IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.09.2018

CORAM

THE HON'BLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.Nos.26814 & 26815 of 2017
and
W.M.P.Nos.28531 to 28533 of 2017
and
W.M.P.No.16197 & 16196 of 2018

M/s.Renault Nissan Automotive India Private Ltd.
Plot No.1, SIPCOT Industrial Park,
Mathur Post, Oragadam,
Kancheepuram,
Chennai
Tamilnadu-602 105
represented by its Chief Financial Officer,
Mr.Sandip Neogi ... Petitioner in W.P.No.26814/2017

M/s.Nissan Motor India Pvt. Ltd.
ASV ramana Towers,
37 and 38, Venkatanarayana Road,
Thiyagaraja Nagar,
Chennai,
Tamil Nadu - 600 017
represented by its Chief Financial Officer,
Mr.Sandip Neogi ... Petitioner in W.P.No.26815/2017

vs.

1. The Secretary,
Dispute Resolution Panel-2 Bengaluru
7th Floor, Income Tax Office,
BMTC Building, 80 Feet Road,
Koramangala,
Bangalore - 560 095. .. 1st respondent in both the W.Ps.

2. The Deputy Commissioner of Income-tax,
Corporate Circle 5(1)
Aayakar Bhawan, Mg Road,
Nungambakkam,
Chennai - 600 034... 2nd respondent inW.P.No.26814/2018

3. The Deputy Commissioner of Income-tax,
Corporate Circle 4(2)
Aayakar Bhawan, MG Road,
Nungambakkam,
Chennai - 600 034. .2nd respondent in W.P.No.26815/2018

4. Joint Commissioner of Income-tax,
Transfer Pricing Officer-TPO-2,
Room No.502, 5th Floor, Tower-1,
BSNL Building, 16 Greams Road,
Chennai-600 006. ... 3rd Respondent in both the W.Ps.

W.P.No.26814/2017 filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records in F.No.316/DRP-2-BNG/2016-17 dated 27.09.2017 on the file of the 1st respondent and quash the same.

W.P.No.26815/2017 filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records of the 1st respondent in F.No.373/DRP-2-BNG/2016-17 dated 25.09.2017 and consequential order of lthe 2nd respondent in PAN AACCN 0695D dated 03.10.2017 for the assessment Year 2013-14 and quash the same.

For Petitioner : Mr.Percy J.Pardzwalla
Senior Counsel for Sandeep Bagmar

For Respondents : Mrs.Hema Muralikrishnan
Standing Counsel

C O M M O N O R D E R

W.P.No.26814 of 2017 is filed by the manufacturer challenging the order of the Dispute Resolution Panel dated 27.09.2017. W.P.No.26815 of 2017 is filed by the Distributor challenging the order of the Dispute Resolution Panel dated 25.09.2017 and the consequential assessment order dated 03.10.2017.

2. In both the writ petitions the issue raised is one and the same.

In respect of the assessment year 2013-14, the return of income tax was filed by the respective writ petitioners along with documents prescribed under the Income Tax Rules by computing arms length price of international transactions. Thus, the assessment was referred to the Transfer Pricing Officer for determining arm's length price. The Transfer Pricing Officer raised objections on the overseas tested party approach adopted by the petitioner. The petitioner filed their analysis also by claiming certain economic adjustments in order to remove from its financial items, which according to the petitioner has incorrectly distorted the petitioner's overall profitability. However, the Transfer Pricing Officer rejected the approach adopted by the petitioner and through a show cause notice dated 20.10.2016, characterised the petitioner's operation as 'contract manufacturing' and rejected the economic adjustments claimed by the petitioner. Consequently, the Transfer Pricing Officer passed an order dated 31.10.2016 proposing the transfer pricing adjustment of Rs.770,01,10,000/-. Based on such order passed by the Transfer Pricing Officer, the Assessing Officer, passed a draft assessment dated 19.12.2016 under Section 143(3) read with Section 144(1) read with Section 92CA of the Act dated 31.12.2016, wherein the Assessing Officer effected the adjustment as directed by the Transfer Pricing Officer. Though the rectification petition was filed by the petitioner before the Transfer Pricing Officer, the same was dismissed 23.06.2017. Thus, the petitioner filed their objections before the Dispute Resolution Panel namely, the first respondent herein on 24.01.2017 under Section 144-C of the said Act objecting the addition made by the transfer Pricing Officer. The first respondent, however passed the impugned order by issuing directions to the assessing officer, which in effect, is accepted the conclusion arrived by the Transfer Pricing Officer in toto.

3. Insofar as W.P.No.26815/2018 is concerned, consequent upon such order passed by the first respondent, the Assessing Officer passed the assessment order by taking into account, the directions issued by the Dispute Resolution Panel while recalculating the Transfer Pricing adjustments. Thus, these writ petitions are filed before this Court questioning the above proceedings of the first and second respondent, as stated supra.

4. Mr.Percy J.Pardzwalla, learned senior counsel appearing for the petitioner, apart from raising the contentions touching upon the merits of the matter dealt with by the Transfer Pricing Officer as well as by the dispute Resolution Panel, has mainly emphasised that the first respondent has passed the impugned order in total non-application of mind to the objections raised by the

petitioner in detail as against the order passed by the Transfer Pricing Officer. It is his contention that a cryptic order passed by the first respondent simply by accepting the finding of the Transfer Pricing Officer with one line approval cannot withstand the scrutiny of law. Thus, the learned senior counsel contended that the Dispute Resolution Panel ought to have considered the objections raised by the petitioner in detail, discussed the same based on the materials placed and arrived at a conclusion thereafter. In the absence of the above said procedure, the learned senior counsel contended that the order of the first respondent and the consequential order of the second respondent are liable to be set aside. Learned senior counsel invited this Court's attention to the order passed by the Transfer Pricing Officer, the detailed objections raised by the petitioner before the Dispute Resolution Panel and the relevant findings rendered by the Dispute Resolution Panel in the impugned order in respect of each objections raised by the petitioner. After inviting the attention of this Court to those details, the learned senior counsel pointed out that the Dispute Resolution Panel is not justified in rejecting the objections and confirming the order of the Transfer Pricing Officer simply by stating that they are in agreement with the findings rendered by the Transfer Pricing Officer without there being any detailed discussions and independent findings on each issue.

5. Learned counsel appearing for the respondents contended that the first respondent panel has considered the objections raised by the petitioner and passed the impugned order.

6. Heard both sides and perused the materials placed before this Court.

7. There is no dispute to the fact that in pursuant to the order passed by the Transfer Pricing Officer, the petitioner approached the first respondent and filed the objections by invoking the jurisdiction under Section 144 (C) of the said Act. There is no dispute to the fact that the grounds of objections raised by the petitioner contained a detailed list of the objections, namely, Objection Nos.1 to 6B with annexure containing Serial Nos.1 to 10. It is also seen that each of those objections were dealt in detail by the petitioner by placing their reliance on certain documents and other relevant provisions. This Court, at this stage, is not inclined to express any view on the merits of those objections as it is for the first respondent to consider the same being the panel, exercising the power under

Section 144-C. However, in this case, perusal of the impugned order of the first respondent would clearly indicate that apart from extracting each objections raised by the petitioner and the relevant portion of the order passed by the Transfer Pricing Officer dealing with such objection, the first respondent has not further discussed anything on the said objection in detail as to how the objections raised by the petitioner cannot be sustained or as to how the findings rendered by the transfer Pricing Officer on such issue has to be accepted. On the other hand, the only finding rendered by the first respondent on each is as follows:

> "After considering all the issues raised, we are in agreement with the above findings as well as the reason cited by the TPO, Therefore, objections of the assessee are rejected."

8. At this juncture, it is relevant to note the power conferred on the Dispute Resolution Panel under Section 144C of the Income Tax Act and as to how such power has to be exercised. It is seen from the above provision of law that the assessee shall file their objections if any, to such variation made in the draft order of assessment within 30 days to the Dispute Resolution Panel and the Assessing Officer as contemplated under Section 144C(2). Sub Section 5 of Section 144C contemplates that the Dispute Resolution Panel shall issue such directions as it thinks fit for the guidance of the Assessing Officer to enable him to complete the assessment. But such directions referred to in Sub section 5 shall be issued by the Dispute Resolution Panel only after considering the following as provided under sub section 6, viz.,

a) draft order;

b) objection 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 cause to be collected by, it; and

g) result of any enquiry made by, or caused to be made by, it.

Sub-Section 7 of section 144C further contemplates that the Dispute Resolution Panel may make such further enquiry as it thinks fit or cause any further enquiry to be made by any Income Tax authority before issuing any directions. Perusal of the procedure contemplated under Sub-Section 6 and Sub-Section 7 thus, would clearly indicate that issuance of such directions as contemplated under Sub-Section 5, cannot be made mechanically or as an empty formality and on the other hand, it has to be done only after considering the above stated materials. Therefore, the consideration of the above materials by the Dispute Resolution Panel must be apparent on the face of the order and such exercise would be evident only when the order contains the discussion of facts and independent findings on those facts, by the Dispute Resolution Panel. Certainly mere extraction of the rival contentions will not satisfy the requirement of consideration. In the absence of any such independent reasoning and finding, it should be construed that the Dispute Resolution Panel has not exercised its power and issued directions by following the mandatory requirements contemplated under Section 144C(6) and (7). In this case, it is found that the Dispute Resolution Panel had failed to do such exercise. Thus, it is evident that the first respondent has passed a cryptic order, which in other words, can be called as an order passed with non-application of mind.

9. Therefore, this Court is fully convinced that the matter has to go back to the first respondent for consideration of the objections raised by the petitioner in detail and to pass a fresh order on merits and in accordance with law with reasons and independent findings. Only when such a speaking order is passed by the 1st respondent, the Assessing Officer will be in a position to pass the consequential order of assessment. Since this Court is satisfied to set aside the order of the first respondent, the consequential order passed by the second respondent in W.P.No.26815/2017 is also liable to be set aside.

10. Accordingly, both these writ petitions are allowed and the impugned orders are set aside. Consequently, the matter is remitted back to the first respondent for considering the objections raised by the petitioner in detail and pass fresh order on merits and in accordance with law by giving independent reasons and findings. It is made clear once again that this Court is not expressing any view on the merits of the claim made

by the petitioner or the findings rendered by the Transfer Pricing Officer, as it is for the first respondent to consider and decide. The first respondent shall pass such order after hearing the petitioner within a period of eight weeks from the date of receipt of a copy of this order. No costs. Consequently connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS ix)

//True Copy//

Sub Assistant Registrar

vsi

To

1. The Secretary,
   Dispute Resolution Panel-2 Bengaluru
   7th Floor, Income Tax Office,
   BMTC Building, 80 Feet Road,
   Koramangala,
   Bangalore - 560 095.

2. The Deputy Commissioner of Income-tax,
   Corporate Circle 5(1)
   Aayakar Bhawan, Mg Road,
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   Chennai - 600 034.

3. Joint Commissioner of Income-tax,
   Transfer Pricing Officer-TPO-2,
   Room No.502, 5th Floor, Tower-1,
   BSNL Building, 16 Greams Road,
   Chennai-600 006.

+1cc to Mr.Sandeep Bagmar , Advocate SR.No. 67957
+1cc to Mr.Sandeep Bagmar , Advocate SR.No. 67958
+1cc to Mrs.Hema Muralikrishnan , Advocate SR.No.67918

W.P.Nos.26814 & 26815 of 2017

ASK(25/10/2018)