

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.07.2015

CORAM:

THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

Writ Petition No.5184 of 2015
And M.P.No.1 of 2015

Reserved on 30.03.2015

M/s. Polaris Consulting Services Ltd.
Rep. By its Authorised Signatory
Mr.S. Swaminathan
Polaris House, 224, Anna Salai
Chennai 600 006.

... Petitioner

Versus

1. The Joint Commissioner of Income Tax
Transfer Pricing Officer 2, III Floor
Main Building, Aayakar Bhavan
No.121, Nungambakkam High Road,
Chennai 600 034
2. The Deputy Commissioner of Income Tax,
Company Circle V(i)
Aayakar Bhavan
No.121, Mahatma Gandhi Road,
Nungambakkam,
Chennai 600 034.

... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorarified Mandamus, to call for the records comprised in the impugned order No.P 201-S/TPO-II/AY 2007-08 dated 29.01.2015 on the file of the first respondent herein, quash the same and consequently direct the first respondent to consider the objections of the petitioner in full and pass order in accordance with law.

For Petitioner : Mr.N.Venkataraman, SC
For Mr.K.Magesh

For Respondents : Mr.Pramod Kumar Chopda

ORDER

The case of the petitioner in the writ petition in brief, as set out in the affidavit filed in support of the writ petition, is that the petitioner/assessee filed its return of income for the assessment year 2007-08, declaring a total income of Rs.189,193,357/-. It was selected for scrutiny and a reference was made to the Transfer Pricing Officer (in short, 'TPO') for the determination of arm's length price of the international transactions. Consequently, by order, dated 26.10.2010, the TPO proposed an adjustment of INR 110.827 crores by arriving at comparable companies' margins which were higher than that of the petitioner. The Assessing Officer passed a draft order of assessment under Section 144 (c) r/w Section 143(3) on 31.12.2010 incorporating the adjustments proposed by the TPO along with certain additions. The petitioner filed its objection to the said draft order of assessment before the Dispute Resolution Panel (in short, 'DRP'), which upheld the additions proposed by the Assessing Officer.

2. For arriving at the arm's length price of the international transactions of the petitioner, the TPO had considered certain information, which was not available in the public domain by issuing notices under Section 133(6) of the Income Act. The petitioner made several requests for providing information, however, as no such information was not furnished, the petitioner has approached this Court by way of writ petitions in W.P.Nos.23564 and 24976 of 2011. By order, dated 15.11.2011, this Court allowed the said writ petitions on the limited ground of violation of principles of natural justice and remitted the matter to the Additional Commissioner of Income tax. Pursuant to the orders of this Court, it appears that the department furnished the information to the petitioner and the petitioner filed its detailed analysis on 11.3.2014 and considering the same, the first respondent has passed the impugned order, dated 29.1.2015 modifying the re-computation of income making an upward adjustment to Rs.57.05 crores. Aggrieved by the same, the petitioner has come forward with the present writ petition.

3. A counter affidavit has been filed on behalf of the respondents, wherein, it is stated that the petitioner is a software solution provider and effects considerable nature of international transactions qualifying for assessment in terms of Sec.92CA of the IT Act 1961. The Petitioner filed its return of income for AY 2007-08 on 31.12.2007 declaring a total income of Rs. 18,91,93,357/-. The case was selected for scrutiny and reference was made to the 1st Respondent ("TPO") for determination of Arm's Length Price ("ALP") of the international transactions effected. The TPO proposed an adjustment of Rs.110.827 crores by arriving at comparable companies margin which were higher than that of the Petitioner vide order dated 26.10.10. The assessing officer passed a draft assessment order dated 31.12.10 incorporating the adjustments proposed by the TPO along with certain other additions proposed by him. The Petitioner filed its objections before the Disputed Resolution Panel ("DRP") against the draft assessment order and the same was confirmed by the proceedings dated 28.9.11. In the above background the petitioner preferred W.P.23546 of 11 seeking to quash the orders passed by the DRP dated 28.9.11 and the orders of the TPO dated 26.10.10 and the draft assessment order dated 31.12.10. A separate Writ Petition challenging the assessment order dated 12.10.11 was preferred in WP. No. 24976 of 2011.

4. The Petitioner in the above writ petitions sought to quash the above cited proceedings mainly on the ground of violation of principles of natural justice. It was alleged by the petitioner that while arriving at a list of comparable companies, the TPO had collated some information u/s 92CA(7) r/w Sec.133(6) from certain third parties and the information of which was not provided to them. Thus the crux of the issue raised in the writ petition was only with reference to the above information collated u/s 133(6) not having been provided to the petitioner. This Court, vide its order dated 15.11.11 in WP. Nos.23564 and 24976 of 2011, allowed the writ petitions on limited grounds of violation of principles of natural justice.

5. In pursuance and due obedience to the order of this Court in the WPs mentioned supra, the collated information/materials in terms of Sec.133(6) were furnished to the petitioner and objections thereof were called for. The petitioner vide its letter dated 11.3.14 submitted the detailed reply based upon the information furnished by the TPO. Upon consideration of the said objections, the TPO, in the impugned proceedings modified the re-computation of income making an upward adjustment to Rs.57.05 crores, instead of Rs.110.25 crores.

Thus this Respondent in due compliance with the order of this Court, provided all the materials/information and Petitioner pursuant thereto filed objections and while providing opportunity, passed the impugned order.

6. It is further stated that the present writ petition has been filed by the petitioner to adopt dilatory tactics to keep matters pending and prevent finality. The petitioner by way of this writ petition seeks to raise a fresh plea regarding most appropriate method adopted by the TPO to arrive at ALP, from CUP method to TNMM method in respect of the international transactions relating to citi group entities. The petitioner is making erroneous assertion that orders passed by this Court in W.P. Nos.23564 and 24976 of 2011 dated 15.11.2011 setting aside the orders impugned therein, will give rise to a de novo fresh assessment. But this Court, while setting aside the order impugned only directed the respondent to provide the materials/information to the Petitioner and no directions for a de novo consideration was made.

7. Pursuant to the orders of this Court, dated 15.11.11 all materials/information collated in terms of Sec.133(6) were duly furnished to the Petitioner based upon which objections/submission dated 11.3.14 were filed by the petitioner and the same were considered in accordance with the provisions of the Act and rules made there under. This aspect is evident from the fact that eight comparables were added at the instance of the Petitioner to the various filters for re-computing the income which was made at Rs.110.27 crores and consequently reduced to Rs. 57.05 crores. Thus, the impugned order and dated 29.01.15 is not a ritualistic order as alleged by the petitioner but in effect is a well reasoned order made in due compliance with the directions of this Hon'ble Court as well as the provisions of the Act.

8. It is further submitted that the petitioner by raising a fresh plea for change in methodology for determination of ALP is nothing but an attempt to put the clock back and keep the matters pending for perpetuity. As stated above, the only issue in the writ petition related to non furnishing of information/material collected u/s 133 (6) of the Act for adopting TNM Method for computing the ALP of the Petitioner's international transaction. Therefore, based on the above plea, this Court has directed to furnish the same. Hence the petitioner cannot now agitate an issue, for which no direction was given by the Hon'ble Court in the said order. The petitioner in the present writ petition now seeks to enlarge the scope of the order dated 15.11.11 passed by this Court in the said WPs mentioned supra

and seeking to raise the plea of change in method from CUP to TNMM in its abjection/submission dated 11.3.2014 which was not the mandate provided by this. The petitioner is seeking undue advantage by trying to take advantage of this Hon'ble Court order by setting aside the earlier orders, which as stated above was only confined to specific limited purpose. With these averments, the petitioner sought for dismissal of the writ petition.

9. Heard the learned senior counsel for the petitioner and the learned standing counsel for the respondents and perused the entire materials available on record.

10. Mr.N.Venkataraman, learned senior counsel would contend that in compliance of the orders of this Court in W.P.Nos.23564 & 24976 of 2011, the first respondent ought to have made the assessment de novo after considering the objections made by the petitioner, however, the first respondent without considering the objections, reiterated the same findings, which is nothing but an empty ritual of formality without in essence complying with the principles of natural justice. He contended that mere receiving and providing opportunities would not meet the ends of justice until a well reasoned order is passed having considered the objections raised by the petitioner. He pointed out that the first respondent has erroneously interpreted the order of this Court as if directing him with a limited scope of providing information sought for by the petitioner and complete the assessment and that he has not considered the objections raised by the petitioner regarding the CUP method for benchmarking transactions with Citi Group and no reasons were provided by the TPO as to why comparable companies selected in its documentation were found to be incorrect, etc., which are crucial in nature, holding that they were already considered by his predecessor and upheld by the DRP, which would cause great prejudice to the petitioner and thereby, the first respondent again violated the principles of natural justice. In support of his contentions, the learned senior counsel relied upon the decision of the Hon'ble Supreme Court in "Asst.Commissioner, Commercial Tax Department Works Contract and Leasing, Kota versus Shukla and Brothers" reported in (2010) 4 SCC 785, wherein, the Hon'ble Supreme Court has impressed upon the need for recording of appropriate reasons in orders and held as under:-

"14. The principle of natural justice has twin ingredients; firstly, the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and granted an opportunity of hearing and secondly, the orders so passed

by the authorities should give reason for arriving at any conclusion showing proper application of mind. Violation of either of them could in the given facts and circumstances of the case, vitiate the order itself. Such rule being applicable to the administrative authorities certainly requires that the judgment of the Court should meet with this requirement with higher degree of satisfaction. The order of an administrative authority may not provide reasons like a judgment but the order must be supported by the reasons of rationality. The distinction between passing of an order by an administrative or quasi-judicial authority has practically extinguished and both are required to pass reasoned orders..."

11. The learned senior counsel also relied upon the decision of the Bombay High Court in "Vodafone India Limited versus Union of India & Others" made in W.P.(L) No.3359 of 2013, wherein, it has been held as under:

"6. We have considered the rival submissions. Normally we would not entertain a petition under Article 226 of the Constitution of India where an alternative remedy in the form of appeal is provided in the statute. In the present case, the order of the Assessment dated 29 November 2013 is an order from which an appeal would lie under Section 246-A of the Act to the Commissioner of Income Tax (Appeals). However this non exercise of our writ jurisdiction in case of availability of an alternative remedy is a self imposed restriction based upon convenience and discretion rather than a rule of law. In appropriate cases where there is a serious flaw in the decision making process or prejudice is caused to a party on account of breach of natural justice, we are enjoined to exercise our writ jurisdiction. In fact non exercise of our writ jurisdiction in appropriate cases would amount to abdication of our obligation to ensure that justice is done. Therefore the availability of an alternative remedy would not by itself bar the exercise of our writ jurisdiction, if the facts of the case so deserve."

Therefore, the learned senior counsel would contend that the impugned order is not sustainable.

12. On the other hand, the learned counsel appearing for the respondents would contend that in compliance to the orders of this

Court in earlier writ petitions, the department has furnished all material information in terms of Section 133(6) and on consideration of the objections made by the petitioner, the first respondent has passed the impugned order and there was no direction of this Court that the first respondent should make a de novo consideration. He also contended that the petitioner cannot seek to enlarge the scope of the order of this Court by raising the plea of change in method from CUP to TNMM for computing the ALP of the petitioner's international transaction. With these contentions, the learned counsel would submit that the impugned order requires not interference. Hence, he sought for dismissal of the writ petition.

13. Before proceeding with the matter on merits, it is relevant to refer the order, dated 15.11.2011 passed by this Court in W.P.Nos.23564 and 24796 of 2011, which reads as under:

"12. Going by the complexities thus involved in the second respondent arriving at his decision on the assessee's transaction as not at arm's length, on the limited question of compliance of the provisions of the Act as well as the basic principle of natural justice, without expressing any opinion on the merits, I feel that it is otherwise a fit case wherein this Court should set aside the order of the second respondent and consequently that of the Dispute Resolution Board so as to enable the petitioner to have the particulars furnished as sought for by the petitioner in its reply dated 28.9.2010 and 20.10.2010 before the second respondent so that the opportunity of filing an objection remains a real and effective opportunity and not a paper opportunity.

"13. In the circumstances, I have no hesitation in setting aside the order of the second respondent, consequently that of the first respondent. Accordingly, the order passed by the first and second respondents dated 28.9.2011 and 26.10.2010 respectively are set aside.

"14. In the result, both the writ petitions are allowed on the limited ground of violation of principles of natural justice and this Court remits the matter back to the second respondent viz., the Additional Commissioner of Income Tax so as to enable the said authority to furnish the materials and information sought for by the assessee in the objection filed on 28.9.2010 and 14.10.2010 before the said authority. On furnishing of the said information

by the second respondent, the petitioner shall file necessary objections within the time frame stipulated by the said authority and co-operate in the matter to complete the proceedings. Connected MPs are closed. No merits."

14. A plain reading of the above, it is clear that this Court has set aside the orders impugned in the above said writ petitions, having noted that the petitioner was not furnished with the relevant information regarding the method of filtering which resulted in taking 28 comparable cases, the detailed search process carried by the department, the notices issued to the companies under Section 133 (6), etc., which crippled the petitioner to make an effective reply to the notice, this Court was of the view that the respondents violated the principles of natural justice and on that limited score, i.e. violation of principles of natural justice, the writ petitions came to be allowed.

15. In compliance to the above said order, it is not in dispute that the respondents have furnished the complete set of information collected under Section 133(6) to the petitioner and pursuant to the same, the petitioner also filed detailed objections on 4.4.2014. Having considered the objections raised by the petitioner, the first respondent determined the arm's length price of the international transaction of the petitioner by selecting the following sets of companies as comparables, viz.,

i) Comparables selected by the TPO in earlier order, dated 26.10.2010; and
ii) Comparables newly identified by the assessee using information collected from responses to letters issued under Section 133(6)
and ultimately determined the arm's length revenue at Rs.57,05,08,292/-.

16. This was resisted by the petitioner mainly on the ground that the first respondent has not made the assessment de novo after considering the objections made by the petitioner, but reiterated the same findings by adopting the comparables selected by the TPO in earlier assessment order, dated 26.10.2010, which in fact, was set aside by this Court. According to the petitioner, the CUP method is the appropriate method for benchmarking transactions with Citi Group and some of its comparables also meet the filters adopted by the TPO and hence, they should also be considered while determining the Arm's length revenue. The contention raised by the learned senior counsel,

in my opinion, does not merit acceptance. It is no doubt true that this Court has set aside the earlier assessment made by the Assessing Officer based on the TPO's findings who selected comparables in its order, dated 26.10.2010. However, it is pertinent to note that the order, dated 15.11.2011 passed by this Court without going into the merits of issues involved in the writ petitions. In para 12, the learned Judge has specifically stated that "..... without expressing any opinion on the merits, I feel that it is otherwise a fit case wherein, this Court should set aside the order" Therefore, when the earlier draft assessment order was not dealt with on merits, but set aside only on the limited ground of violation of principles of natural justice, I am of the considered view that there is absolutely nothing wrong in adopting the comparables selected by the TPO in erstwhile order, dated 26.10.2010 by the first respondent in determining the arm's length price of the international transaction of the petitioner while passing the impugned order. If at all the petitioner is aggrieved in such adoption, it is needless to state that the petitioner is always at liberty to challenge the impugned order in the manner known to law as the impugned order passed by the first respondent is not final and as against the said order, under the statute, an efficacious remedy of appeal is available to the petitioner. In fact, the first respondent has not only considered the comparables selected by the TPO in erstwhile draft assessment, but he has also considered the eight comparables newly identified by the petitioner using information collected from responses to letters issued under Section 133(6) and thereby determined the arm's length revenue at Rs.57,05,68,292/- which is considerably lower than the erstwhile draft assessment, wherein, it was determined at Rs.110.27 crores. Hence, the contention that the first respondent has reiterated the earlier findings, cannot be accepted. Therefore, it seems that the petitioner is not aggrieved of the impugned order passed by the first respondent on the premise that it was reiterated on earlier findings without making de novo assessment, but for the order that was not passed by the first respondent in favour of the petitioner by their expectation.

17. For the fore going reasons, I do not find any illegality or irregularity in the impugned order passed by the first respondent in order to interfere with same. In such view of the matter, the reliance sought for by the petitioner, is no way helpful to the case of the petitioner. Since efficacious alternate remedy is available to the petitioner as against the impugned order under the Act, this Court is not inclined to delve upon the merits of the case.

In the result, the Writ Petition fails and it is dismissed. The petitioner is at liberty to approach the appellate authority to work out their remedy. On such approach by the petitioner within a period of six weeks from the date of receipt of copy of this order, the appellate authority is directed to entertain the same without insisting upon the limitation aspect. No costs. Consequently, connected MP is closed.

Sd/-
Assistant Registrar(J)

//True Copy//

Sub Assistant Registrar

Suk

To

1. The Joint Commissioner of Income Tax
Transfer Pricing Officer 2, III Floor
Main Building, Aayakar Bhavan
No.121, Nungambakkam High Road,
Chennai 600 034
2. The Deputy Commissioner of Income Tax,
Company Circle V(i)
Aayakar Bhavan
No.121, Mahatma Gandhi Road,
Nungambakkam,
Chennai 600 034.

+1cc to Mr.K.Magesh, Advocate, S.R.No.36114

+1cc to Mr.T.Pramod Kumar Chopda, Advocate, S.R.No.35940

W.P.NO.5184 OF 2015

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