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

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**W.P.(C) 6422/2013 & CM No.14002/2013 (Stay)**

INDORAMA SYNTHETICS (INDIA) LTD. .... Petitioner  
Through: Mr. Ajay Vohra, Senior Advocate with  
Ms. Kavita Jha and Mr.Vaibhav Kulkarni,  
Advocates.

versus

THE ADDITIONAL COMMISSIONER OF INCOME-TAX  
& ANR. .... Respondents  
Through: Mr. Ashok K. Manchanda, Senior  
Standing Counsel.

With

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**W.P.(C) 4558/2014**

INDORAMA SYNTHETICS (INDIA) LTD. .... Petitioner  
Through: Mr. Ajay Vohra, Senior Advocate with  
Ms. Kavita Jha and Mr.Vaibhav Kulkarni,  
Advocates.

versus

THE ADDITIONAL COMMISSIONER OF INCOME-TAX  
& ANR. .... Respondents  
Through: Mr. Ashok K. Manchanda, Senior  
Standing Counsel.

And

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**W.P.(C) 12072/2015**

INDORAMA SYNTHETICS INDIA LTD. .... Petitioner

Through: Mr. Ajay Vohra, Senior Advocate with  
Ms. Kavita Jha and Mr. Vaibhav Kulkarni,  
Advocates.

versus

JOINT COMMISSIONER OF INCOME-TAX  
& ANR.

..... Respondents

Through: Mr. Ashok K. Manchanda, Senior  
Standing Counsel.

**CORAM:**  
**JUSTICE S. MURALIDHAR**  
**JUSTICE NAJMI WAZIRI**

**ORDER**  
**25.07.2016**

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**Dr. S. Muralidhar, J.**

1. These three writ petitions involve a common but interesting question of law regarding the procedure adopted by the Assessing Officer ('AO') while referring to the Transfer Pricing Officer ('TPO') under Section 92 CA of the Income Tax Act, 1961 ('Act') the question of determination of the Arm's Length Price ('ALP') of the international transaction entered into by the Petitioner Assessee with its Associated Enterprise ('AE').

***Background facts***

2. The facts in brief are that the Petitioner is a widely held public limited company. The Deputy Commissioner of Income Tax ('DCIT'), Circle 11 (1), [Respondent No. 2] is the AO of the Petitioner. During the previous year 2009-10 relevant to the Assessment Year ('AY') 2010-11, the Petitioner, Indorama Synthetics (India) Limited ['ISIL'], entered into transactions of

import of raw material amounting to Rs. 196.48 crores from Indorama Petrochem Limited (IPL), a company incorporated in Thailand. For the AY 2010-11 the Petitioner filed its return of income on 15<sup>th</sup> October 2010 declaring 'Nil' income after setting off the brought forward losses. The Petitioner's case was picked up for scrutiny and notices under Section 143 (2) and Section 142 (1) of the Act were issued. In terms of Section 153 of the Act, the assessment proceedings for the AY 2010-11 were required to be completed by the AO by 31<sup>st</sup> March 2013. If a reference were to be made by the AO to the TPO for determination of the ALP under Section 92CA (1) of the Act, the time limit for completion of the assessment would get extended by a period of nine months, i.e., up to October 2014 instead of March 2013.

3. The Petitioner states that during the course of assessment proceedings, the Petitioner submitted voluminous information/details to the AO. In the month of February 2013, the AO required the Petitioner to explain why the transfer pricing (TP) provisions contained in Chapter X of the Act, i.e., Sections 92CA to 92F should not be made applicable in respect of transactions of import of raw materials amounting to Rs. 196.48 crores from IPL.

4. By a reply dated 26<sup>th</sup> February 2013 the Petitioner pointed out that IPL was not an AE of the Assessee as defined in Section 92A of the Act. The Petitioner confirmed that both the companies are "separate companies and managed by independent Board of Directors and do not have either direct or indirect control over each other's business." The Petitioner states that in support of the above stand, it also submitted an independent legal opinion dated 19<sup>th</sup> February 2013.

5. The Petitioner states that thereafter nothing was heard from Respondent No. 2 nor any further query raised. By a letter dated 31<sup>st</sup> March 2013, the AO informed the Petitioner that its case had been referred to TPO, i.e., Respondent No. 1 for determination of ALP in relation to the international transactions undertaken by the Petitioner with AEs during AY 2010-11. The letter dated 31<sup>st</sup> March 2013 issued by the AO reads as follows:

“Kindly refer the above.

Please refer to the 3CD report and the other financial accounts filed by you in this office during the assessment proceedings of AY 2010-11 wherein it is noted that you have not filed the Transfer Pricing report under Section 92E of the I.T. Act, 1961 in this office which was required. Therefore, with the prior approval of the CIT-IV Delhi, New Delhi your case for AY 2010-11 has been referred to the Transfer Pricing Officer for the determination of the Arms Length Price.”

6. The case of the Petitioner is that the above reference is illegal since during the AY in question it did not enter into any international transaction with an AE. It is submitted that no reference of such transaction for the purpose of determination of the ALP could have been made by the AO to the TPO under Section 92 CA of the Act.

7. It requires to be noticed at this stage that for AYs 2011-12 and 2012-13, similar references were made by the AO to the TPO for determination of the ALP of an alleged similar international transaction involving the Assessee and its AE. The stand of the Petitioner Assessee qua the references for the said two years was the same. While the subject matter of Writ Petition (Civil) No. 6422 of 2013 is the reference dated 31<sup>st</sup> March 2013 by which

the AO referred to the TPO on the question of determination of ALP of the alleged international transaction between the Assessee and IPL for the AY 2010-11, Writ Petition (Civil) No. 4588 of 2014 challenges a similar reference made by the AO under Section 92CA of the Act of the same international transaction and the consequent notice dated 5<sup>th</sup> May 2014 issued by the TPO to the Petitioner in that regard. Writ Petition (Civil) No. 12072 of 2015 likewise challenges the notice dated 15<sup>th</sup> July 2015 issued by the TPO to the Petitioner under Section 92CA (2) and 92D (3) of the Act. The issue in all the writ petitions is common.

***Submissions of learned counsel***

8. Referring to Instruction No. 3 of 20<sup>th</sup> May 2003 issued by the Central Board of Direct Taxes ('CBDT'), Mr. Ajay Vohra, learned Senior counsel appearing for the Petitioner, submits that the AO was required to arrive at a *prima facie* determination on the basis of the details provided in the Accountant's report in Form 3 CEB containing the basic details of the international transaction. It is pointed out by Mr. Vohra that in the instant case with the Assessee having taken a specific stand in its reply dated 26<sup>th</sup> February 2013 that it did not enter into any international transaction, the AO was bound to deal with the said objection while issuing an order making a reference of the transaction to the TPO in exercise of the power under Section 92CA (1) of the Act. Mr. Vohra submitted that the AO ought to have recorded the reasons stating that it was 'necessary and expedient' to refer the matter to the TPO and that too only after giving the Petitioner an opportunity of being heard.

9. Reliance is placed on the decision of the Bombay High Court in ***Vodafone India Services (P) Limited v. Union of India (2014) 361 ITR 531 (Bom)*** where it was held that such a requirement of giving the Petitioner hearing prior to making a reference under Section 92CA of the Act has to be read into Section 92C A (1) in a case where the very jurisdiction of the AO to make such a reference under Chapter X is challenged by the Assessee. Mr. Vohra pointed out that the Bombay High Court had distinguished the decision to the contrary of the Gujarat High Court in ***Veer Gems v. Assistant Commissioner of Income Tax (2013) 351 ITR 35 (Guj)***. Mr. Vohra submitted that CBDT Instruction No. 15 of 2015 issued on 16<sup>th</sup> October 2015 recognized the necessity of giving the Assessee a hearing. He submitted that for the purpose of reopening of the assessment under Section 147 of the Act, the Supreme Court has in ***GKN Driveshafts (India) Limited v. Income-tax Officer (2003) 259 ITR 19 (SC)*** mandated a hearing to an Assessee in regard to the objections filed to the re-opening of the assessment. Likewise, for the purposes of Section 92 CA (1) of the Act the Assessee who has raised an objection ought to be heard by the AO prior to the making of the reference the Petitioner.

10. Countering the above submissions it was urged by Mr. Ashok Manchanda, learned Senior standing counsel for the Revenue, that from a plain reading of Section 92CA (1) of the Act there was no requirement of any hearing being given to the Petitioner by the AO before making a reference to the TPO. Mr. Manchanda submitted that the principles of natural justice would be satisfied as long as the Assessee is given a notice by the AO regarding the proposed reference and the objections thereto are

considered by the AO.

11. Mr. Manchanda further submitted that as far as AY 2009-10 is concerned, although the order of the AO making a reference to the TPO does not itself record that the AO considers it “necessary or expedient” to make a reference, it must be taken that the AO had come to that conclusion. Further, there was no need, according to Mr. Manchanda, for the AO to deal with the objections raised by the Assessee. He submitted that no prejudice would be caused to the Assessee if the TPO were to proceed with the reference made by the AO. The Assessee would in any event be heard by the TPO. If the Assessee was aggrieved by the report of the TPO and consequential draft or final assessment order of the AO, the Assessee would have other remedies in accordance with law. Mr. Manchanda pointed out that the CBDT’s Instruction No. 3 did not envisage any hearing being given to the Assessee. He relied on the decision of the Gujarat High Court in **Veer Gems** (supra). He further submitted that CBDT’s Instruction No. 15 of 2015 was prospective and would not invalidate the AO's order dated 31<sup>st</sup> March 2013.

***Discussion and Reasons***

12. To begin with it is required to be noticed that Chapter X contains provisions regarding determination of ALP of international transactions and specified domestic transactions. While Section 92C talks of computation of ALP, Section 92BA defines a specified domestic transaction. For the purpose of the present petitions, it is not necessary for the Court to examine if in fact the Petitioner did enter into an international transaction and whether IPL could be said to be the AE of the Petitioner. The main issue in

these petitions is whether it was incumbent on the AO to have given the Petitioner an opportunity of being heard before making a reference to the TPO under Section 92 CA (1) of the Act?

13. The relevant portions of Section 92CA of the Act, which deals *inter alia* with the procedure to be followed in the making of a reference by the AO to the TPO reads as under:

**“Section 92CA:-**

(1) Where any person being the Assessee, has entered into an international transaction or specified domestic transaction in any previous year, and the Assessing Officer considers it necessary or expedient so to do, he may with the previous approval of the Principal Commissioner or Commissioner, refer the computation of the arm's length price in relation to the said international transaction or specified domestic transaction under Section 92C to the Transfer Pricing Officer.

(2) Where a reference is made under sub-Section (1), the Transfer Pricing Officer shall serve a notice on the Assessee requiring him to produce or cause to be produced on a date to be specified therein, any evidence on which the Assessee may rely in support of the computation made by him of the arm's length price in relation to the international transaction or specified domestic transaction referred to in sub-Section (1).

(2A) Where any other international transaction other than an international transaction referred under sub-Section (1), comes to the notice of the Transfer Pricing Officer during the course of the proceedings before him, the provisions of this Chapter shall apply as if such other international transaction is an international transaction referred to him under sub-section (1)

(2B) Where in respect of an international transaction, the Assessee has not furnished the report under Section 92 E and such transaction comes to the notice of the Transfer Pricing Officer during the course

of the proceeding before him, the provisions of this Chapter shall apply as if such transaction is an international transaction referred to him under sub-Section (1).

(2C) Nothing contained in sub-Section (2B), shall empower the Assessing Officer either to assess or reassess under Section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the Assessee under Section 154, for any assessment year, proceedings for which have been completed before the 1<sup>st</sup> day of July 2012.

(3) On the date specified in the notice under sub-Section (2), or as soon thereafter as may be, after hearing evidence as the Assessee may produce, including any information or documents referred to in sub-section (3) of Section 92D and after considering such evidence as the Transfer Pricing Officer may require on any specified points and after taking into account all relevant materials which he has gathered, the Transfer Pricing Officer shall by order in writing, determine the arm's length price in relation to the international transaction or specified domestic transaction in accordance with sub-section (3) of Section 92C and send a copy of his order to the Assessing Officer and to the Assessee.”

14. Section 92CA reveals that there are certain jurisdictional prerequisites for the making of a reference by the AO to the TPO. In the first place, the AO has to be satisfied that the Assessee has entered into an international transaction or a specified domestic transaction. Where, as in the present case, the Assessee raises a threshold objection that it has not entered into any international transaction within the meaning of Section 92B of the Act, it is imperative for the AO to deal with such an objection. If the AO decides to nevertheless make a reference, he has to record the reasons, even *prima facie*, why he considers it necessary and expedient to make such a reference to the TPO.

15. What is referred to the TPO is the determination of the ALP of the said international transaction or specified domestic transaction. Therefore, the satisfaction to be arrived at by the AO regarding the existence of the international transaction or specified domestic transaction, even *prima facie*, is a *sine qua non* for making the reference to the TPO. Where such an Accountant's report is submitted by the Assessee in Form 3CEB, then there should be no difficulty for the AO to form an opinion, even a *prima facie* one, that it is necessary and expedient to make a reference to the TPO on the question of the determination of the ALP of such international transaction involving the Assessee.

16. CBDT's Instruction No. 3 of 2003 categorically states that in order to make a reference to the TPO, the AO has to satisfy himself that the Assessee has entered into an international transaction with its AE. One of the sources from which the factual information regarding the international transaction can be gathered is Form No. 3 CEB filed with the return which is in the nature of an Accountant's report containing the details of the international transaction entered into by the taxpayer during the AY in question. Where no such report in Form 3 CEB is filed by the Assessee, what will be the basis for the AO to record that it is necessary and expedient to refer the question of determination of the ALP of such transaction to the TPO? Where the AO is of the view that a transaction reflected in the filed return partakes of the character of an international transaction, he will put the Assessee on notice of his proposal to make a reference to the TPO under Section 92CA (1) of the Act. Before making a reference to the TPO, the AO has to seek

approval of the Commissioner/Director as contemplated under the Act. Therefore, all transactions have to be explicitly mentioned in the letter of reference. The very nature of this exercise is such that the AO will first put the Assessee on notice of his proposing to make a reference to the TPO and seek information and clarification from the Assessee. If at this stage, the Assessee raises an objection as to the very jurisdiction of the AO to make the reference, then it will be incumbent on the AO to deal with such objection on merits.

17. While Section 92CA (1) does not itself talk about a hearing having to be given to the Assessee upon the latter raising an objection as to the jurisdiction of the AO to make a reference, such requirement appears to be implicit in the very nature of the procedure that is expected to be followed by the AO. As already noticed, the AO has to record that he considers it necessary and expedient to make a reference. The AO has to deal with the objections raised by the Assessee. It is only thereafter that the AO can come to the conclusion, even *prime facie*, that it is necessary and expedient to make the reference. This has to be done prior to making a reference.

18. The further issue as far as the procedure to be followed is whether the AO is obliged to give the Assessee an opportunity of being heard prior to making the reference where an objection as to jurisdiction is raised by the Assessee in relation to the making a of reference?

19.1 In ***Vodafone India Services (P) Limited v. Union of India*** (*supra*), the Bombay High Court was seized of a similar question relating to AY 2009-10. Vodafone India Services (P) Limited [‘VISPL’] filed its return of income

along with Form 3 CEB in which the transaction of issuance of equity shares by VISPL to its holding company (which it was undisputedly an AE) was declared as an international transaction. Also the ALP of the shares so issued, was determined. However, a notice was appended by the Accountant stating that the transaction of issue of equity shares did not affect the income of the Assessee and was being reported only as a matter of abundant caution.

19.2 The return was picked up for scrutiny by the AO. Thereafter, the AO, after obtaining the previous approval of the Commissioner of Income Tax ('CIT') referred all the transactions reported in Form 3 CEB to the TPO under Section 92CA (1) of the Act. The TPO then issued a show-cause notice (SCN) to VISPL on 14<sup>th</sup> December 2012, *inter alia* asking it to show cause why the issue price (including the premium) of the equity shares to its holding company as declared by VISPL should be accepted for the purposes of computing ALP under the Act.

19.3 In reply VISPL contended that the notice was completely without jurisdiction on the ground that provisions of Chapter X did not apply to issue of equity shares. Without prejudice, VISPL contested the SCN on merits. The TPO passed an order on 28<sup>th</sup> January 2013 negating the above contentions of the Petitioner and proceeded to determine the ALP of the transaction in question. The AO then issued a draft assessment order under Section 143 read with Section 144-C(1) of the Act adding the entire income determined by the TPO to VISPL's income. VISPL then filed objections to the draft assessment order before the Dispute Resolution Panel ('DRP'). Objections were raised only with regard to the issues of valuation and

quantification and not with regard to the issue of jurisdiction. A writ petition was later filed in the Bombay High Court challenging the jurisdiction of the AO to make a reference of the above transaction to the TPO.

19.4 While discussing the provisions of Chapter X of the Act and in particular Section 92CA thereof, the Bombay High Court observed as under:

“32. It is clear that in view of Section 92 (1), there must be income arising and/or affected or potentially arising and/or affected by an International Transaction for the purpose of application of Chapter X. This would appear to be in the nature of jurisdictional requirement and the Assessing Officer must be satisfied that there is an income or a potential of an income arising and/or being affected on determination of an ALP before he proceeds further in determining the ALP or referring the issue to the TPO to determine the ALP. In this case, we find that the Petitioner has from the very beginning been challenging the jurisdiction to apply Chapter X on the ground that no income arises and/or is affected or potentially arises and/or is affected on account of issue of its shares to its holding company. The Assessing Officer does not deal with this objection/issue before referring the matter to the TPO. The TPO does not deal with the above objection on the ground that in terms of Section 92CA, his mandate is only to compute the ALP in relation to the International Transaction. The TPO in the impugned order dated 28<sup>th</sup> January 2012 meets the Petitioner’s objection by stating that the same would be dealt with by the Assessing Officer. However, when the same objection was raised before the Assessing Officer post the order of the TPO, the Assessing Officer does not consider the same in the impugned draft assessment order dated 22<sup>nd</sup> March 2013 on the ground that in view of Section 92CA (4), the Assessing Officer is obliged to pass an order in conformity with the ALP determined by the TPO. This jurisdictional issue has to be dealt with either by the TPO or the Assessing Officer when specifically raised by the Petitioner/Assessee.

33. Normally when an accountant reports an international transaction under Section 92E there may be no dispute that

there is an income arising and/or being affected or a potential of an income arising and/or being affected by an international transaction on determination of ALP. However when an Assessee challenges the above premise, then the issue must be decided. Such an issue must be dealt with at the very threshold that is before determination of ALP. This is so because in case it is held that in the International Transaction there is no income or potential of any income arising and/or being affected on determination of an ALP, the entire exercise of determining the ALP would become academic. In terms of Section 92CA (4), the Assessing Officer is bound to pass an order in conformity with the ALP determined by the TPO as held by another Division Bench of this Court in the judgment dated 6<sup>th</sup> September 2013 in *Vodafone II* case. However, where the Assessing Officer is himself determining the ALP in terms of Section 94C (3) then in accordance with Section 94C (4) he would compute the income, having regard to the ALP. In such cases, where the Assessing Officer decides the ALP himself, it is open to him to consider the issue of income arising and/or being affected or not before commencing the proceedings under Chapter X or at the stage of passing an assessment order.”

19.5 The Bombay High Court further observed that where the objection is raised about the applicability of Chapter X of the Act, “then the requirement for taking a decision after taking on board the objection becomes necessary. In the absence of it being considered at this stage, the same could only be considered by the DRP and as pointed out above, if considered at the very threshold by the Assessing Officer, it could save an elaborate exercise of determining the ALP which may turn out to be entirely academic.” It is in the above circumstances, the Bombay High Court concluded that “grant of personal hearing before referring the matter to the TPO has to be read into Section 92CA (1) in cases where the very jurisdiction to tax under Chapter X is challenged by the Assessee.”

19.6. While disagreeing with the view of the Gujarat High Court in *Veer Gems (supra)*, the Bombay High Court set aside the order passed by the AO making a reference to the TPO. The Bombay High Court further explained the consequence of hearing being given to the Assessee by the AO before making a reference to the TPO and observed in para 40, as under:

“40. In our view, once the AO gives hearing to the Assessee before making a reference to TPO, the TPO would be bound by formation of opinion of AO that there was international transaction in the relevant year and that income arises or is affected by the international transaction and the TPO is bound to determine the ALP of the international transaction under consideration, since ultimately it is the duty and responsibility of AO to assess chargeable income of the Assessee on the basis of the provisions. Hence, there would be sufficient compliance with the principles of natural justice, if AO gives an opportunity of hearing to the Assessee. Normally when the Assessee files his return along with a copy of the Accountant’s report under Section 92E the applicability of Chapter X may be an admitted position. However we may add a caveat and that is: where the Assessee objects to the jurisdiction under Chapter X being exercised then hearing is required to be given by the Assessing Officer to the Assessee to consider whether it is necessary and expedient to refer the matter to the TPO as otherwise this objection would never be considered, as pointed out above and as in fact has happened in this case. In such cases where the applicability of Chapter X to the facts of the Assessee’s case is objected to, a hearing should be given to consider the Assessee’s objection but not otherwise.”

19.7. However instead of remanding the matter to the AO, the Bombay High Court was of the view that the question must be considered by the DRP on merits.

20. This Court concurs with the view expressed by the Bombay High Court in *Vodafone India Services (P) Limited v. Union of India* (*supra*). It appears that the CBDT has specifically accepted the legal position as explained by the Bombay High Court in the aforementioned decision and has not gone by the decision by the Gujarat High Court in *Veer Gems* (*supra*). Instruction No. 15 of 2015 dated 16<sup>th</sup> October 2015 issued by the CBDT which sets out, *inter alia*, the procedure to be followed by the AO has since been replaced by Instruction No.3 of 2016 dated 10<sup>th</sup> March 2016. Para 3.4 thereof reads as under:

“3.4 For cases to be referred by the AO to the TPO in accordance with paras 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:

- (a) 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;
- (b) 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
- (c) 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 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 [Section 92 to 92F] of the Act to these three situations, then the 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 applicability of Chapter X [Section 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.”

21. As far as the present case is concerned, the Assessee has not filed the Accountant's report under Section 92E of the Act. Yet the AO has to proceed to determine the ALP under Section 92C (3) of the Act or refer the matter to the TPO to determine the ALP under Section 92CA (1) of the Act in case the Assessee has not declared one or more international transactions in the report filed under Section 92E of the Act. As explained in the above situations in para 3.2, the AO must provide an opportunity of being heard to the taxpayer before recording his satisfaction or otherwise.

22. Although Mr. Manchanda tried to contend that the above instruction of the CBDT was prospective, in the considered view of the Court, the above CBDT's Instruction No. 15 of 2015 as replaced by CBDT Instruction No.3 of 2016 dated 10<sup>th</sup> March 2016 clarifies the correct legal position and cannot be construed as not applying to the facts on hand. Since it is a procedural aspect and is intended to the benefit to the Assessee, it requires to be applied

even in the present case where a reference was earlier made by the AO to the TPO on 31<sup>st</sup> March 2013 and thereafter.

23. For all the aforesaid reasons, the Court is of the view that the three references made by the AO to the TPO on the question of determination of ALP of the alleged international transactions involving the Petitioner and its AE have been made without affording the Petitioner an opportunity of being heard as was required by law. This, as explained by the Bombay High Court in *Vodafone India Services (P) Limited v. Union of India* (*supra*), and reaffirmed by the CBDT's Instruction No. 3 of 2016, is a procedural requirement implicit in Section 92 CA (1) of the Act. Accordingly, the said three references made by the AO to the TPO for determination of the said question for the AYs 2011-12, 2012-13 and 2013-14 are hereby set aside.

24. The question of whether or not a reference should be made to the TPO, for the three AYs in question, will now be determined by the AO afresh after giving the Petitioner an opportunity of being heard in respect of each of the AYs within the next 15 days. At least one week's advance notice be given to the Petitioner of the exact date of hearing before the AO.

25. After hearing the Petitioner, and within a period of four weeks after the conclusion of such hearing, the AO will issue a fresh order stating whether the AO considers it necessary and expedient to make a reference to the TPO on the question of determination of the ALP of the international transactions, if any, involving the Petitioner. The said decision will be communicated forthwith to the Petitioner and in any event not later than one week from the date it is issued.

26. If aggrieved by such decision, it will be open to the Petitioner to seek appropriate relief which may be available to the Petitioner in accordance with law.

27. The petitions are disposed of in the above terms with no orders as costs.

**S. MURALIDHAR, J**

**NAJMI WAZIRI, J**

**JULY 25, 2016**

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