

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.10.2019

Reserved on 18.09.2019

Delivered on 22.10.2019

CORAM

THE HON'BLE Mr.JUSTICE K.RAVICHANDRABAABU

W.P.No.2919 of 2019

and

W.M.P.No.3180 of 2019

M/s.EOS GmbH-India Branch,  
Rep. By its Authorized Signatory,  
Mr.Prakasam Anand (Country Manager),  
No.36, Sivananda Nagar, Kolathur,  
Chennai 600 099.

...Petitioner

vs

The Deputy Commissioner of Income Tax,  
International Taxation 1(1),  
Room No.407, 4<sup>th</sup> Floor,  
BSNL Building, Tower-I,  
Greams Road, Chennai 600 034.

...Respondent

Prayer:Writ petition filed under Article 226 of the Constitution of India for issuance of a writ of Certiorari to call for the records comprised in the impugned draft assessment order passed by the respondent under Section 143(3) read with Section 144C(1) of the Income Tax, 1961 for Assessment Year 2016-17 in PAN: AABCE3484E dated December 31, 2018 and quash the same.

For petitioner : Mr.N.V.Balaji

For Respondents : Mrs.Hema Muralikrishnan  
Senior Standing Counsel

O R D E R

The challenge made in this writ petition is against the draft assessment order passed under Section 143(3) read with Section 144C(1) of the Income Tax, 1961 for Assessment Year 2016-17 dated 31.12.2018.

2. The case of the petitioner is as follows:

a) The Petitioner Company operates as an Indian Branch office of EOS GmbH Electro Optical Systems, Germany ('EOS Germany' or 'Head Office'). The petitioner is a Permanent

Establishment of EOS Germany in India as per the Act and India-Germany Double Tax Avoidance Agreement ('DTAA'). The petitioner is engaged in the business of rendering agency support services along with technical support services to EOS Germany.

b) The petitioner filed its return of income as a Permanent Establishment in India under Section 139 of the Act for the assessment year 2016-17 on 30.11.2016. The international transaction of the petitioner with its Head Office was duly reported in the Accountant's Report in Form 3CEB filed in accordance with the provisions of Indian Transfer Pricing Regulations contained in Sections 92, 92A to 92F of the Act. In the TP documentation, the petitioner conducted a detailed analysis of the Functions, Assets and Risks ('FAR') of the petitioner and its Head Office and Transactional Net Margin Method ('TNMM') for testing the arm's length results of the petitioner's international transaction. Based on the said TP analysis, the profit earned by the petitioner was found to be at arm's length as per the applicable TP regulations having regard to the FAR undertaken by the petitioner in its operations and the margins earned by the comparable companies found on the basis of the detailed benchmarking analysis. The income declared by the petitioner in its return of income was more than the profit arrived at based on the arm's length margin determined above. The return of income filed by the petitioner as a Permanent Establishment in India was selected for scrutiny assessment. The respondent issued notice under Section 143(2) of the Act on 18.09.2017. The respondent did not make a reference to the Transfer Pricing Officer (TPO) for verification of the FAR analysis and determination of arm's length nature of the petitioner's international transaction. After expiry of one year after selecting the case for scrutiny assessment, an inspection was conducted by the respondent at the premises of the petitioner on 31.10.2018, wherein sworn statement was obtained from the petitioner's employee.

c) The respondent issued a show cause notice (SCN) on 13.12.2018. The respondent further assuming jurisdiction of the TPO, analyzed the FAR and proposed to attribute 100 percent of the global profits earned from the sales in India by EOS Germany to the petitioner.

d) In the reply to the show cause notice dated 17.12.2018, the petitioner submitted that based on the detailed FAR and benchmarking analysis undertaken in its TP documentation, the profits earned by the petitioner is established to be at arm's length. Accordingly, no further profit attribution can be made to the petitioner's operations. The respondent disregarded the submissions made by the petitioner and passed the impugned draft

assessment order dated 31.12.2018, by attributing 100 percent of EOS Germany's profits from India operations to the petitioner, as against the income declared by the petitioner in its return of income, which is established to be at arm's length.

e) Explanation 3 to Section 9(1)(i) of the Act provides that only so much of income as is attributable to operations carried out in India shall be deemed to accrue or arise in India. Further, Article 7(2) of the India-Germany DTAA provides that attribution to a Permanent Establishment shall be to the extent the Permanent Establishment would be expected to earn if it were a enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently. Once a transaction has been established to be at arm's length in accordance with the TP provisions under the Act, it extinguishes any further attribution of profits to such Permanent Establishment. Thus, the law of the land is settled that any attribution of profit to a Permanent Establishment has to satisfy the arm's length test.

f) The respondent has exceeded her jurisdiction and has undertaken a TP scrutiny, resulting in 100 percent attribution of the global profits earned from the sales in India by EOS Germany to the petitioner. Conducting a FAR analysis and determination of the arm's length nature of an international transaction is the domain of a TPO, as provided by Section 92C of the Act, Rule 10B(2) and 10C(2) of the Income Tax Rules, 1962 ('the Rules'). Though the respondent has power to determine arm's length as per the provisions of the Act, the same has been restricted by Instruction 3 of 2016 dated 10.03.2016 issued by the CBDT, for better administration of the Act. The respondent is bound to follow the directions provided in the instruction, in view of the settled position of law that the circulars issued by the CBDT under Section 119 of the Act is binding on the AOs. The respondent has exceeded her jurisdiction in analyzing the FAR of the petitioner and determining the arm's length attribution at 100 percent of the global profits earned from the sales in India by EOS Germany on the basis of such FAR analysis, which can be undertaken only by the TPO. Even if the action of the respondent is construed valid, the impugned order is bad in law for the following reasons:

i) The respondent did not provide any reason for rejecting the TP analysis conducted by the petitioner, as required under Section 92C (3) of the Act;

ii) The respondent failed to conduct analysis of independent parties to determine the arm's length attribution as required under law and the DTAA and attributed to the petitioner, 100 percent of the global profits earned from the

sales in India by EOS Germany though critical functions such as R&D, manufacture, sales strategy, pricing, negotiation, etc., were performed by EOS Germany and not the Indian Branch and

iii) The respondent issued the show cause notice dated 13.12.2018, almost at the end of the time limit prescribed for passing of the draft assessment order for the subject Assessment Year 2016-17, with factually incorrect conclusions and statements regarding the functions and activities performed by the petitioner. The entire exercise of issuance of show cause notice is perfunctory, superficial and has been reduced to a mere formality, with predetermined end result of adjustments to be achieved.

3. The respondent filed a counter affidavit, wherein it is stated as follows:

a) The petitioner filed its return of income for the Assessment Year 2016-17 on 30.11.2016 declaring an income of Rs.53,00,847/-. The petitioner is involved in the business of designing, manufacturing and selling machines and materials that are used for rapid prototyping. The case was selected for scrutiny through Computer Assistant Scrutiny Selection (CASS) and notices under Sections 143(2) and 142(1) of the Income Tax Act, 1961 were issued to the petitioner on 18.09.2017 and 18.06.2018, respectively.

b) On further verification, it was found that the petitioner is involved in identifying the potential customers, the marketing of its business by explaining the product profile, product feature, its utility and application in India. Based on branch office operation performed by the sales support personnel orders are solicited from customers and preliminary evaluation of the customers and distributors are done to finalise the sales process.

c) Since all the activities like purchase, sale, operations, services everything was carried out by the India branch office of EOS GmbH, a show cause notice dated 13.12.2018 was issued to the petitioner stating that why the profit of the branch office of the petitioner Company should not be taxed at the rate of 40 percent for the relevant Assessment Year 2016-17. In response, the petitioner filed its reply on 20.12.2018.

d) The contention of the petitioner was not accepted by the respondent for the reason that the activities of EOS India Branch Office prove that it is more than a mere agency support office and that it was a fully functional branch office in India. It was ascertained by the respondent that the employees in the EOS India Branch Office are involved in the activity of

identifying potential customers and explaining the product features and its utility and application and therefore held that the petitioner's claim of mere liaison between EOS Germany and third party distributors is not correct. Since sales and marketing personnel in EOS India are directly involved in the identification of customers, solicit orders for EOS products in India, offering technical services like checking of pyrometer, process chamber, optic chamber, re-coater alignment, knuckle joint platform pin, laser power at process chamber, wiper sheet, etc., the respondent concluded that the functions performed and the risk assumed by India office significantly proves that it is more than that of a mere agency support branch office. In view of the above, the respondent recomputed the income of the petitioner including the income attributable to the profits earned from the sales in India of the foreign entity and taxed accordingly under Section 9(1)(ia) of the Act.

e) Further, the petitioner is a Permanent Establishment in India and had only admitted the commission income and other income earned and had not admitted the income from the business activities carried out by it for the foreign entity as Permanent Establishment as per Article 7 of DTAA between India and Germany. Therefore, the entire profit from Indian operation was brought to tax in India and a draft assessment order under Section 143(3) read with Section 144C(1) of the Income Tax Act, 1961 was completed determining the total income of the petitioner at Rs.5,22,90,844/- and taxed accordingly.

f) The respondent has jurisdiction over the case, the order under Section 143(3) read with Section 144C(1) of the Act was passed as per the provisions of the Act and after complying with CBDT Instructions and Principle of Equity and Natural Justice.

g) As regards the averments in paragraph 5, it is submitted that the respondent had not made any adjustment to the income admitted by the petitioner. The petitioner, being Permanent Establishment in India of foreign entity i.e. EOS GmbH, Germany, had only admitted the Commission amount received from the parent Company, service charges, etc., in the return of income filed. However, the business activities carried on by the petitioner as Permanent Establishment was not admitted for taxation. It was ascertained by the respondent that sales and marketing personnel of the petitioner is directly involved in the identification of customers, solicit orders for EOS products in India, offering technical services like checking of pyrometer, process chamber, optic chamber, re-coater alignment, knuckle joint platform pin, laser power at process chamber,

wiper sheet, etc., In view of the above, the respondent applying the provisions of Rule 10 of Income Tax Rules, 1962 read with Section 9(1)(ia) of the Act, recomputed the income of the petitioner including the income attributable to the profits earned from the sales in India of the foreign entity for the reasons that the functions performed and the risk assumed by India Branch Office i.e. the petitioner significantly proves that it is more than that of branch office. The respondent had added only the income to the extent it was attributable to the profits earned from the sales in India. The respondent had not carried out any Transfer Pricing Analysis to recompute the income of the petitioner but had only determined the income based on the details furnished by the petitioner in 3CEB report without making any adjustments.

h) The respondent cannot exercise power suo-moto to make a reference to Transfer Pricing Officer (TPO), unless the case falls under any of the circumstances mentioned in Central Board of Direct Taxes (CBDT) Instruction No.3/2016 dated 10.03.2016.

i) The petitioner is trying to divert the issue by dragging Transfer Pricing (TP) issue before the Court, which is not at all of relevance here. The respondent has neither assumed the jurisdiction of the TPO nor analyzed the FAR of the petitioner. The functions performed and the risk assumed by India Branch Office i.e. the petitioner significantly proves that it is more than that of branch office. The respondent had added only the income to the extent it was attributable to the profits to the profits earned from the sales in India. It is absolutely wrong to contend that there is no alternative efficacious remedy available to the petitioner, when the petitioner has the option to either approach the Dispute Resolution Panel against the impugned order or wait till the final order is passed and file appeal before the Commissioner of Income Tax (Appeals) against the same. Hence, on this score itself, this writ petition deserves to be dismissed.

4. A rejoinder affidavit is filed by the petitioner, wherein it is stated as follows:

The primary contention of the petitioner in this writ petition is that the respondent has undertaken Transfer Pricing (TP) analysis, which is contrary to the binding instruction issued by the Central Board of Direct Taxes (CBDT) and the ruling of the Hon'ble Supreme Court in the case of DIT vs Morgan Stanley & Co. (292 ITR 416). The respondent has erroneously mentioned in para 3(i) that the petitioner is involved in the business of designing, manufacturing and selling machines and materials. It is an undisputed fact that these activities are

carried out by the petitioner's Head Office at Germany. Even in the impugned order, the respondent's allegation is that the petitioner is undertaking activities related to sales and marketing in India. The respondent erroneously states that the petitioner has imported materials from its Head Office and sold the same to Indian customers. However, the petitioner merely acts as a liaison office between the Head Office and its customers in India. The petitioner does not import any goods from its Head Office. This fact is evident from the petitioner's financial statements. Further, the respondent does not allege the same in the impugned order. The attribution to a Permanent Establishment shall be to the extent the Permanent Establishment would be expected to earn if it were an enterprise engaged in the same similar activities under the same or similar conditions and dealing wholly independently. Thus, for the purpose of attribution, a Permanent Establishment is considered as a separate entity and expected to earn profits as if it was an independent enterprise, i.e., an arm's length profit.

5. Mr.N.V.Balaji, learned counsel for the petitioner made his oral submissions. He has also filed written arguments. The sum and substance of the contentions raised on behalf of the petitioner are as follows:

The petitioner is a branch office of EOS GmbH ('EOS Germany') engaged in agency services and after-sale services to its Head Office. The petitioner is an admitted Permanent Establishment by virtue of Article 5(2)(b) of the Double Tax Avoidance Agreement ('DTAA') entered between India and Germany. For services rendered (agency and after sales), the petitioner is remunerated with a commission at the rate of 1 percent of the sales made by EOS Germany in India. The said remuneration has been justified to be at arm's length (hereinafter referred to as ALP), based on a Transfer Pricing (TP) analysis undertaken in the TP documentation by adopting Transactional Net Margin Method (TNMM) whereby the petitioner's net profit was computed by 13 percent as compared to the range of profits earned by the comparable companies from 7.25 percent to 11.38 percent. The same was also certified by an independent Chartered Accountant in Form No.3CEB. This ALP remuneration translates to an attribution of 6.5 percent of the global profits to the petitioner. The petitioner has offered such ALP remuneration to tax in its return of income. During the course of assessment proceedings, the respondent obtained a sworn affidavit from a finance team member, who had limited knowledge on the field work undertaken by the petitioner. The petitioner provided its reply, retracting the statements provided by the petitioner's employee above, however, solely placing reliance on the above statement, the respondent concluded that the petitioner is a

Permanent Establishment in India, which is an admitted fact. In the impugned order, the respondent further concludes that the petitioner's functions, Assets and Risks (FAR) is more than what has been admitted and therefore, the attribution of 6.5 percent was enhanced to 100 percent of the profits of EOS Germany's India business. In the present writ petition, the petitioner has challenged the above action of the respondent in enhancing the profits attributable to the petitioner, which is contrary to the provisions of law and binding instruction issued by the Central Board of Direct Taxes (CBDT). The petitioner also clarifies that it is only challenging the jurisdiction of the respondent to attribute profits to a Permanent Establishment without a TP analysis and is not challenging the quantification of the attribution. The petitioner does not have an effective alternate remedy against the impugned order. In order to attract TP provisions under Chapter-X of the Act, there has to be an international transaction between associated enterprises having regard to the arm's length price. A detailed comparability analysis has been undertaken by the petitioner in its TP documentation and it was concluded that the transaction between the petitioner and its Head Office was at ALP. The TP documentation was furnished to the respondent during the course of assessment proceedings. Article 7 OECD Model Tax Convention deals with the taxing rights of contracting states with regard to a PE. The Model recommends a separate entity approach, i.e., the PE would be treated as a separate enterprise, independent from the rest of the enterprise of which it is a part i.e., the Head Office. Further, paragraphs 15 and 16 of the Commentary to Article 7 provides that the approach for determining profits attributable to a PE requires the determination of the profits under the fiction that the PE is a separate enterprise which is independent from the rest of the enterprise of which it is a part, i.e. The Head Office. The second part of that fiction corresponds to the ALP which is also applicable under the provisions of Article 9 for the purpose of adjusting the profits of associated enterprises. Paragraphs 20 to 22 of the Commentary to Article 7 further elaborates that the attribution of profits to a PE involves two steps. Under the first step, a functional and factual analysis is to be undertaken. Under the second step, any transaction of the PE with its associated enterprises are priced in accordance with the guidance of the OECD Transfer Pricing Guidelines and these Guidelines are applied by analogy to dealings between the permanent establishment and the other parts of the enterprise of which it is a part. The wordings of Article 7 of the Model Tax Convention is pari-materia to Article 7 of India-Germany DTAA. The present case would fall under the second category discussed by the Hon'ble Supreme Court in the case of Morgan Stanley & Co.

[2007] 292 416 ITR (SC), wherein the respondent is alleging that the FAR analysis demonstrated by the petitioner does not reflect the functions actually performed. In such a situation, the Hon'ble Apex Court requires an examination of the TP analysis and the more particular the FAR analysis conducted by the taxpayer. From the above submissions, it can be concluded that attribution of profits to a PE can be determined only through a TP analysis. Though Section 92C of the Act provides power to the respondent to determine ALP, the same is curtailed by the instruction of the CBDT in para 3.7. The above circular of CBDT is binding on the respondent and any deviation from the same would render the assessment void. In this regard, he relied on the decision of the Supreme Court reported in 1999 237 ITR 889 (SC), UCO Bank vs Commissioner of Income Tax. The contentions raised in this writ petition deals with jurisdictional aspect of whether the respondent has powers to determine FAR and ALP, without following the binding instructions of CBDT and decision of the Hon'ble Apex Court (supra). In this case, the alternate remedy in DRP is not an effective one as DRP does not have the power to quash-refer Section 144C(8). DRP does not have power to annul an assessment. Therefore, the remedy available under the Act is not an effective remedy. Further, availability of remedy is no bar when a jurisdictional aspect is challenged. The respondent has not referred to Rule 10 of the Rules in the impugned order while attributing 100 percent of the global profits to the petitioner. The respondent cannot improve upon the impugned order in the counter affidavit. Reliance is placed on the Hon'ble Apex Court in the case of Mohinder Singh Gill V. Chief Election Commissioner (1978) 1 SCC 405. The respondent has not established why the attribution was not ascertainable in the petitioner's case. The petitioner relies on the ruling of the Delhi Bench of the Income Tax Appellate Tribunal in the case of Hyundai Rotem Company vs ADIT (53 SOT 142), wherein it was held that an Assessing Officer cannot invoke Rule 10 without pointing out any error in taxpayer's TP documentation.

6. Mrs.Hema Muralikrishnan, learned counsel for the respondent made her oral submissions. She has also filed written arguments. The sum and substance of the contentions raised on behalf of the respondent are as follows:

On an analysis of the state of affairs at the time of inspection and various records perused at the time of inspection, it was found that the petitioner is involved in identifying the potential customers, the marketing of its business by explaining the product profile, product feature, its utility and application in India. Based on branch office operation performed by the sales support personnel orders are

solicited from customers and preliminary evaluation of the customers and distributors are done to finalise the sales process. Since all the activities like purchase, sale, operations, services everything was carried out by the India branch office of EOS GmbH, a show cause notice dated 13.12.2018 was issued to the petitioner stating that why the profit of the branch office of the petitioner company should not be computed by taking into consideration the revenue earned through sales in India and taxed at the rate of 40 percent for the relevant Assessment Year 2016-17. The petitioner filed its objections explaining the various operations carried out by its India Office and German Office and how the remuneration received by it @ 1% of the sales revenue and the invoice raised by it on its German Office of cost +15% is at Arms Length Price. After duly considering the objections of the petitioner, the respondent passed draft assessment order dated 31.12.2018 under Section 143 read with 144C of the Act. Admittedly the impugned order is only a draft assessment order and the petitioner can either file its objections before the Dispute Resolution Panel (DRP) against the draft assessment order itself or wait till the final assessment order (which has to be passed within one month from the draft assessment order) and file appeal before the Commissioner of Income Tax (Appeals) against the final assessment order. It is therefore clear that the petitioner has an effective and efficacious statutory appellate remedy against the impugned order. It is the petitioner's arguments that the DRP does not have the power to annul the assessment and therefore the petitioner is remediless. Such an argument is baseless. In any event, the petitioner has also the remedy of filing appeal before the CIT(A) against the final assessment order and therefore when two avenues of remedy are available to the petitioner, it is for the petitioner to choose the appropriate one and a writ petition cannot be maintained just because it is the petitioner's contentions that the powers of DRP are limited. It is submitted that the Supreme Court and this Court in the following decisions have held that writ petition ought not to be entertained under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour involving recovery of taxes, cess, fees, other types of public money.

United Bank of India Vs Satyawati Tandon 2010(8) SCC 110;

State Bank of Travancore Vs. Mathew K.C (2018) 3 SCC 85 (SC);

The role and function of the Transfer Pricing Officer is limited to verifying the Transfer Pricing documents maintained by the petitioner and analyzing whether the price mentioned by it is at

Arms Length Price after comparing the same with other comparable companies. The issue as to which other companies are comparable companies is based on the Transfer pricing documents maintained by the petitioner wherein the petitioner maintains data about the work done by it on parameters like Research & Development, Manufacturing, Distribution, Internal Administration as found in page 20 of the typed set. These parameters do not reveal the real facts as found out by the respondent herein at the time of survey regarding the extent of work done by the India Office. Therefore, in this case there is no question of reference to a Transfer Pricing Officer in as much as the conclusion arrived on an analysis of the facts found at the time of inspection and the records perused at that time reveals that the petitioner's contention that it is only an agency PE and that the customers are the customers of the German Head Office and therefore entire sales is to be treated as sales revenue of the German Head Office is a farce and an attempt to evade taxes in India. The reference to a Transfer Pricing Officer pre-supposes the fact that the assessee has not hidden the true facts and that the assessee's submissions with regard to the extent of work done by it and the extent of work done by the Associated Enterprise is correct. In the present case, the results of the survey show the same to be false. The assessing Officer has not made any Function, Asset and Risk study (FAR Study) as alleged by the petitioner and therefore Instructions No.3/2016 dated 10.03.2016 issued by CBDT is not applicable to the present case. The respondent has not carried out any Transfer Pricing study but has merely applied Section 9 of the Income Tax Act, 1961, Article 7(2) of the India Germany DTAA and Rule 10 of the Income Tax Rules. The Respondent had added only the income to the extent it was attributable to the profits earned from the sales in India. Therefore the case law relied on by the petitioner i.e. the Ruling of Hon'ble Supreme Court in the case of DIT vs Morgan Stanley & Co. (292 ITR 416) is not applicable to the facts of the present case. It had never been the plea of the petitioner before the respondent that what was being attempted to be done by the respondent was within the ambit of powers of Transfer Pricing Officer and that the respondent did not have the power to do so. Such a plea was obviously not raised by the petitioner at any earlier point of time because the petitioner was well aware of the fact that the respondent was not undertaking any transfer pricing study and was merely discharging her functions and role as an assessing authority under Section 143 read with Section 144C of the Act.

7. Heard the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondent. I have also

perused the order impugned in this writ petition, which is a draft assessment order passed under Section 143(3) read with Section 144C(1) of the Income Tax Act, 1961.

8. Since various facts and circumstances narrated and the respective submissions made by both parties are extracted extensively supra, I am not reiterating the same once again hereunder except to an extent referring to certain facts and contentions, which are enough for deciding this writ petition. It is claimed by the petitioner that it is a branch office of its Germany Company viz., EOS Gmbh. It is further claimed that the petitioner is engaged in agency services and after sales services to its Head Office. The petitioner further claims that it is a Permanent Establishment and the said fact is not disputed by the Revenue. In respect of the relevant Assessment Year 2016-17, the petitioner's case was selected for scrutiny and it is stated by the Revenue that at the time of inspection, it was found that corresponding income to the sale value made to the relevant Assessment Year 2016-17 was unreasonable and on further analysis of state of affairs at the time of inspection and on perusal of various records, it was found that the petitioner was involved in identifying the potential customers and marketing of business by explaining the product profile, product feature, its utility and application in India. It is further claimed by the Revenue that based on the branch office operation performed by the sales support personnel, orders are solicited from customers and preliminary evaluation of the customers and distributors are done to finalise the sales process and since all the activities like purchase, sale operations, services were carried out by the petitioner in India, a show cause notice was issued to the petitioner on 13.12.2018 to show cause as to why the profit of the branch office of the petitioner Company should not be computed by taking into consideration of the revenue earned through sales in India and taxed at the rate of 40% for the relevant Assessment Year 2016-17. In other words, it is the case of the Revenue that all the activities carried out by the petitioner is within India and thus, the profits derived out of such activities should be computed as the revenue earned through sales in India and brought to tax. The petitioner filed detailed reply and objected to the proposal. However, the Assessing Officer passed the impugned draft assessment order on 31.12.2018, after considering the reply submitted by the petitioner dated 20.12.2018.

9. The contention of the petitioner before this Court is that for the services rendered by the petitioner, they are remunerated with commission at the rate of 1% of the sales made

by EOS Germany in India and that the said remuneration has been justified to be at arm's length based on a Transfer Pricing analysis undertaken in the transfer pricing documentation whereby the petitioner's net profit was computed by 13% as compared to the range of profits earned by the comparable Companies from 7.25 percent to 11.38 percent. It is further claimed by the petitioner that this Arm's Length Pricing remuneration translates to an attribution of 6.5 percent of the global profits to the petitioner. Therefore, it is contended that the action of the respondent in enhancing the profits attributable to the petitioner is erroneous, since transaction between the Head Office and Permanent Establishment in India is subject to transfer pricing provisions and therefore, the transaction between a foreign enterprise and its Permanent Establishment are also subject to the transfer pricing regulations. Therefore, it is contended by the petitioner that the Assessing Officer is not justified in deciding the issue by himself which requires the role of the Transfer Pricing Officer. It is the further contention that determination of FAR analysis and ALP is within the domain of the Transfer Pricing Officer and not that of the Assessing Officer. Therefore, it is contended that the very draft assessment order passed by the respondent cannot be sustained and on the other hand, the Assessing Officer is to be directed to refer the matter to the Transfer Pricing Officer and thereafter to make the draft assessment order.

10. The assessee in this case, with reference to its activities, claims that it does not conclude contracts on behalf of EOS Germany and its activities are limited to perform agency support activities and acting as a liaison channel between EOS Germany and third party distributors in India and the third parties are responsible for identifying customers and securing orders with Indian customers based on which EOS Germany sells products to customers. By stating so, the assessee contends that the profit earned by the petitioner is to be determined by adopting arm's length pricing method. Therefore, it is stated that such ALP determination is within the domain of Transfer Pricing Officer and not that of the Assessing Officer.

11. On the other hand, the Assessing Officer, after considering the objections of the petitioner, has in clear and categorical terms found in the draft assessment order that the above contention of the assessee is not acceptable for the reason that the activities of the petitioner prove that they are more than the branch office in India and that the employees of the petitioner in EOS India Branch Office involve in the activity of identifying potential customers and explaining the product features and its utility and application. Therefore,

the Assessing Officer rejected the claim of the assessee as mere liaison between EOS Germany and third party distributors. The Assessing Officer has also found that the sales and marketing personnel in the petitioner Company are directly involved in identification of customers, verification of know your customer documents, preliminary evaluation of distributors, solicit orders for EOS products in India. Therefore, the Assessing Officer has observed that the petitioner is not performing a limited role as contended by them. The Assessing Officer has also referred to certain purchase orders, installation report, customer relationship marketing report, service engineers report and found that the above documents clearly prove that the petitioner Company is performing all activities relating to marketing, sales, documentation, installation, post-sale services, coordinating with third party distributors, etc., and therefore, they are not a mere branch office. The Assessing Officer has further pointed out that the employees working in the petitioner Company involve all activities relating to sales made in India and also post-sale services in India. The Assessing Officer has also taken note of the communication received from Hindustan Aeronautical Limited (HAL) informing that the petitioner Company has confirmed its Permanent Establishment in India in order to obtain the business sales in India and thus found that the claim of the mere liaisons is not acceptable.

12. From the above rival contentions of the parties, it is evident that so many factual disputes, which go to the root of the matter, viz., the nature of activities carried on by the petitioner, exist between the parties. Unless and until those factual disputes are settled by appreciation of factual aspects of the matter by a fact finding authority, the question as to whether the income at the hands of the petitioner is to be treated as income earned in India and liable for tax, as claimed by the Revenue, or as the income to be determined by adopting ALP method, as claimed by the petitioner, cannot be considered by this Court and decided at this stage, since the order impugned is only a draft assessment order and the petitioner is only called upon to make objection against the same, if they are not agreeable. Therefore, the disputes raised by the petitioner herein are to be considered by the competent forum provided under the statute itself and resolved accordingly. It is not any empty formality but an effective mechanism. Therefore, to settle such dispute, necessarily the petitioner has to go before the Dispute Resolution Panel as provided under Section 144C of the Income Tax Act, 1961.

13. It is pertinent to note that Section 144C of the Income Tax Act, 1961 deals with reference to the Dispute Resolution Panel. In the said provision, the Assessing Officer, shall in the first instance, forward a draft of the proposed order of assessment to the assessee, if the Assessing Officer proposes to make any variation in the income or loss returned, which is prejudicial to such assessee. Under Sub Clause (2) of Section 144C, the Assessee, on receipt of such draft order, shall file his acceptance of the variations to the Assessing Officer or file his objections, if any, to such variations with the Dispute Resolution Panel and the Assessing Officer. If the assessee intimates his acceptance of the variations to the Assessing Officer or if no objections are received within the period of 30 days, the Assessing Officer shall complete the assessment on the basis of the draft order, as contemplated under Section 144C(3). On the other hand, if the assessee has filed his objections, 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 as contemplated under Section 144C(5). It is to be noted that the Dispute Resolution Panel shall issue such directions only after considering the following namely,

- a) draft order;
  - b) objections 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 caused to be collected by it;
- and
- g) result of any enquiry made by, or caused to be made by it.

14. It is further seen that before issuing any directions, the Dispute Resolution Panel may make such further enquiry, as it think fits or cause any further enquiry to be made by any Income Tax Authority and report the result of the same to it. Section 144C(8) contemplates that the Dispute Resolution Panel may confirm, reduce or enhance the variations in the draft order so. Therefore, it is evident that the petitioner is not remediless as against the draft assessment order and on the other hand, they are entitled to resort to the remedy available under Section 144C(2) (b) by filing their objections.

15. No doubt, the learned counsel for the petitioner contended that the petitioner cannot go before the Dispute Resolution Panel, since the petitioner is questioning the very

jurisdiction of the Assessing Officer in exercising the role of Transfer Pricing Officer. It is also contended by the learned counsel that since the Dispute Resolution Panel is not having power to set aside the draft assessment order and hence there is no meaning in going before the Dispute Resolution Panel.

16. I am unable to accept the above contention of the learned counsel for the petitioner for the following reasons:

a) Firstly, it is to be noted that the respondent/Assessing Officer has not accepted anywhere that he has determined the income by treating or accepting the same as the one to be derived after determination by the Transfer Pricing Officer. In other words, it is the specific claim of the Assessing Officer that the entire activities of the petitioner squarely fall within his power and jurisdiction for determination of the taxable income by himself without referring to the Transfer Pricing Officer. Therefore, this factual dispute has to be settled first for which purpose only the Dispute Resolution Panel is constituted. At this juncture, it is to be stated that a jurisdictional issue raised must be of such nature which should be apparent on the face of the action/order of the authority evidently showing that such authority lacks jurisdiction. On the other hand, if the jurisdictional issue raised could be considered and decided only by further probing the matter and culling out certain facts, it need not necessarily be decided by this Court by exercising its discretionary jurisdiction under Article 226 of the Constitution of India, except to relegate the parties to agitate before the next fact finding authority.

b) Secondly, the Assessing Officer has only passed the draft assessment order thereby giving sufficient opportunity to the petitioner to raise their objections. The objections to be raised under Section 144 (2b) are certainly not with a limited scope and on the other hand, it is very clear that objections of any kind can be made by the assessee against the draft assessment order which certainly include the jurisdictional issue as well. Therefore, the Dispute Resolution Panel shall consider the objections and issue such directions accordingly as it deem fit for the guidance of the Assessing Officer to enable him to complete the assessment. In the event of the petitioner succeeding before the Dispute Resolution Panel in establishing that the methodology adopted by the Assessing Officer in computing the income is incorrect and that he should have referred the matter to the Transfer Pricing Officer for determination of FAR analysis and arm's length pricing, certainly the Dispute Resolution Panel would give such direction to the Assessing Officer to exercise such course of

action and thereafter to complete the assessment accordingly. Therefore, it is not correct to contend that the issue raised by the petitioner cannot be considered and decided by the Dispute Resolution Panel.

c) The question of setting aside the proposed variation does not arise in this case, since the issue as raised by the petitioner with regard to the adoption methodology of the taxable income is a dispute, which has to be decided first by the Dispute Resolution Panel and thereafter, to issue direction to the Assessing Officer to complete the assessment as contemplated under Section 144C(5). After all, it is the draft assessment order placed before the Dispute Resolution Panel and thus a suitable direction issued by the Panel would bind the Assessing Officer.

17. When the statute provides a mechanism for resolving the dispute between the parties and before which forum, the assessee is entitled to file objections of any nature and when such forum is also vested with power to issue directions to the Assessing Officer for completion of the assessment, this Court is of the view that it is not correct to contend as if the scope and ambit of such forum is with limited purpose and jurisdiction on certain issues. If the above contention of the petitioner is to be accepted that the issue raised in this writ petition cannot be considered by the Dispute Resolution Panel, I am of the view that the very object of providing such mechanism to resolve the dispute through the Dispute Resolution Panel would become redundant. Certainly, the intention of the legislature is not to that effect, as claimed by the petitioner, to make such mechanism practically unworkable.

18. I myself considered the scope and power of the Dispute Resolution Panel in W.P.Nos.26814 and 26815 of 2017 and passed an order on 28.09.2018, by observing that issuance of directions as contemplated under Sub Section (5) of Section 144C cannot be made mechanically or an empty formality and on the other hand, it has to be done only after considering the materials referred to under sub Section (6).

19. Learned counsel for the petitioner relied on the decision of the Supreme Court reported in (2007) 292 ITR 416 (SC), Director of Income-tax (International Taxation) vs Morgan Stanley & Co. In support of his contention that in each case, the data placed by the taxpayer has to be examined as to whether the transfer pricing analysis by the taxpayer is exhaustive of attribution of profits and that would depend on the functional

and factual analysis to be undertaken in each case. Perusal of the facts and circumstances of the case before the Apex Court would show that the Apex Court has observed so in an appeal filed by the Revenue against the Ruling of the Advance Ruling Authority, wherein the said Authority has held that the respondent Company therein cannot be regarded as having a fixed place Permanent Establishment in India. Here, the facts and circumstances are different and the Revenue has also found that the petitioner is a Permanent Establishment, however the Revenue contended that the whole activities carried on by the petitioner within this country make and empower the Assessing Officer to make 100% attribution. This contention is resisted by the petitioner that such attribution cannot be made and on the other hand, it should be determined only by adopting Arm's Length Price method. I have already pointed out that this disputed question of fact need to be gone into and decided by the next fact finding Authority, more particularly, by the Forum, where a mechanism is provided to resolve the dispute viz., Dispute Resolution Panel. Therefore, I find that the above decision is not helping the petitioner, at this stage, in any manner.

20. Learned counsel for the petitioner further relied on the decision of the Supreme Court reported in 1999 237 ITR 889 (SC), UCO Bank vs Commissioner of Income Tax in support of his contention that the Board has power to tone down the rigour of the law and ensure a fair enforcement of its provisions, by issuing circulars, which are binding on the authorities for the purpose of just, proper, and efficient management of the work of assessment and in public interest. The learned counsel also relied on the Board Circular in Instruction No.3/2016 dated 01.03.2016, where the Board has issued certain instructions to the Assessing Officer as to how and when reference to the Transfer Pricing Officer should be made, where the cases are selected for scrutiny. It is also found in the said circular that though the Assessing Officer has the power under Section 92C to determine the Arms Length Price for international transactions or specified domestic transactions, determination of ALP should not be carried out by the Assessing Officer in a case, where reference is not made to the Transfer Pricing Officer. In this case, I have already pointed out that the dispute between the parties is as to whether material facts are existence for determination of ALP by the Transfer Pricing Officer, as contended by the petitioner or the available materials, as such, are sufficient for the Assessing Officer to exercise the attribution by himself in view of his claim that all the activities carried on by the Assessee in this case is within India and therefore, no question of referring the issue for Transfer Pricing Officer would arise. Since such disputed

issue has to be considered and decided by the Dispute Resolution Panel, I am of the view that the above decision and the Circular are also to be considered at the appropriate stage, after a decision is taken by the Dispute Resolution Panel.

21. Since this Court is inclined to direct the petitioner to approach the Dispute Resolution Panel for resolving the dispute raised in this writ petition, the other two decisions relied on by the learned counsel for the petitioner reported in (1978) 1 SCC 405, *Mohinder Singh Gill v. Chief Election Commissioner* and (53) SOT 142), *Hyundai Rotem Company vs. Adit* are not relevant to be discussed at this stage.

22. It is well settled that in fiscal matters, the parties cannot directly approach this Court and file writ petition, when an effective alternative remedy is available under the Statute. In other words, the parties cannot attempt to short circuit the whole process, by filing a writ petition straight away and inviting this Court to either assume the role of the Appellate Authority or the Revisional Authority. In this connection, the following decision of the Apex Court can be usually referred to: (2010) 8 SCC 110, *United Bank of India vs. Satyawati Tandon*, (2018) 3 SCC 85 (SC), *State Bank of Travancore vs Mathew K.C.* Therefore, this Court is of the view that the petitioner, instead of agitating the matter before this Court, has to approach the Dispute Resolution Panel and file their objections as provided under Section 144C.

23. Needless to say that all the contentions raised in this writ petition can be raised before the Dispute Resolution Panel, which in turn would consider the same and pass appropriate orders/directions for the guidance of the Assessing Officer to enable him to complete the assessment. Based on the objections raised by the petitioner, if the Dispute Resolution Panel comes to the conclusion that the Assessing Officer should complete the assessment only after referring the matter to the Transfer Pricing Officer, as contended by the petitioner, it can also issue such direction to the Assessing Officer and therefore, the apprehension of the petitioner as if they are remediless as against the draft assessment order, is without any basis.

24. Accordingly, this writ petition is disposed of, by granting liberty to the petitioner to file such objection before the Dispute Resolution Panel as well as the Assessing Officer within a period of 30 days from the date of receipt of a copy of this order. On receipt of such objections, the Dispute Resolution Panel shall consider the same and pass appropriate

directions/orders, as it thinks fit, on merits and in accordance with law by following the procedures contemplated under Section 144 C (5), (6) and (7) of the Act. Needless to say that since this Court, in this order, grants liberty to the petitioner to file objections within a period of 30 days from the date of receipt of a copy of this order, the objections so filed shall be taken as the one filed within the time stipulated under Section 144C(2)(b). No costs. The connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

The Deputy Commissioner of Income Tax,  
International Taxation 1(1),  
Room No.407, 4<sup>th</sup> Floor,  
BSNL Building, Tower-I,  
Greens Road, Chennai 600 034.

+1 cc to M/s.N.V.Balaji, Advocate Sr.No. 88653

+1 cc to M/s.Hema Muralikrishnan, Advocate Sr.No.88184

AKM/21.11.19/20P-4C /

ORDER IN  
W.P.No.2919 OF 2019