Besides, the respondent No.4 held that the entire period relevant to the Assessment Year 2010-11 has expired and in view thereof, allowing of the application now would be infructuous.

4 In the context of the above facts, Mr. Pardiwala, learned Senior Counsel appearing for the petitioner challenges the impugned order on the following grounds:-

(a) The impugned order ignored the fact that once a MAP proceedings is initiated for a specific issue, then the suspension of collection of withholding taxes is mandated for all future taxable years also. In the present case admittedly, identical issues for the earlier Assessment Years 2001-02 to 2007-08 have been admitted under the MAP and the benefit of the same is available in the future years till the issue is resolved. Thus suspension of collection of taxes under the MOU would be available even in respect of subsequent Assessment Year 2010-11.

(b) The impugned order ignores the fact that the Appellant had made its application to the competent authority in USA on 3 November 2009 for admission of Assessment Year 2010-11 to MAP proceedings. The fact that the above application has been made is also acknowledged on 17 December 2010 by the competent authority in USA and also by the competent authority in India in September 2012. In spite of the aforesaid, the impugned order holds that at the time when the application for issuance of certificate under Section 197 of the Act was made by the petitioner and also when the order rejecting the application was passed by the Assessing Officer, there were no MAP proceedings pending in respect of Assessment Year 2010-11. This finding is contrary to the application dated 3 November 2009 which is on record and ignored in the impugned order.

(c) The respondent No.4 in the impugned order holds that as the financial Year 2009-10 i.e. Assessment Year 2010-11 had already expired/ended, then the entire proceedings for an order under Section 197 of the Act has become infructuous. This finding is in the face of Clause 6 (iii) of the MOU which provides that suspension of collection of Withholding tax would apply even to MAP proceedings for prior years;

(d) The grant of Nil Tax Withholding certificate for the Assessment Year 2010-11 under Section 197 of the Act would cause no prejudice to the revenue as its interests are protected by the petitioner, having furnished a bank guarantee for the requisite amount of tax payable; and

(e) In any view of the matter, at the time when respondent No.4 passed his order, it is undisputed position that the issue arising in Assessment Year 2010-11 had been admitted for MAP proceedings and so also acknowledged by the competent authority in both USA as well as in India. In this view of the matter, the respondents ought to have take into account the subsequent development and granted the benefit of the MOU which suspended taxation of income at source pending the resolution of the issue before the authorities under MAP.

5 On the other hand, Mr. Vimal Gupta, learned Senior Counsel appearing for the Respondents supports the impugned order and submits as under:-

(a) In terms of Instruction No.2 of 2003 of CBDT dated 28 April 2003, the pendency of the MAP proceedings can be taken cognizance of only

when it has been admitted by competent authority in India by confirmation to that effect being issued by FTD of CBDT. In this case, though bank guarantee has been furnished, the requirement of the Circular of obtaining the confirmation from the FTD of CBDT had not been fulfilled on 15 December 2010 when the Assessing Officer viz respondent No.3 rejected the application of the petitioner for certificate under Section 197 of the Act;

(b) The application made by the petitioner before the competent authority of USA to include Assessment Year 2010-11 as a part of original MAP proceedings dated 13 November 2006 was only made on 3 November 2009. On 15 December 2010 when respondent No.3 i.e. Assessing Officer passed an order, rejecting the petitioner's application for an order of Nil Withholding Tax under Section 197 of the Act, the FTD of CBDT had clarified that no request for inclusion of financial year 2010-11 i.e. Assessment Year 2011-12 in MAP proceedings had been received by that office (orally it is submitted that same should be read as financial year 2009-10 i.e. Assessment Year 2010-11); and

(c) The respondent Nos.3 and 4 could not have passed an order under Section 197 of the Act issuing a Nil Tax Withholding order as the acceptance of the petitioner's claim for Assessment Year 2010-11 in MAP proceedings came much after the end of the Assessment Year 2010-11. Therefore, in the absence of a certificate being available during the course of the Assessment Year, the petitioner could not be granted a certificate of Nil Withholding Tax under Section 197 of the Act. Thus, the respondent No.1 was duty bound to have deducted tax in the absence of any order

under Section 197 of the Act in respect of any payment made or amount credited to the petitioner during the previous year relevant to the Assessment Year 2010-11.

In view of the above, it was submitted that the impugned order called for no interference.

6 As is evident from Article 27 of the DTAA entered into between USA and India, a procedure for resolving a conflict between the DTAA and the tax regime in one of the Contracting States has been evolved and is known as Mutual Agreement Procedure i.e. MAP. If the tax payer in any one or both of the Contracting States considers the action of the one of the Contracting State would result in his being charged to tax not in accordance with the provisions of the convention, he may invoke the MAP proceeding (notwithstanding that a remedy is available under the domestic law of the State) by moving Competent Authority of the Contracting State of which he is a resident or national. By the aforesaid MAP proceeding, the competent authority of both the Contracting States would endeavor to resolve the conflict by mutual agreement.

7 Consequent to the above, the competent authorities in USA and India, exercising powers under MAP procedure realized that during the pendency of MAP proceedings, it would be necessary to protect the assessee (tax payer) concerned till the successful resolution or failure of the issue referred to MAP. In view thereof, an MOU was arrived at between USA and India which inter alia, provides for deferment of assessment and/or suspension of collection of tax during MAP procedure. This MOU was arrived at so as to prevent unnecessary harassment and/or

collection of taxes during the time the issue raised by the tax payers is under consideration of MAP. The fact that MOU was entered into between USA and India so as to obviate harassment and/or hardship to the tax payer is also stated in Instruction No.2 dated 28 April 2013 issued by Central Board of Direct Taxes (CBDT).

8 However, to protect the interest of the revenue, the MOU provides that deferment/suspension of assessment and collection of taxes to only available those tax payers who provide a security. The MOU provides that the security should be in the nature of irrevocable bank guarantee, securing the revenue of the Contracting State whose assessment or collection of taxes is suspended pending the MAP procedure.

9 It is undisputed that an identical issue as arising in the Assessment Year 2010-11 is a subject matter of MAP proceedings for earlier Assessment Year and Nil Tax Withholding orders have been issued. For the Assessment Year 2010-11, the petitioner has by letter dated 3 November 2009 moved the Competent Authority in USA under the MAP procedure, seeking to resolve its claim that no Withholding tax is payable in respect of the amounts received by it from respondent No.1. On 29 March 2010, an application for a certificate of Nil Withholding Tax under Section 197 of the Act was made to the Assessing Officer i.e. respondent No.3 while pointing out certificates/orders passed for Nil Tax Withholding orders passed for the earlier assessment years and its application dated 3 November 2010 to the Competent Authority in USA. Besides, in terms of the MOU, the petitioner furnished a bank guarantee of Rs.6,07,55,238/-

securing the revenue. However, respondent No.3 being the Assessing Officer by an order dated 15 December 2010 informed the petitioner that no Nil Withholding Tax Certificate can be issued to the petitioner as the FTD of CBDT had informed the respondent No.3 that no request for inclusion of Assessment Year 2011-12 i.e. financial Year 2010-11 had been received for MAP. However, at the hearing, we are informed that it is a typographical error on the part of respondent No.3 i.e. the Assessing Officer, and it should read as financial Year 2009-10. It must be pointed out that no affidavit of respondent No.3 to clarify the above position has been filed. Therefore, the basis of the order dated 15 December 2010 is suspect. Be that as it may, in any case on 17 December 2010, the Competent Authority of USA informed the petitioner that the petitioner's application for MAP in respect of the Assessment Year 2010-11 was being considered by the Competent Authority. On the basis of the aforesaid clarification, the petitioner sought rectification of the order dated 15 December 2007 passed by respondent No.3 but no order was passed by the Assessing Officer on the application of the petitioner.

10 It was in the aforesaid circumstances, that the petitioner was constrained to file a revision application/petition under Section 264 of the Act with respondent No.4. The respondent No.4 by an order dated 21 March 2013, rejected the petitioner's application on the ground that the MAP proceedings for Assessment Year 2010-11 had been admitted and initiated only on 21 September 2012. Consequently, it is submitted by Mr. Gupta on behalf of the revenue, no fault according to respondent No.4 can be found with the order of respondent No.3, rejecting the application for a Nil Withholding Tax order under Section 197 of the Act.

The impugned order has proceeded on the basis that suspension of assessment and collection of taxes (including Withholding taxes) under MOU can only take place when the issue raised by a tax payer have been admitted for consideration under MAP proceedings. According to Mr. Gupta, Counsel appearing for respondent No.4, the trigger for the MOU coming into force is the MAP proceedings being admitted for consideration. This is not so for the reason that Article 27 of DTAA read with the MOU, makes it clear that the suspension of assessment and collection of tax takes place, no sooner an application is made to the Competent Authorities to settle the dispute under MOU proceedings and the revenue is secured by the tax payer furnishing a Bank Guarantee. There is no provision for a process of admission and thereafter final consideration provided either in Article 27 of DTAA or MOU. Thus, it is not open to read the same into it.

11 Further, in any view of the matter, when respondent No.4 was exercising jurisdiction under revision and he does not dispute the fact that MAP proceedings for the Assessment Year 2010-11 have been admitted and are pending for the Assessment Year 2010-11 w.e.f. 21 September 2012 as recorded in the impugned order, it was obligatory on his part to have directed the grant of Certificate of Nil Withholding Tax under Section 197 of the Act. The contention of the revenue that grant of such Certificate of Nil Withholding Tax after the completion of the Assessment Year 2010-11 would be an exercise in futility is not sustainable. This is for the reason that under Article 27 of the DTAA, the tax payer is entitled to apply for MAP procedure and claim deferment/suspension of assessment and collection of tax within three

years of receipt of notice from the authorities. In this case, notice had been issued to respondent No.1 to deduct the tax in respect of payment being made by it to the petitioner only on 8 August 2013. If the submission of the revenue were to be accepted, then Article 27 of the DTAA providing for a period of three years to move the Competent Authority from the date of the receipt of the notice would be rendered redundant. This understanding of ours is further supported by MOU which in clause 6 (iii) thereof, inter alia, provides that Withholding tax on income can be a subject matter of MAP for prior, current and future taxation years. Consequently, this also supports our understanding that even when an Assessment Year for which a certificate as sought has expired, yet the suspension of assessment and collection of taxes will take place, if the proceedings are under consideration of Competent Authorities under the MAP. The collection and assessment of taxes will stop at least from that date when the MAP proceedings are commenced for Assessment Year 2010-11. In case the submission of the revenue is accepted, then the suspension of Assessment and collection of taxes would be applicable only in respect of current taxation years and not previous and future years which is clearly contrary to and in the face clause 6 (iii) of MOU.

12 The submission of Mr. Gupta, learned Counsel appearing on behalf of the revenue that no fault can be found with the impugned order of respondent No.4 in view of Instruction No.2 dated 28 April 2003 issued by CBDT. In particular, learned Counsel place reliance upon the following observations of Instruction No.2 dated 28 April 2003 which reads as under:-

“ A copy of the MOU is enclosed along with a model draft of bank guarantee to be furnished by the tax-payer. These are self-explanatory.

On receipt of a formal request in terms of this MOU form a tax payer resident of USA, the Assessing Officers (A.O.) are required to keep the enforcement of collection of outstanding taxes in abeyance in respect of such tax payers who have-

(a) Invoked MAP through U.S. Competent Authorities and same has been admitted by the Indian Competent Authority (a confirmation to this effect to be obtained from the Foreign Tax Division of Central Board of Direct Taxes), and;

(b) Furnished Bank Guarantee in the model draft format for an amount calculated in accordance with the manner indicated therein.”

Taking support for the above, it is contended that unless the application made to the Competent Authority under the MAP has been admitted, the MOU does not become operational so as to suspend the Assessment and collection of taxes. The word admitted by Indian Competent Authority only means that the Competent Authority in India has to admit i.e. acknowledge that the MAP proceedings have been invoked by tax payers through the Competent Authority in USA. It does not mean that the invocation of the MAP proceedings by Competent Authority by the tax payer has been admitted for the future consideration by the authorities.

13 In the circumstances, we find that the impugned order passed by respondent No.4 is not sustainable in law as it is in the face of Article 27 of the DTAA entered into between USA and India and clause 6 (iii) of MOU entered into between Competent Authority in USA and India

in respect of application made to any of them under the MAP proceedings. We make it clear that we have not found it necessary in the present facts to examine the issue of the pending MAP proceeding enuring to the benefit of a tax payer for future taxable years.

14 We, therefore, quash and set aside the impugned order dated 21 March 2013 passed by respondent No.4 and the order dated 15 December 2010 passed by respondent No.3. We further direct respondent No.3 to issue appropriate Nil Withholding Tax order in respect of Assessment Year 2010-11 to the petitioner, upon the petitioner giving an undertaking to keep alive the bank guarantee already furnished and to give a further bank guarantee, if necessary, to secure the revenue of its dues (tax and interest) to the satisfaction of respondent No.3.

15 Accordingly, **petition is allowed** in the above terms, with no order as to costs.

**CHIEF JUSTICE**

**(M.S.SANKLECHA,J.)**