IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.12.2019

CORAM :

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.No.19846 of 2011
and M.P.No.1 of 2011

M/s.Transworld Garnet India Pvt Ltd.,
New No.34, Old no.46,
MGR Road, Kalakshetra Colony,
Besant Nagar, Chennai - 600 090. ... Petitioner

Vs.

1. Assistant Commissioner of Income Tax,
Company circle III (2)
Chennai - 600 034.

2.Deputy Commissioner of Income Tax
Transfer Pricing Officer - VI
Nungambakkam High Road,
Chennai - 600 034. ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorari calling for the records of the first respondent herein pertaining to the notice under Section 156 dated 29.12.2010 issued to the petitioner herein and the consequential notice under Section 211(1) bearing PAN No.AAACT3408N dated 26.07.2011 quash the same to the extent of the demand of Rs.1,88,97,106/- pertaining to the Assessment Year 2007-08.

For Petitioner : Mr.Srinath Sridevan

For Respondents : Mrs.Hema Muralikrishnan
Senior Standing Counsel

O R D E R

The petitioner is an assessee in terms of the provisions of the Income Tax Act, 1961 (in short 'Act') on the files of the first respondent. A Return of income was filed in respect of AY 2007-2008 that was taken up for scrutiny and assessment. A reference was made in terms of Section 92CA of the Act on 16.07.2009 for determination of the arms length price (ALP) of the transactions entered into by the petitioner with entities outside the Country. The procedure for assessment in cases where the issue includes determination of ALP is set out in Section 144 C of the Act. Section 144C(1) provides for the Assessing Officer (AO) to forward a draft of the proposed order of assessment referred to as a draft assessment order to the assessee in the event that he proposes to make a variation to the income or the loss returned. Sub-section (2) states that upon receipt of the draft order, the assessee will either indicate acceptance of the variations proposed by the AO or file objections, if any, to the said variations with the Dispute Resolution Panel (DRP), with a copy thereof filed with the AO as well.

2. The AO issued a draft assessment order dated 29.12.2010 accompanied with a notice of demand dated 29.12.2010 calling upon the petitioner to remit the demand of a sum of Rs.1,88,97,106/-. Admittedly, the petitioner did not file objections before the DRP resting content with objecting to the variations before the AO/R1 only. Thus, communication dated 18.01.2011 came to be issued by the AO to the petitioner drawing attention specifically to the provisions of Section 144C(3) that required the officer to complete the assessment on the basis of the draft order of assessment if no objections were received within the time specified in sub-section (2) of Section 144C. A reply was filed by the petitioner on 28.01.2011 seeking some time to object to the proposed variations in the draft order. On 23.02.2011, R1, as per counter, proceeded to pass a final order of assessment, recording that if at all the petitioner were to have legitimately objected to the variations proposed, such objections ought to have been filed before the DRP under intimation to the AO and this had not been done by the petitioner.

3. The petitioner has, in the present Writ Petition, challenged demand notice dated 29.12.2010 issued under Section 156 of the Act and a notice under Section 221(1) of the Act dated 26.07.2011, which has proceeded to tabulate the pending demands for various years including a demand for the present assessment year.

4. The challenge to notice under Section 156 dated 29.12.2010 is well founded, since the notice accompanies order dated 29.12.2010, a draft assessment order, which does not provide for the raising of an enforceable demand. The scheme of assessment under Section 144C provides firstly for a draft of the proposed order of assessment to be sent to the assessee, indicating the variations proposed, thereafter, either

acceptance to the proposed variations or objections thereto to be filed before the DRP and AO and only thereafter, the completion of assessment on the basis of the draft order, if the assessee had accepted the variations made or if no objections were received by the DRP and the AO within the time provided. Such final assessment shall be made within a period of one month from the end of the month in which the acceptance of proposed variations was received or the period of filing of objections under sub-section (2) to Section 144C expired and a demand under Section 156 shall be raised so as to accompany only such a final order of assessment passed in terms of Section 144C(3) of the Act. The impugned demand under Section 156 dated 29.12.2010 is thus quashed.

5. The case of the revenue is that in the light of letter dated 28.01.2011 filed by the petitioner raising objections to the Draft Assessment order, the AO was lulled into believing that in fact the petitioner had filed objections before the DRP. In the course of disposing the objections filed, the AO came to understand that no objections had been filed before the DRP. Hence the AO proceeded to pass an order of assessment under Section 143(3) read with Section 144C(4) and the same was dispatched on 23.02.2011.

6. A copy of the final order of assessment is placed on file. To this, serious objection is raised by the petitioner who contends that such an order is being produced for the first time before the Court and no final order of assessment has been passed or served upon the petitioner till date.

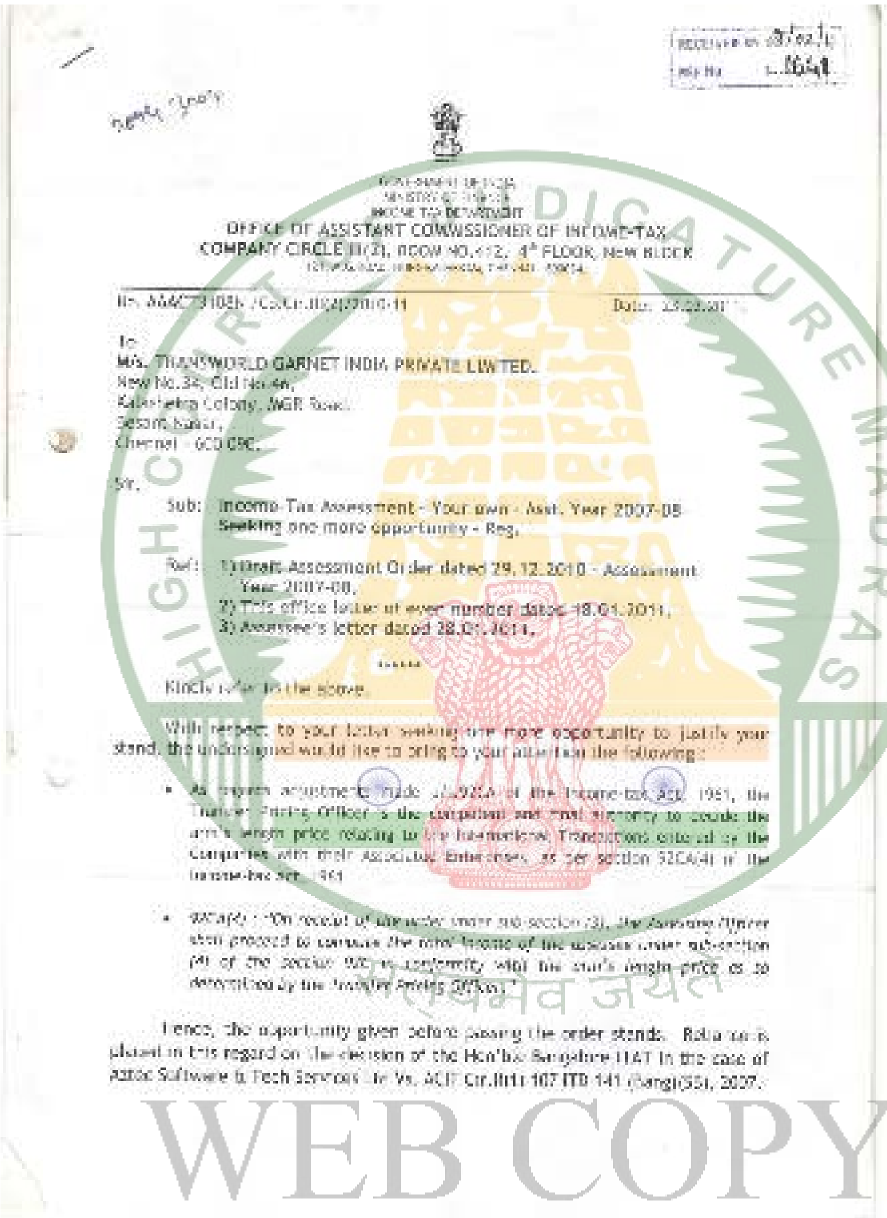
7. Though there is no challenge in the prayer to the Writ Petition to the final order of assessment dated 23.02.2011, such order being brought to the notice only now vide the counter filed by the respondents, both sides have proceeded to advance extensive arguments in regard to the veracity of the final order of assessment as well. The records were thus called for to verify this aspect of the matter.

8. The dispatch register has been produced by learned Senior Standing Counsel and my attention drawn to the entry at serial number '3004' dated 22.02.2011 reading as follows:

S.No.	Pan/A.Y.	Document dispatched	Name of the Assessee
3004	AACT3408N 07-08/111(2)	lr.143(3)	Transworld Garnet India P. Ltd. - Ch-90

According to her, the above reference relates to the final order of assessment that is in dispute.

9. The petitioner, for its part, produced the original of communication dated 23.02.2011, that contains the same number, that is, '3004' scrawled in hand at the top. The communication is scanned below for clarity:



Received on 23/02/11
Inward No. 1641

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF ASSISTANT COMMISSIONER OF INCOME-TAX
COMPANY CIRCLE III(2), ROOM NO.412, 4th FLOOR, NEW BLOCK
[illegible]

No. AAACT[illegible]/C.C.III(2)/2010-11 Date: 23.02.20[illegible]

To
M/s. TRANSWORLD GARNET INDIA PRIVATE LIMITED.
New No.34, Old No.46,
Kalakshetra Colony, MGR Road,
Besant Nagar,
Chennai - 600 090.

Sir,

Sub: Income-Tax Assessment - Your own - Asst. Year 2007-08
Seeking one more opportunity - Reg.

Ref: 1) Draft Assessment Order dated 29.12.2010 - Assessment Year 2007-08.
2) This office letter of even number dated 18.01.2011.
3) Assessee's letter dated 28.01.2011.

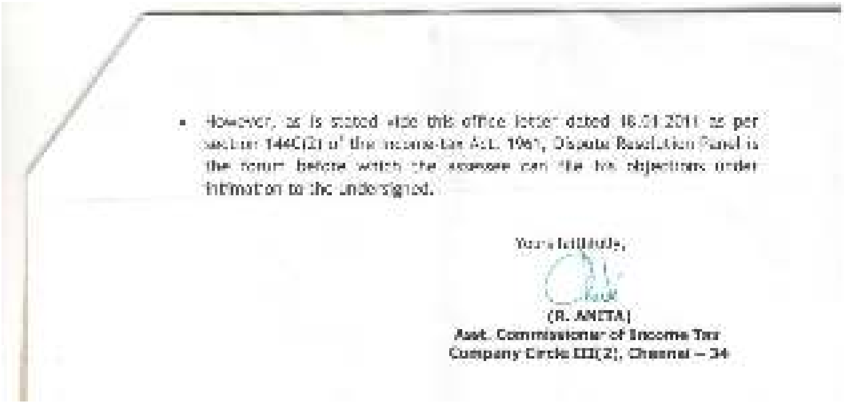
******

Kindly refer to the above.

With respect to your letter seeking one more opportunity to justify your stand, the undersigned would like to bring to your attention the following:

- As regards adjustments made u/s.92CA of the Income-tax Act, 1961, the Transfer Pricing Officer is the competent and final authority to decide the arm's length price relating to the International Transactions entered by the Companies with their Associated Enterprises, as per section 92CA(4) of the Income-tax Act, 1961.
- 92CA(4) : "On receipt of the order under sub-section (3), the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of the section 92C in conformity with the arm's length price as so determined by the Transfer Pricing Officer."

Hence, the opportunity given before passing the order stands. Reliance is placed in this regard on the decision of the Hon'ble Bangalore ITAT in the case of Aztec Software & Tech Services Ltd Vs. ACIT Cir.III(1) 107 ITD 141 (Bang)(SB), 2007.



- However, as is stated vide this office letter dated 18.01.2011 as per section 144C(2) of the Income-tax Act, 1961, Dispute Resolution Panel is the forum before which the assessee can file his objections under intimation to the undersigned.

Yours faithfully,

(R. ANITA)
Asst. Commissioner of Income Tax
Company Circle III(2), Chennai – 34

10. Thus according to the petitioner, it is letter dated 23.02.2011 that is referred to in the dispatch register at serial number '3004' and not the final order of assessment.

11. The contentions of the revenue, seen in the light of the dispatch register, inspires no confidence whatsoever. While the order is said to be dated 23.02.2011, the date of dispatch as per the register produced is 22.02.2011 and the argument thus fails at the threshold itself. Moreover, the description of the document under serial number '3004' is 'lr.' indicating a letter. There are other entries in the register itself where the description of the document referred to therein is 'order' and the Officer thus makes a clear distinction between a 'letter' and an 'order' in the same register. This is also supported by the letter produced by the petitioner relating to serial number '3004'. The anomaly with regard to the date of letter and the entry in the dispatch register continues, since the letter is dated 23.02.2011, but has been, according to the register, dispatched on 22.02.2011 itself.

12. The points above were specifically put to learned standing counsel and sufficient opportunity afforded to (i) produce separate entry for dispatch of the letter dated 23.02.2011, if any; (ii) explain why serial number '3004' features on letter dated 23.02.2011 and to what it related. No explanation/response is forthcoming in this regard.

13. I am thus inclined to accept the submission of the petitioner to the effect that no valid final order of assessment has been passed or served upon it for AY 2007-08. This Writ Petition is allowed. No costs. Connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1. The Assistant Commissioner of Income Tax,
   Company circle III (2)
   Chennai - 600 034.

2. The Deputy Commissioner of Income Tax
   Transfer Pricing Officer - VI
   Nungambakkam High Road,
   Chennai - 600 034.

+1cc to M/s.Hema Muralikrishnan, Advocate Sr.101681
+1cc to M/s.Srinath Sridevan, Advocate Sr.102464

W.P.No.19846 of 2011
and M.P.No.1 of 2011

rsv[co]
srg 03/08/2020