

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

Civil Writ Petition No. 13613 of 2016 (O&M)
Date of Decision: 3rd October, 2016

M/s Shri Vishnu Eatables (India) Limited. ..Petitioner

versus

Deputy Commissioner of Income Tax, Central Circle, Karnal and another
..Respondents

**CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE.
HON'BLE MR. JUSTICE DEEPAK SIBAL, JUDGE.**

Present : Ms. Radhika Suri, Senior Advocate with
Ms. Rinku Dahiya, Advocate, for the petitioner.

Mr. Rajesh Sethi, Advocate and
Ms. Pridhi Jaswinder Sandhu, Advocate,
for the respondents.

S.J.VAZIFDAR, CHIEF JUSTICE

Respondent No.1 is the Assessing Officer and respondent No.2, also a Deputy Commissioner of Income Tax, is the Transfer Pricing Officer (TPO).

2. The petitioner seeks a writ of certiorari to quash the reference by the first respondent to the second respondent-Transfer Pricing Officer (TPO) and the satisfaction recorded by the first respondent for making the reference. The relief was sought on the ground that the provisions of Chapter-X of the Income Tax Act, 1961 (for short 'the Act') were not applicable to the international transactions undertaken by the petitioner as they were not with its associated enterprises within the meaning of that expression in the Act. It is contended, therefore, that the entire proceedings

including the reference to the TPO for the assessment year 2011-12 is without jurisdiction and void.

3. By our interim order dated 29.08.2016 we recorded Ms. Radhika Suri's statement that the petitioner would only raise legal submissions to the effect that before making a reference to the TPO to determine the arms length price of an international transaction the Assessing Officer is bound to grant the assessee an opportunity of showing cause against it including by a personal hearing, pass a reasoned order on the objections and serve the same.

4. In view of the limited scope of this petition it is necessary to state only those facts which are necessary for deciding the submissions.

5. Section 92A(1) of the Act reads as under:-

Meaning of associated enterprise

92A. (1) For the purposes of this section and sections 92, 92B, 92C, 92D, 92E and 92F, "associated enterprise", in relation to another enterprise, means an enterprise—

(a) which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or

(b) in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

6. The first respondent by a notice dated 19.03.2016 called upon the petitioner to show cause why its cases for the assessment years 2011-12 to 2014-15 be not transferred to the TPO. The notice granted the petitioner a hearing. The notice referred to the earlier questionnaire issued by the Department in connection with the assessment proceedings under sections 153A, 153C and 142(1) of the Act and stated that during the course of a survey of the petitioner's premises various documents were found and

impounded. The notice further stated that the petitioner had made sales to its group companies M/s Haryana Trading Company, Dubai managed by one Kushal Mittal and M/s Indian Treat Pvt. Ltd. Singapore managed by one Sunny Mittal; that the sales to the sister concern were under invoiced with a view to evading tax and that profits from India were diverted to tax havens which were remitted back to India for investing in properties by said Kushal Mittal and his family members. The notice further stated that the Accountant's report under section 92E in Form No. 3CEB was not furnished by the petitioner.

7. The petitioner by its letter dated 21.03.2016 filed its objections. The petitioner denied that it had under invoiced its exports. The petitioner also alleged that the remittances of said Kushal Mittal were in the normal course of business and were personal transactions with one Adarsh Kumar and M/s Vashudev Trading Company and that said Kushal Mittal was not directly or indirectly related to either the said Adarsh Kumar or M/s Vashudev Trading Company. Adarsh Kumar and M/s Vashudev Trading Company were shown in the bank statements tabulated in the show cause notice. It was further stated that neither M/s Haryana Trading Company, Dubai nor M/s Indian Treat Pvt. Ltd. Singapore were the petitioner's associate enterprises; that the petitioner was not required to submit the accountant's report under section 92E and that its case was not liable to be referred to the TPO.

8. A show cause notice dated 22.03.2016 in continuance of the earlier letters including the show cause notice dated 19.03.2016 was issued in respect of the assessment years 2008-09 to 2010-11 calling upon the

petitioner to show cause why its cases for the said years be not also referred to the TPO.

9. By a letter dated 05.04.2016 respondent No.2. i.e. the TPO informed the petitioner that he had received a reference under section 92CA(1) of the Act from respondent No.1 to determine under section 92CA(3) the arm's length price in respect of international transactions/specified domestic transaction entered into by the petitioner during the financial year 2010-11 corresponding to the assessment year 2011-12. The petitioner was called upon to produce the evidence and/or material relied upon by it in support of its computation of the arm's length price of the said transactions as well as various other documents including form No.3CEB and information and documents maintained under section 92D(1) read with rules 10D(1) and (3) of the Income Tax Rules, 1962 alongwith a copy of the transfer pricing study report.

10. By a letter dated 30.04.2016 the petitioner contended that there was no international transaction or specified domestic transaction undertaken by it during the assessment years 2008-09 to 2014-15 with an associate enterprise and accordingly it was not required to submit the Form No.3CEB. The letter further stated that a copy of the reference had not been supplied to the petitioner.

The petitioner by its Chartered Accountant's letter dated 27.05.2016 addressed to the TPO, which was in continuation of the earlier letter dated 30.04.2016 referred to its objections to the show cause notice, the contentions raised therein and requested for a copy of the reference by the first respondent to him and a personal hearing.

11. Respondent No.1 under the cover of a letter dated 06.05.2016 forwarded the reasons/satisfaction recorded by him before referring the matter to the TPO. The reasons/satisfaction note is titled; *“Reasons/Satisfaction note for transfer the case of M/s Shri Vishnu Eatables (India) Ltd. PAN: AABCS4831R to Transfer Pricing Officer, New Delhi”*. The satisfaction note referred to the search and seizure operation under section 132 of the Act carried out at the petitioner’s premises and the incriminating documents found and seized during the search. The satisfaction note further records as follows. ₹ 33 crores were surrendered. However, complete taxes on the said undisclosed income had not been paid. The petitioner and its group were not cooperating in the assessment proceedings. The petitioner had under invoiced its sales to its said group companies/sister concerns with a view to evading tax. A comparative chart tabulating the export sales to the sister concerns were set out. Profit from India was diverted to tax heavens which were then remitted back to India for investing in properties by Kushal Mittal and his family members. Their bank details were also tabulated. The details tabulated showed that the petitioner exported its products to its related concerns but that the petitioner had failed to file the accountant’s report under section 92 in Form-3CEB alongwith its return of income. The petitioner and the said companies “are family members”. The said Kushal Mittal, who managed the Haryana Trading Company, Dubai is the son of Vishnu Bhagwan Mittal, a key person as well as the Managing Director/promoter of the petitioner. The sales by the petitioner to the sister concern were at very low rates and the sister concern in turn sold the same at much higher rates and the income generated thereby found its way back to India and was invested in properties by the members

of the group. Instruction No.3/2016 dated 10.03.2016 issued by the Central Board of Direct Taxes was held applicable. The circular contains instructions for reference to the TPO inter-alia where search and seizure or survey operations had been carried out and findings regarding transfer pricing issues have been recorded by the Assessing Officer.

12. The first respondent has submitted a satisfaction note with adequate particulars and reasons. The correctness of what is stated therein is a different matter. The challenge to the decision to refer the transactions to the TPO on the ground that there are no international transactions must be taken in the proceedings and before the authorities under the Act. It is not a fit case to entertain them in a writ petition under Article 226 of the Constitution of India.

13. Respondent No.1 by his letter dated 23.03.2016 addressed to the Principal, Commissioner of Income Tax, set out all that he had recorded in the satisfaction note as well as the petitioner's reply/objections to the same. He also dealt with the petitioner's contention that the Dubai and Singapore Companies were not its associate enterprises. He referred to the provisions of law. Based on the same, he stated that the provisions of section 92A were applicable to the case and that he was satisfied that the petitioner's case required a reference to the Transfer Pricing Officer for the determination of the arm's length price of the transactions. He sought the approval of the Principal, Commissioner of Income Tax for the same in respect of the assessment years 2008-09 to 2014-15. The Principal, Commissioner of Income Tax by his letter dated 28/29.03.2016 gave the necessary permission.

14. Ms. Suri's submissions are as follow:-

- I) In terms of the instructions given by the CBDT circular dated 10.03.2016, the requirement of passing a reasoned order on the objections regarding whether a transaction is an international transaction or not and the service of the order upon the assessee is a condition precedent to the Assessing Officer making a reference to the Transfer Pricing Officer.
- II) Non-compliance with either or both the above mandatory conditions render the reference to the Transfer Pricing Officer void.

15. While the first submission is well founded, the second is not.

16. In support of the first submission Ms. Suri relied upon a judgment of the Bombay High Court in *Vodafone India Service Pvt. Ltd. v.*

Union of India and others [2014] 361 ITR 531 (Bombay) where it is held:-

“50. We have mentioned herein above that it is necessary for the Assessing Officer to decide the issue of objection to applicability of chapter X, if raised by the assessee, before referring the transaction to the TPO as it is a basic issue and would prevent loss of man hours on both sides in computing the ALP if it is finally concluded that Chapter X is not applicable. We are of the view that this exercise could also be done by the Assessing officer before he determines the ALP in exercise of his powers under Section 92C(3). It was Mr. Nani Palkhiwala who in the concluding paragraph of his Preface to the eighth edition of his monumental work “The Law and Practice of Income Tax” observed:-

*“Every Government has a right to levy taxes.
But no Government has the right, in the
process of extracting tax, to cause misery and
harassment to the taxpayer and the gnawing
feeling that he is made the victim of palpable
injustice”*

The revenue would do well to keep the above stage advice in mind while dealing with the assessee. We are constrained to observe that in this case it would be natural for the petitioner to feel harassed as the Assessing Officer did not give any opportunity of hearing before making a reference to the TPO and none of the two authorities viz. the TPO and the Assessing Officer dealt with its preliminary objection. The TPO does not deal with

the petitioner's objection about applicability of Chapter X, on the ground that it would be dealt with by the Assessing officer. Thereafter when the petitioner raises the same issue before the Assessing Officer he does not deal with the same on the ground that he is bound to complete the assessment in terms of the ALP determined by the TPO. We hope the revenue will be more sensitive to the just demands of the assessee and not treat the assessee as an adversary who has to be taxed, no matter what."

17. We are in respectful agreement with the view that it is necessary for the Assessing Officer to decide the objections, if any, to the applicability of Chapter-X before referring the transactions to the TPO as also before determining the arm's length price himself. To the reasons furnished by the Bombay High Court for this view we venture to add reasons of our own.

18. In another case of *Vodafone India Service Pvt. Ltd. v. Union of India and others* [2013] 359 ITR 133 (Bombay) a Division Bench of the Bombay High Court (to which one of us S.J.Vazifdar, J. was a party) held that where a reference is made under section 92CA(1), the Transfer Pricing Officer must determine the arm's length price of the transaction and in doing so he would not be entitled to consider the question as to whether the transaction referred to him is an international transaction or not. It was held:-

"65. The Advocate General submitted that the AO is not bound by the TPO's order in any respect and is entitled to decide the questions determined by the TPO on his own. Mr. Salve, on the other hand, rightly submitted that the AO is not entitled to revisit or to even question any part of the order of the TPO determining the arm's length price, including the question whether the transaction is an international transaction or not.

66. The AO has jurisdiction to consider any international transaction and to determine the arm's length price thereof. This is clear from sections 92C and 92CA. The AO has the power to tax all income under section 4 of the Act. He has the power to determine whether a transaction is an international transaction and to determine the arm's length price thereof under section 92C(1) and (3). He is not bound to refer the computation of the arm's length price in relation to an international transaction under

section 92CA(1) to the TPO. He may determine these questions himself. Where the AO determines the arm's length price of an international transaction himself and proceeds to complete the assessment without the intervention of the TPO, either on a reference under section 92CA(1) or suo moto under sub-sections (2A) and (2B) of section 92CA, no complications arise.

The exercise of power by the AO on the one hand and the TPO under sections 92C and 92CA on the other are a different matter and of considerable general importance.

67. The AO may, in exercise of his discretion under section 92CA and with the previous approval of the Commissioner, refer the computation of the arm's length price in relation to an international transaction under section 92C to the TPO. In such a case, the TPO would be bound to determine the arm's length price in respect of the said transaction. In doing so, the TPO would not be entitled to reconsider the question as to whether the transaction is an international transaction or not. In a reference under section 92CA(1), this question is determined by the AO as well as the Commissioner. That under section 92CA(1) the Commissioner must accord his approval to the AO's decision to refer the computation of the arm's length price to the TPO posits the Commissioner having satisfied himself that the transaction is an international transaction. The remedy of the assessee to question the TPO's decision would be before the Commissioner of Income-tax or the Dispute Resolution Panel as we will shortly indicate and thereafter before the ITAT. The provisions of the Act do not indicate that the Legislature intended conferring upon the TPO the jurisdiction to effectively sit in appeal over the decision not merely of the AO, but of the Commissioner as well.

The explanation to section 92CA provides that for the purpose of section 92CA, the TPO means a Joint Commissioner or Deputy Commissioner or Assistant Commissioner authorized by the Board to perform the functions of an Assessing Officer specified in section 92C and 92D in respect of any person or class of persons. These officers are junior to a Commissioner who exercises appellate authority. The Legislature has not conferred upon a Joint Commissioner or Deputy Commissioner or Assistant Commissioner, the power to sit in appeal over a decision of a Commissioner.

In this regard, we are in respectful agreement with the judgment of a Division Bench of the Gujarat High Court in *Veer Gems v. Assistant Commissioner of Income Tax* (2012) 246 CTR (Guj.) 352.

68. Thus, where a reference is made under section 92CA (1), the TPO must determine the arm's length price of the transaction and in doing so, he would not be entitled to consider the question as to whether the transaction referred to him is an international transaction or not."

19. In a case where the Assessing Officer himself determines the arm's length price, the assessee would be entitled to place his case before him including regarding the question as to whether the transactions are international transactions or not. If the assessee does not accept the Assessing Officer's determination of these issues, he would be entitled to challenge the same before the Commissioner of Income Tax (Appeals) and thereafter before the Income Tax Appellate Tribunal. Both the appellate authorities would have the benefit of the case of the Revenue and of the assessee. However, if the Assessing Officer decides to refer the determination of the arm's length price to the TPO without affording the assessee an opportunity of being heard and without deciding the objections, as to whether the transaction is an international transaction or not, the assessee would be severely prejudiced for it would then not have had an opportunity of having this objection even considered once the reference is made under section 92A(1) the Transfer Pricing Officer cannot for reasons stated in the second Vodafone's judgment [2013] 359 ITR 133 (*supra*) consider the question as to whether the transaction referred to him is an international transaction or not. This in turn would affect the assessment proceedings itself for the Assessing Officer would also be deprived the opportunity of arriving at a informed decision as to whether the transaction that he prima-facie considered to be an international transaction is or is not infact an international transaction. The first opportunity that the assessee would in such a case have to raise a contention that the transaction is not an international transaction would be before the Disputes Resolution Panel (DRP) or the CIT(A) as the case may be. These are in effect appellate proceedings where the appellate or the higher authority CIT(A)/DRP would

have to consider the issue with the benefit of the case of the department as well as of the assessee for the first time. Indeed even the Revenue would come to know of the assessee's objections and the material in support thereof for the first time. This may in a given case result in the CIT(A) or the ITAT remanding the matter resulting in multiplicity of proceedings. They may of course decide the issue themselves and indeed that would always be preferable than an order of removal. The DRP ofcourse must decide the issue itself. The DRP has ample powers under section 144C(5)(6) and (7) to consider all aspects and even further material.

20. Further in respect of international transactions, an assessee must maintain certain information. Section 92D provides that every person who has entered into an international transaction or specified domestic transaction shall keep and maintain such information and document in respect thereof, as may be prescribed. Rule 10D of the Rules stipulates the information and documents to be kept by the assessee in respect of an international transaction or a specified domestic transaction. There is a detailed description of such information and documents in clauses (a) to (m) of sub-rule (1) of Rule 10D. This information is to be kept and maintained for a period of eight years from the end of the relevant assessment year. Section 92E requires that every person who has entered into an international transaction or specified domestic transaction during a previous year shall obtain a report from an accountant and furnish such report on or before the specified date in the prescribed form duly signed and verified in the prescribed manner by such accountant and setting forth such particulars as may be prescribed. Rule 10E in turns provides that the report from the

accountant required to be furnished under section 92E shall be in Form-3CEB.

21. The failure to furnish the information invites penal consequences under section 271G of the Act. An assessee who fails to furnish the information or documents as required by section 92D(3) may be directed by the Assessing Officer or the Commissioner (Appeals) to pay by way of penalty a sum equal to two percent of the value of the international transaction or specified domestic transaction for each such failure.

22. It is evident, therefore, that the decision as to whether a transaction is an international transaction or not has far reaching consequences upon the assessee. An assessee is substantially affected by the finding as to whether or not a transaction entered into by it is an international transaction. It is only fair then that an assessee is given an opportunity of being heard on the question as to whether a transaction entered into by it is an international transaction or not.

23. It does occur to us that it could be said that the opportunity of raising objections and being heard on this issue ought to be granted by the Principal, Commissioner of Income Tax (Pr.CIT) for it is the Pr.CIT who ultimately grants or refuses the approval to refer the transaction to the Transfer Pricing Officer for determination of the arm's length price. However, if an assessee is given such an opportunity before the Assessing Officer, that would be sufficient. The Assessing Officer would undoubtedly have to forward the same alongwith the objections, if any, to the Pr.CIT while seeking his approval to refer the transaction to the Transfer Pricing Officer. Ultimately the assessee has the opportunity of challenging the same in appeal.

24. Ms. Suri also relied upon a circular issued by the Central Board of Direct Taxes dated 10.03.2016 containing guidelines for implementation of the Transfer Pricing Provisions. The same is applicable to both international transactions and specified domestic transactions between associate enterprises. Ms. Suri relied upon the following provisions in the circular:-

3. Reference to Transfer Pricing Officer (TPO)

3.1 The power to determine the Arm's Length Price (ALP) in an international transaction or specified domestic transaction is contained in sub-section (3) of Section 92C. However, Section 92CA provides that where the Assessing Officer (AO) considers it necessary or expedient so to do, he may refer the computation of ALP in relation to an international transaction or specified domestic transaction to the TPO. For proper administration of the Income-tax Act, the Board has decided that the AO shall henceforth make a reference to the TPO only under the circumstances laid out in this Instruction.

3.2 xx xx xx xx xx

3.3 Cases selected for scrutiny on non-transfer pricing risk parameters but also having international transactions or specified domestic transactions, shall be referred to TPOs only in the following circumstances:

(a) where the AO comes to know that the taxpayer has entered into international transactions or specified domestic transactions or both but the taxpayer has either not filed the Accountant's report under Section 92E at all or has not disclosed the said transactions in the Accountant's report filed;

(b) where there has been a transfer pricing adjustment of Rs. 10 Crore or more in an earlier assessment year and such adjustment has been upheld by the judicial authorities or is pending in appeal; and

(c) where search and seizure or survey operations have been carried out under the provisions of the Income-tax Act and findings regarding transfer pricing issues in respect of international transactions or specified domestic transactions or both have been recorded by the Investigation Wing or the AO.

3.4 For cases to be referred by the AO to the TPO in accordance with paragraphs 3.2 and 3.3 above, in respect of transactions having the following situations, the AO must, as a jurisdictional requirement, record his satisfaction that there is an income or a potential of an

income arising and/or being affected on determination of the ALP of an international transaction or specified domestic transaction before seeking approval of the PCIT or CIT to refer the matter to the TPO for determination of the ALP:

- where the taxpayer has not filed the Accountant's report under Section 92E of the Act but the international transactions or specified domestic transactions undertaken by it come to the notice of the AO;

- where the taxpayer has not declared one or more international transaction or specified domestic transaction in the Accountant's report filed under Section 92E of the Act and the said transaction or transactions come to the notice of the AO; and

- where the taxpayer has declared the international transactions or specified domestic transactions in the Accountant's report filed under Section 92E of the Act but has made certain qualifying remarks to the effect that the said transactions are not international transactions or specified domestic transactions or they do not impact the income of the taxpayer.

In the above three situations, the AO must provide an opportunity of being heard to the taxpayer before recording his satisfaction or otherwise. In case no objection is raised by the taxpayer to the applicability of Chapter X [Sections 92 to 92F] of the Act to these three situations, then AO should refer the international transaction or specified domestic transaction to the TPO for determining the ALP after obtaining the approval of the PCIT or CIT. However, where the applicability of Chapter X [Sections 92 to 92F] to these three situations is objected to by the taxpayer, the AO must consider the taxpayer's objections and pass a speaking order so as to comply with the principles of natural justice. If the AO decides in the said order that the transaction in question needs to be referred to the TPO, he should make a reference after obtaining the approval of the PCIT or CIT".
(emphasis supplied).

25. Admittedly, in the present case there was a search and seizure operation at the petitioner's premises and it is the respondent(s) case that the petitioner has not filed the accountant's report under section 92E. The petitioner's case, therefore, falls within paragraph 3.3 (c) and the first sub-paragraph after the opening part of paragraph 3.4, both of which have been emphasized by us.

26. Mr. Sethi's contention that in cases falling under paragraph 3.3(c) it is not necessary for the Assessing Officer to pass a

speaking/reasoned order is not well founded. Paragraph 3.3(c) cannot be read in isolation. It must be read with paragraph 3.4. The opening part of paragraph 3.4 deals with cases to be referred by the Assessing Officer to the TPO in accordance with paragraphs 3.2 and 3.3 in respect of transactions having the “following situations” meaning thereby the three situations immediately following and identified by the marks ‘.’.

27. The circular further provides that in such cases the Assessing Officer must “record his satisfaction”. The words used are “record his satisfaction” which indicate firstly that the Assessing Officer must reduce his satisfaction in writing and secondly he must furnish reasons for the same. That the satisfaction is to be in writing is clear from the word “record”. Moreover paragraph 3.3 expressly states that the Assessing Officer “mustpass a speaking order.....”.

28. We have, however, already held that the satisfaction recorded by the Assessing Officer in the present case contains sufficient reasons. He has indicated the relationship between the assessee and the other parties. He has made a comparative chart and alleged that the sales were under invoiced. That is sufficient to refer the matter to the TPO. Whether the allegations are true or not must be tested before the authorities under the Act and not in a Writ Petition under Article 226. The challenge on this ground is, therefore, unsustainable.

29. This brings us to Ms. Suri’s second submission, namely, that the order recording satisfaction upon which the Principal, Commissioner of Income Tax, grants permission, must be served upon the assessee. We agree. The purpose of this exercise of granting the assessee an opportunity of raising objections and being heard and the requirement of

the Assessing Officer to furnish reasons for the satisfaction for the reference of the transaction to the TPO for determination of the arm's length price is inter-alia to enable the assessee firstly to meet the case and represent against it to the TPO before the Assessing Officer on the ground that there is no international transaction and secondly in the event of his objections being overruled, an opportunity of challenging the same before the Disputes Resolution Panel or the Commissioner of Income Tax(Appeals) as the case may be, and thereafter before the Income Tax Appellate Tribunal.

30. The matter, however, does not end here for the respondents have complied with all these requirements. The respondents have produced the satisfaction without the Pr.CIT approval for the reference. Ms. Suri, however, contends that the satisfaction that was recorded by the first respondent has not been served upon the assessee. She submits that where the satisfaction is not served upon the assessee before a reference to the TPO by the Assessing Officer, the reference is void and consequently all the proceedings before the Transfer Pricing Officer are void.

31. The submission is not well founded. As we noted earlier, the purpose of this entire exercise is inter-alia to afford the assessee an opportunity of establishing at the threshold that the transaction is not an international transaction. If his objections are overruled it is open for him to challenge the same before the Commissioner of Income Tax (Appeals) or the Disputes Resolution Panel, as the case may be. An assessee is not entitled as a matter of right to invoke the writ jurisdiction at the stage of reference by the Assessing Officer to the TPO. His grievances can be

raised in a challenge to the draft assessment order before the Disputes Resolution Panel or the final assessment order before to the Commissioner of Income Tax (Appeals). The requirements of the rules of natural justice and of the said circular dated 10.03.2016 would have been met even if the satisfaction note is furnished subsequently. As we noted earlier, in any event the assessee cannot raise the question as to whether or not the referred transaction is an international transaction before the Transfer Pricing Officer. It is, therefore, sufficient if he is served with the order subsequently even alongwith the draft assessment order or the assessment order as the case may be.

32. The answer to Ms. Suri's question as to what if the satisfaction note is not furnished at all is obvious. The assessee can always apply for the same either before the authorities and failing which by filing a writ petition.

33. The contention that the reference is void *ab initio* on account of the satisfaction note not having been furnished to the assessee before the reference of the transaction by the Assessing Officer to the TPO is, therefore, rejected. The failure to supply the satisfaction note before the reference to the TPO is at the highest a mere irregularity and does not prejudice the assessee in any manner whatsoever.

34. If we were to accept this contention, it would lead to the startling result of the entire assessment proceedings being annulled on account thereof. There is nothing in the Act or in the circular that warrants such an interpretation. The view that we have taken does not prejudice the assessee in any manner whatsoever.

35. In view of the above findings we are inclined to dismiss the writ petition. In view of the fact that the reference to the TPO has already been made after obtaining the approval of the Pr.CIT the objection raised by the petitioner may be taken before the DRP or the CIT(A) as the case may be. It is necessary, however, now to consider the nature of the order to be passed. As the provisions of the Act and of the circular have not been complied with strictly and the matter already stands referred to the TPO it is necessary to protect the petitioner in certain aspects. Normally the petitioner would have had an opportunity of contending that the transactions are not international transactions as they are not with its associated enterprises before the Assessing Officer himself. That stage having passed, it is only fair that if the petitioner chooses the DRP route or the CIT(A) route, the DRP or the CIT(A) as the case may be ought to first adjudicate the question as to whether the said transactions are international transactions or not. If they come to the conclusion that they are not international transactions, certain consequences may follow which we keep open for the petitioner to take before the DRP or the CIT(A) as the case may be. We clarify that in the event of the CIT(A) or the DRP coming to the conclusion that they are international transactions, it would not be necessary for them to stall the proceedings and they may proceed to decide them finally. To this extent, our order is at a variance with the directions issued by the Bombay High Court in *Vodafone India Service Pvt. Ltd. v. Union of India and others* [2014] 361 ITR 531 (Bombay) which are as follow:-

“53. In the above circumstances, we dispose of the present petition with the following directions:-

(A) to (C) xx xx xx xx xx xx

(D) We further make it clear that in case the decision of the DRP on the above preliminary issue is adverse to the petitioner, it would be open to the petitioner to challenge the order of the DRP on the preliminary issue in a writ petition if a case is made out at that stage that the decision of the DRP is patently illegal, notwithstanding the availability of alternative remedy of filing an appeal before the Income Tax Appellate Tribunal.”

We see no reason for these authorities to stall the proceedings if they come to the conclusion that the transactions are international transactions.

36. The penalty proceedings under section 271(G) have been initiated on the basis that the provisions of Chapter-X and in particular Sections 92D and 92E have not been complied with. As we noted earlier the petitioner did not have an opportunity of representing its case to the effect that these transactions are not international transactions. It is only fair then that while the penalty proceedings may continue the order imposing penalty, if any, shall not be implemented till the decision of the DRP or the CIT(A) as the case may be on the preliminary issue as to whether it is an international transaction or not.

37. In the circumstances the writ petition is dismissed subject to what is stated in the above paragraphs.

(S.J.VAZIFDAR)
CHIEF JUSTICE

(DEEPAK SIBAL)
JUDGE

03.10.2016
'ravinder'

Whether speaking/reasoned	√ Yes/No
Whether reportable	√ Yes/No