

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE :: 12.10.2015

CORAM ::

THE HON'BLE MR. JUSTICE R. MAHADEVAN

Writ Petition No: 13442 of 2015

M/s. Carrier Race Technologies Pvt. Ltd.
Temple Step, 9th floor
Block No: 1
No: 184/187 Anna Salai
Little Mount
Chennai - 600 015. Petitioner

-vs-

The Income Tax Officer
Corporate Ward - I (4)
Room No: 627-A, 6th floor
No: 121 Nungambakkam High Road
Chennai - 600 034. Respondent

Writ petition under Article 226 of the Constitution of India praying for issuance of a writ of certiorari calling for the records relating to the impugned Assessment Order dated 27.3.2015 relating to PAN/GIR No. AABCR1863L for assessment year 2012-2013 and the Corrigendum to Assessment Order dated 9.4.2015 bearing No: AABCR1863L/12-13/99 passed by the Respondent / Assessing Officer and quash the same.

For petitioner :: Mr. P.H. Arvind Pandian
Senior Counsel for
M/s. P.J. Rishikesh

For respondent :: Mr. T. Pramod Kumar Chopda
Senior Standing Counsel

O R D E R

The impugned assessment order dated 27.03.2015 relating to PAN/GIR No. AABCR1863L for assessment year 2012-2013 and the Corrigendum to Assessment Order dated 9.4.2015 bearing No: AABCR1863L/12-13/99 are being challenged on the ground that the circular issued by the department in accordance with Section 144 C of the Income Tax Act has not been complied with. The international transactions involved by the petitioner in this writ petition are referred to in paragraph

5 of the affidavit filed in support of the writ petition. The said international transactions were certified to be at arm's length, based on Transactional Net Margin Method as defined. The Transfer Pricing Report and the Transfer Pricing Documentation had been filed with the respondent during the assessment year. The Provisions of Section 144 C makes it clear that if the assessing authority proposes to make any variation in income or loss returned by the assessee, necessarily he has to pass a draft assessment order, forward it to the assessee with all the details and after the assessee files his objections, the assessment can be completed within one month. Section also provides an option to the assessee to file the objections before the Disputes Resolution Panel which can issue a direction for guidance of the assessing authority to enable him to complete the assessment. Since the respondent failed to follow the above provision, the petitioner is before this Court.

2. According to the learned Senior counsel for the petitioner the respondent failed to follow the provisions of Section 144 C of the Income Tax Act, 1961. By the act of the respondent, the petitioner lost several opportunities. The learned Senior Counsel appearing for the petitioner further submitted that as per the C.P.D.T. instructions dated 20.05.2003, the value, once it crosses over and above a sum of Rs. 5 crores, necessarily the assessing authority has to refer the matter to the Transfer Pricing Officer so as to proceed further. In this case, admittedly, the matter has not been referred to the Transfer Pricing Officer. Hence, he seeks to quash the said order.

3. The standing counsel for the respondent submitted that as per Section 92 CA (1) where the assessee has entered into an international transaction or specified domestic transaction and the assessing officer considers it necessary or expedient so to do, he may with the previous approval of the competent authority refer the computation of Arms length price to the Transfer Pricing Officer. He further submitted that no reference to transfer pricing officer in terms of Section 92 CA, was referred and the respondent proceeded to compute the arms length price of the international transaction of the petitioner after affording due opportunity to the petitioner and passed the impugned order. Hence, he sought to dismiss the writ petition.

4. Heard both sides.

5. At the first place, let us see the relevant Sections. Section 144 C of the Income Tax Act, 1961 reads as under :

" 144C. (1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section

referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.

(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,--

(a) file his acceptance of the variations to the Assessing Officer; or

(b) file his objections, if any, to such variation with, --

(i) the Dispute Resolution Panel; and

(ii) the Assessing Officer.

(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if--

(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or

(b) no objections are received within the period specified in sub-section (2).

(4) The Assessing Officer shall, notwithstanding anything contained in section 153⁵⁰ [or section 153B], pass the assessment order under sub-section (3) within one month from the end of the month in which,--

(a) the acceptance is received; or

(b) the period of filing of objections under sub-section (2) expires.

(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:--

(a) draft order;

(b) objections filed by the assessee;

(c) evidence furnished by the assessee;

(d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority,

- (e) records relating to the draft order;
- (f) evidence collected by, or caused to be collected by, it; and
- (g) result of any enquiry made by, or caused to be made by, it.

(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),—

- (a) make such further enquiry, as it thinks fit; or
- (b) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.

(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

[Explanation.—For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.]

(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in [section 153](#) ^{51a} [or [section](#)

153B], the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

(14) The Board may make rules⁵² for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.

The following sub-section (14A) shall be inserted after sub-section (14) of section 144C by the Finance Act, 2013, w.e.f. 1-4-2016 :

(14A) The provisions of this section shall not apply to any assessment or reassessment order passed by the Assessing Officer with the prior approval of the Commissioner as provided in sub-section (12) of section 144BA.

(15) For the purposes of this section, -

(a) "Dispute Resolution Panel" means a collegium comprising of three Commissioners of Income-tax constituted by the Board⁵⁴ for this purpose;

(b) "eligible assessee" means, -

(i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and any foreign company.]

Section 92 C of the Act, reads as under :

" 92CA. The assessing officer may refer the case for determination of the arm's length price to the TPO where the assessing officer considers it necessary and expedient to do so."

6. While dealing with a similar circumstance, this Court in W.P. No: 1526 and 1527 of 2014, vide its order dated 29.04.2014, held as follows :-

"20. Under Section 144 (C) of the Act, it is evident that the assessing officer is required to pass only a draft assessment order on the basis of the recommendations made by the TPO after giving an opportunity to the assessee to file their objections and then the assessing officer shall pass a final order. According to the learned senior counsel for

the petitioners, this procedure has not been followed by the second respondent inasmuch as a final order has been straightaway passed without passing a draft assessment order.

21.

22. As mentioned supra, as per Section 144C (1) of the Act, the second respondent - assessing officer has no right to pass a final order pursuant to the recommendations made by the TPO. In fact, the second respondent - assessing officer himself has admitted by virtue of the corrigendum dated 15.04.2013, that the order dated 26.03.2013 is only a final order and it was directed to be treated as a draft assessment order. In this context, it is worthwhile to refer to the decisions of the Hon'ble Supreme Court in the decision reported in Deepak Agro Foods vs. State of Rajasthan and others reported in 2008 (16) VST 454 SC wherein in Para No.10, the Hon'ble Supreme Court discussed as to when an order could be construed as a final order.

23 to 29.

30. It is evident from the above decision of the Division Bench of this Court that where there is an omission on the part of the assessing officer to follow the mandatory procedures prescribed in the Act, such an omission cannot be termed as a mere procedural irregularity and it cannot be cured.

31. In identical case as that of the case on hand, the Division Bench of the Andhra Pradesh High Court, in an unreported decision, had an occasion to consider the scope of the validity of the demand notice issued by the assessing officer in the case of Zuari Cement Limited vs. Assistant Commissioner of Income Tax, Circle 2 (1) passed in WP No. 5557 of 2012 dated 21.02.2013, wherein it was held as under:-

"A reading of the above section shows that if the assessing officer proposes to make, on or after 01.10.2009, any variation in the income or loss returned by an assessee, then, notwithstanding anything to the contrary contained in the Act, he shall first pass a draft assessment order, forward it to the assessee and after the assessee files his objections, if any, the assessing officer shall complete assessment within one month. The assessee is also given an option to file objections before the Dispute Resolution Panel in which event the latter can issue directions for the guidance of the Assessing Officer to enable him to complete the assessment.

In the case of the petitioner, admittedly the TPO suggested an adjustment of Rs.52.14 crores u/s.92CA of the Act on 20.09.2011 and forwarded it to the Assessing Officer and to the assessee under sub-section (3) thereof. The assessing officer accepted the variation submitted by the TPO without giving the petitioner any opportunity to object to it and passed the impugned assessment order. As this has occurred after 01.10.2009, the cut off date prescribed in sub-section (1) of S.144C, the Assessing Officer is mandated to first pass a draft assessment order, communicate it to the assessee, hear his objections and then complete assessment. Admittedly, this has not been done and the respondent has passed a final assessment order dated 22.12.2011 straight away. Therefore, the impugned order of assessment is clearly contrary to S.144C of the Act and is without jurisdiction, null and void.

The contention of the Revenue that the circular No.5/2010 of the CBDT has clarified that the provisions of S.144C shall not apply for the assessment year 2008-09 and would apply only from the assessment year 2010-2011 and later years is not tenable in as much as the language of Sub-section (1) of Section 144C referring to the cut off date of 01.10.2009 indicates an intention of the legislature to make it applicable, if there is a proposal by the Assessing Officer to make a variation in the income or loss returned by the assessee which is prejudicial to the assessee, after 01.10.2009. Therefore, this particular provision introduced by Finance (No.2) Act, 2009, would apply if the above condition is satisfied and other provisions, in which similar contrary intention is not indicated, which were introduced by the said enactment, would apply from 01.04.2009 i.e., from the assessment year 2010-2011.

It is not disputed that the memorandum explaining the Finance Bill and the Notes and clauses accompanying the Finance Bill which preceded the Finance (No.2) Act, 2009 clearly indicated that the amendments relating to S.144C would take effect from 01.10.2009. In our view, the circular No.5/2010 issued by the CBDT stating that S.144C(1) would apply only from the assessment year 2010-2011 and subsequent years and not for the assessment year 2008-09 is contrary to the express language in S.144C(1) and the said view of the Revenue is unacceptable. The circular may represent only the understanding of the Board/Central Government of the statutory provisions, but it will not bind this Court or the Supreme Court. It cannot interfere

with the jurisdiction and power of this Court to declare what the legislature says and take a view contrary to that declared in the circular of the CBDT (Ratan Melting and Wire Industries Case (1 Supra), Indra Industries (2 supra). The Revenue has not been able to persuade us to take a contra view by citing any authority.

In this view of the matter, we are of the view that the impugned order of assessment dated 23.12.2011 passed by the respondent is contrary to the mandatory provisions of S.144C of the Act and is passed in violation thereof. Therefore, it is declared as one without jurisdiction, null and void and unenforceable. Consequently, the demand notice dated 23.12.2011 issued by the respondent is set aside.

32. As against this order of the Division Bench of the Andhra Pradesh High Court, the Revenue went on appeal before the Honourable Supreme Court. The record of proceedings of the Supreme Court indicate that the Special Leave Petition was dismissed on 27.09.2013.

33. The decision of the Division Bench of the Andhra Pradesh High Court deals with an identical issue as that of the present case. In this case, against the order passed by the second respondent on 26.03.2013, the petitioner filed objections before the DRP, the first respondent herein and the first respondent refused to entertain it by stating that the order passed by the second respondent is a final order and it had jurisdiction to entertain objections only if it is a draft assessment order. While so, the order dated 26.03.2013 of the second respondent can only be termed as a final order and in such event it is contrary to Section 144C of the Act. As mentioned supra, in and by the order dated 26.03.2013, the second respondent determined the taxable amount and also imposed penalty payable by the petitioner. According to the learned senior counsel for the petitioners, even as on this date, the website of the department indicate the amount determined by the second respondent payable by the company inspite of issuance of the corrigendum on 15.04.2013 as a tax due amount. Thus, while issuing the corrigendum, the second respondent did not even withdraw the taxable amount determined by him or updated the status in the website. In any event, such an order dated 26.03.2013 passed by the second respondent can only be construed as a final order passed in violation of the statutory provisions of the Act. The corrigendum dated 15.04.2013 is also

beyond the period prescribed for limitation. Such a defect or failure on the part of the second respondent to adhere to the statutory provisions is not a curable defect by virtue of the corrigendum dated 15.04.2013. By issuing the corrigendum, the respondents cannot be allowed to develop their own case. Therefore, following the order passed by the Division Bench of the Andhra Pradesh High Court, which was also affirmed by the Honourable Supreme Court by dismissing the Special Leave Petition filed thereof, on 27.09.2013, the orders, which are impugned in these writ petitions are liable to be set aside. "

7. Similar issue came up for consideration before a Division Bench of the Delhi High Court in I.T.A. No: 504 of 2008. By its decision dated 18.11.2011, the Division Bench of the Delhi High Court held as follows :

" 13. On the basis of aforesaid reasoning, the Tribunal concluded that once validity of CBDT Circular was upheld, as per the said circular the Assessing Officer was duty bound to refer the matter to the TPO having regard to the purpose of Specialized Cell created by the Revenue Department to deal with complicated and complex issues and since this channel was not resorted to by the Assessing Officer in the instant case, the Commissioner was right in passing the order under Section 263 of the Act.

14. No doubt, the validity of the said instruction was upheld on the touch stone of Article 14 of the Constitution holding that it was based on reasonable classification and there was rationale nexus with the objectives sought to be achieved. At the same time, we feel that while doing so this Court had also laid down the rigors of the said Circular. No doubt, this Court observed, in the process that the said Circular acted as a guideline to the Assessing Officer. However, much mileage cannot be drawn by the appellant from those observations as these observations were made while dealing with the contention of the petitioner in the said petition. That instruction completely takes away the discretion of the Assessing Officer in relation to an international transaction if the aggregate value thereof exceeded Rs. 5 crore. This contention was turned down in the following words :-

" 37. The other ground on which the instruction is challenged is that it completely takes away the discretion of the AO in relation to an international transaction of the value

exceeding Rs. 5 crores. A reading of the impugned instruction indicates that it acts as a guideline to the AO in the exercise of the discretion conferred under Section 92CA (1). This instruction is in fact helpful in ensuring that the discretion of the AO will not be abused. It correctly interprets the law as requiring only a formation of a prima facie opinion by the AO at the stage of the reference. Therefore, the question of the CBDT supplanting the judicial discretion of the AO does not arise. It is perfectly possible that, independent of the circular, the AO might still "consider it necessary or expedient" to refer an international transaction of such value of the TPO for determination of the ALP. At the same time it is not as if the transactions of the value of less than Rs. 5 crores cannot be referred to the TOP by the AO. Ultimately, any exercise of discretion by the AO is bound to be judicially reviewed by the statutory appellate authorities as well as by Courts. Therefore, it is not as if there is no check on the exercise of discretion by the AO.

39. For these reasons, we hold that the impugned Instruction No: 3 dated 20.5.2003 issued by the CBDT is consistent with the statutory objective underlying Section 92 CA (1) and acts as a guidance to the AO in the exercise of discretion in referring an international transaction to the TPO for determination of its ALP. It is neither arbitrary nor unreasonable, and is not ultra virus the Act. "

15. It is clear from the above that this Court held that referred of the matter to the TPO for determination of arm's length price acts as a guide to the AO and is, in fact helpful in ensuring that the discretion of the Assessing Officer will not be abused. "

8. Since the provisions of the Act makes it very clear that under Section 92 CA of I.T. Act the only option is to place the matter to the TPO and the same has not been followed, this Court feels it appropriate to set aside the order of the assessing authority so that the matter can be referred to the TPO.

9. Accordingly, the order impugned in this writ petition is set aside and the matter is remanded to the Assessing Authority who shall in turn refer the matter to the Transfer Pricing Officer. On such reference, the Transfer Pricing

Officer shall proceed in accordance with the C.P.D.T. Regulations dated 20.05.2003. This writ petition stands disposed of in the above terms. Connected miscellaneous petition is closed. There shall be no orders as to the costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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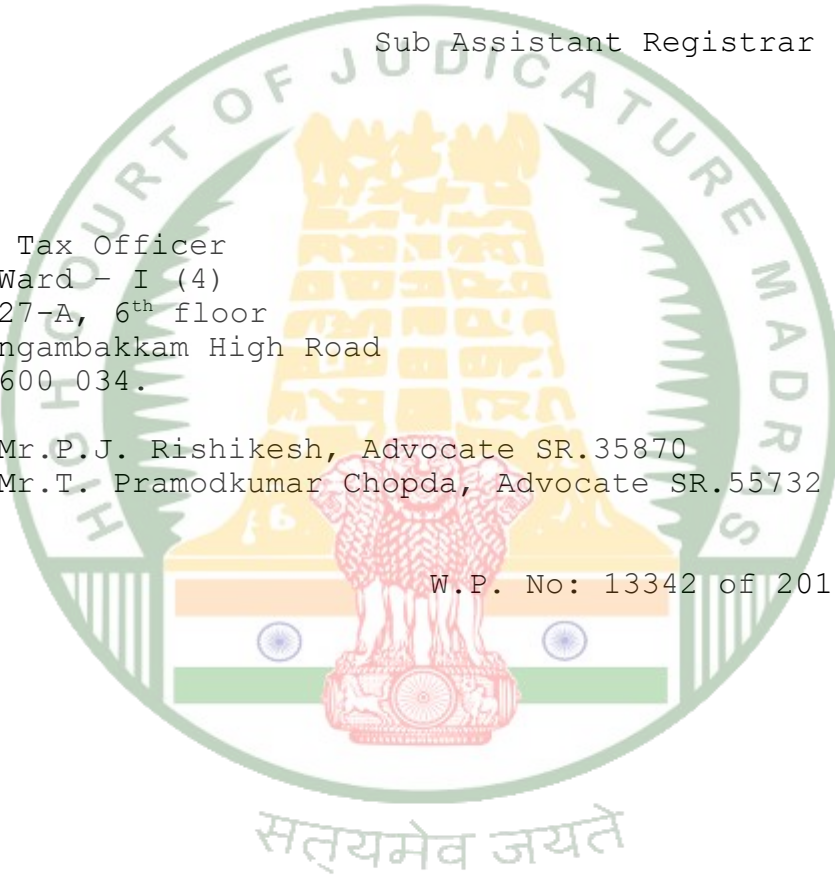
To

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+ 1 cc to Mr.P.J. Rishikesh, Advocate SR.35870
+ 1 cc to Mr.T. Pramodkumar Chopda, Advocate SR.55732

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