

IN THE HIGH COURT OF JUDICATURE AT MADRAS

|              |            |
|--------------|------------|
| Reserved on  | 05/04/2019 |
| Delivered on | 25/06/2019 |

CORAM:

THE HONOURABLE MR. JUSTICE K.KALYANASUNDARAM

W.P.Nos. 1244 & 1245 of 2018 &

W.M.P.Nos.1553 & 1554 of 2018 &

W.M.P.Nos.6060 & 6061 of 2018

W.P.No.1244 of 2018

Cognizant (Mauritius) Limited,  
6th Floor, Tower A1,  
Cybercity,  
Ebene,  
Mauritius.

.. Petitioner

Vs.

1.The Deputy Commissioner of Income Tax,  
International Taxation 1(1),  
BSNL Building, Room No.407,  
Tower 1,  
16, Greams Road,  
Chennai - 600 006.

2.Ms.Helen Ruby Jesindha,  
BSNL Building, Room No.407,  
Tower 1,  
16, Greams Road,  
Chennai - 600 006.

.. Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus to call for the records of the first respondent, pertaining to the order dated 31.12.2017, on the file of the first respondent, styled as "draft assessment order" issued for Assessment Year 2014-15, and quash the same, and consequently direct the first respondent to pass a fresh assessment order in conformity with the order bearing F.No.C-101/TPO-1, AY.2014-15, dated 31.10.2017, issued by the Transfer Pricing Officer (Joint Commissioner of Income Tax - TP01), Chennai.

\* \* \*

W.P.No.1245 of 2018

Cognizant Technology Solutions Corporation,  
500, Frank W. Burr.,  
Boulevard, Teaneck,  
New Jersey,  
United States of America - 00766.

.. Petitioner

Vs.

1.The Deputy Commissioner of Income Tax,  
International Taxation 1(1),  
BSNL Building, Room No.407,  
Tower 1,  
16, Grems Road,  
Chennai - 600 006.

2.Ms.Helen Ruby Jesindha,  
BSNL Building, Room No.407,  
Tower 1,  
16, Grems Road,  
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\* \* \*

For Petitioner in  
both W.Ps'

: Mr.Gopal Subramaniam  
Senior Advocate  
For Mr.Srinath Sridevan

For Respondents in  
both W.Ps'

: Mr.G.Rajagopalan  
Additional Solicitor General  
Assisted by Mr.Karthik Ranganathan  
Senior Standing Counsel  
for Income Tax Department

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## C O M M O N      O R D E R

Since these Writ Petitions raise common issues, they are disposed of by a common order.

2. The petitioners are Companies incorporated under laws of Mauritius and United States of America respectively. The petitioners are the shareholders in Cognizant Technology Solutions India Private Limited [In short "CTSIPL"]. As on 31.03.2013, the Mauritius Company owned 1,39,93,649 shares and the American Company was owning 39,60,000 shares in CTSIPL.

3. These Writ Petitions have been filed for issuance of Writ of Certiorarified Mandamus to quash the draft assessment order passed by the respondent under Section 143 (3) read with Section 144 C(1) of the Income Tax Act, 1961, dated 31.12.2017 and for a direction to pass fresh assessment in conformity with the order bearing F.No.C-101/TPO-1, AY.2014-15, dated 31.10.2017, issued by the Transfer Pricing Officer (Joint Commissioner of Income Tax - TP01), Chennai and the order bearing No.ITBA/TPO/F/92CA3/2017-18/1007519415(1), dated 01.11.2017, issued by the Transfer Pricing Officer (Assistant Commissioner of Income Tax - TPO Circle 1(1), Chennai, respectively.

4. According to the petitioners, during the year 2013 CTSIPL had substantial cash surplus, for which, there was no immediate requirement for the Company. The buy-back of shares was in the best interest of shareholders and hence, CTSIPL identified buy-back of shares under Section 77A of the Companies Act, 1956.

5. The petitioners would state that since all the shareholders of CTSIPL were non-residents, the buy-back had to be done in accordance with the regulations framed by the Reserve Bank of India under the Foreign Exchange Management Act, 1999 ["FEMA"]. The RBI Circular on Foreign Direct Investment ["FDI"], dated 02.07.2012 stipulates conditions for an Indian Company intending to buy-back shares from non-resident shareholders. In accordance with the Circular, CTSIPL ascertained valuation of its shares through SEBI registered Category-I Merchant Banker and the price per share of the Company, based on the valuation undertaken using the Discounted Free Cash Flow ["DCF"] method, was Rs.23,915.10. The Board of Directors of CTSIPL resolved that the shares could be bought by CTSIPL at the value of Rs.23,915/- per share under Section 77 A of the Companies Act.

6. The petitioners would claim that CTSIPL completed the buy-back of shares on 22.05.2013 and the non-resident shareholders received their consideration in accordance with the

relevant regulations under FEMA and the Companies Act. The Reserve Bank of India has accepted the said value and the Form FC-TRS was duly filed with the Authorized Dealer Bank and the same was approved. The petitioners filed their returns of income on 29.09.2014 and 29.11.2014 along with the relevant Transfer Price Certificates in Form 3CEB. The Assessing Officer referred the determination of Arms Length Price ["ALP"] for buy-back of shares to the Transfer Pricing Authority ["TPA"] and between February 2017 and October 2017, the Transfer Pricing Officer sought for details from the petitioners and after considering the detailed materials submitted by the petitioners, dated 18.10.2017, 27.10.2017, Transfer Pricing Officer passed an order on 31.10.2017 stating that on perusal of documents made available, "no adverse inference is drawn".

7. It is the case of the petitioners that when the matter to ascertain the value of the share for the buy-back referred to Transfer Pricing Officer and the reference has been answered under Section 92CA (4) of the Income-tax Act, 1961 [In short "the IT Act"] the Assessing Officer is bound to pass order in conformity with the valuation arrived by the Transfer Pricing Officer. There can be no deviation, however, on 06.11.2017, the first respondent asked for other documents with respect to the cost of acquisition of the shares. The petitioners provided the details on 08.11.2017 and thereafter for a period of 45 days, the first respondent did nothing and again on 21.12.2017 sought for a statement from the valuer and the statement was obtained on 22.12.2017 and on the same day, a notice was served on the petitioners to show-cause as to why the shares should not be valued at Rs.8,612/- and why the excess consideration over the said Fair Market Value not to be assessed to tax under Section 56(1) of the IT Act.

8. The petitioners would claim that the Authorized Representatives of their Company replied to the show-cause notice on 26.12.2017 stating that there was no possibility of giving reply within the specified time and sought for reasonable time. But, on 27.12.2017, the first respondent sent an e-mail to the Authorized Representatives of the petitioners to attend the hearing on 28.12.2017, as a last and final opportunity. The Authorized Representatives appeared and placed before the first respondent the fact that the valuation of the shares had been accepted by the RBI and TPO and the Returns of the other two shareholders had been accepted by the Department. The petitioners further pointed out that the CTSIPL declared the amount of money paid towards buy-back in the financial statements and Form 3CEB and the Assessing Officer had accepted the value so paid. But, the impugned Draft Assessment Orders came to be passed on 31.12.2017.

9. The impugned Draft Assessment Orders have been assailed in these Writ Petitions directly before the High Court invoking under Article 226 of the Constitution of India, contending that the impugned orders have been passed in violation of the principles of natural justice and in contravention of Section 92CA(4) of the Act. According to the petitioners, when the Transfer Pricing Officer had determined Arms Length Price in view of Section 92CA (4) of the IT Act, the first respondent had absolutely no power to differ from the Transfer Pricing Officer.

10. A detailed counter affidavit has been filed by the first respondent, primarily questioning the maintainability of this Writ Petition. It is contended that the Writ Petition is liable to be dismissed in limine as the petitioners have an effective and efficacious alternative remedy under the IT Act. It is stated that the Parliament in order to encourage Foreign Investors and to provide them with effective and quick appeal remedy against the assessment orders passed by the Assessing Officers, amended the Income Tax Act in Finance Act, 2009 by introducing a new Section 144C. As per the said Section, the Assessing Officer will scrutinize the Income Tax Returns filed by the Foreign Companies by issuing notices under Section 142(1) and 143(2) of the IT Act. However, instead of passing the assessment order under Section 143(3) of the IT Act, the Assessing Officer passes a draft assessment order under Section 144C(1) of the IT Act. If the assessee has objections to the actions proposed in the Draft Assessment Order, they are entitled to file objections before the Dispute Resolution Panel [DRP] under Section 144 C of the IT Act or to file an appeal against the final assessment order before the Commissioner of Income Tax (Appeals) under Section 246A of the IT Act. It is further stated that the powers of the Dispute Resolution Panel is wider and it can consider any objections raised before it by the assessee.

11. In the counter, it is further stated that there was no violation of principles of natural justice and the delay in issuing show cause notice was purely on account of delay attributable to the petitioners in producing the documents and clarification called for by the Department. The first respondent has given the following dates and events to sustain their case that there is no violation of principles of natural justice:-

"

| Sl.No | Dates      | Events                                                                                                                                                                                                                                                                                                                                                                                                                   |
|-------|------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1     | 28.08.2015 | Notice under Section 143(2) was issued to the assessee and directed it to appear on 15.09.2015. No response from the petitioner.                                                                                                                                                                                                                                                                                         |
| 2     | 16.09.2015 | Email was sent to the assessee requesting it to acknowledge the receipt of the notice and file necessary documents in favour of its claims. Again, there was a non-compliance from the assessee regarding the above said notice.                                                                                                                                                                                         |
| 3     | 28.09.2015 | Authorized Representative of petitioner was called and the notice was once again served on the assessee.                                                                                                                                                                                                                                                                                                                 |
| 4     | 28.12.2015 | After 91 days of receipt of the notice the assessee filed its submission.                                                                                                                                                                                                                                                                                                                                                |
| 5     | 13.04.2016 | Notice under Section 142(1) was issued to the assessee and requested to appear on 18.04.2016 with specified documents. There was a non-compliance by the petitioner by way of non-filling of requested documents. So, case was posted on 29.04.2016 to furnish Form 3CEB, Share Purchase Agreement, Share Valuation Report, Share Holding Pattern, Bank Statements Reflecting Receipts and Computation of Capital Gains. |
| 6     | 19.04.2016 | Assessee filed its 3CEB report alone without any other document.                                                                                                                                                                                                                                                                                                                                                         |
| 7     | 29.04.2016 | Petitioner appeared without submission and sought time to file the documents. Upon its request the assessing officer granted additional time till 06.05.2016.                                                                                                                                                                                                                                                            |
| 8     | 04.05.2016 | Request letter to Commissioner to refer the case to TPO                                                                                                                                                                                                                                                                                                                                                                  |
| 9     | 23.05.2016 | Approval from Commissioner received                                                                                                                                                                                                                                                                                                                                                                                      |
| 10    | 26.05.2016 | Reference was made to TPO                                                                                                                                                                                                                                                                                                                                                                                                |
| 11    | 13.10.2017 | Assessee filed copy of its submission in response to show cause notice issued by the TPO                                                                                                                                                                                                                                                                                                                                 |
| 12    | 03.11.2017 | TPO Order received                                                                                                                                                                                                                                                                                                                                                                                                       |

| Sl.No | Dates      | Events                                                                                                                                                                  |
|-------|------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 13    | 06.11.2017 | Authorized Representative appeared and explained the transaction related to buy back of share and sought time to produce related documents.                             |
| 14    | 08.11.2017 | Assessee filed supporting documents for cost of acquisition of shares and valuation report of shares of CTS India.                                                      |
| 15    | 20.12.2017 | Summons was issued to Shri Navin Vohra, Direct Ernst & Young.                                                                                                           |
| 16    | 21.12.2017 | Statement recorded from Navin Vohra                                                                                                                                     |
| 17    | 21.12.2017 | Summons issued to Shri. Visvanathan, Senior Director (Finance).                                                                                                         |
| 18    | 22.12.2017 | Statement recorded from Visvanathan, Senior Director (Finance).                                                                                                         |
| 19    | 22.12.2017 | Show cause notice issued to assessee Based on statements recorded from Shri. Navin Vohra, Shri. Visvanathan and fresh evidence collected regarding CTS India Pvt. Ltd., |
| 20    | 26.12.2017 | Navin Vohra filed response to questions which were not answered in statement.                                                                                           |
| 21    | 26.12.2017 | Assessee asked for adjournment to file response to SCN                                                                                                                  |
| 22    | 27.12.2017 | Visvanathan filed responses to questions which were not answered in statement.                                                                                          |
| 23    | 28.12.2017 | Upon repetitive requests the assessee filed its submission to SCN.                                                                                                      |
| 24    | 31.12.2017 | Draft Assessment Order passed.                                                                                                                                          |

12. It is alleged that though all documents sought for by the first respondent were readily available with the petitioners, they deliberately withheld by producing them. The petitioners have been dodging the Department for several months by evading the notices and by not filing the required documents and the first respondent has to pass orders on or before 31.12.2017 (before expiry of statutory time). The documentation for cost of acquisition of shares and valuation report of shares of CTS India and related documents and clarifications were sought for by the respondent on 13.04.2016 & 08.04.2016 respectively, but the complete details were furnished only on 08.11.2017 i.e., after lapse of 1 1/2 years. Since the valuation of shares is a complex assignment and it requires meticulous and painstaking efforts, the first respondent took six weeks time to

arrive the value of shares. Further, the first respondent summoned and recorded the statement of Senior Executives of CTS India and its auditors to arrive at its conclusion before issuing the show-cause notice, dated 22.12.2017.

13. It is further stated that CTS India being the subsidiary of the petitioners had not declared any dividend since 2003 in order to avoid paying Dividend Distribution Tax ("DDT") under Section 115O of the IT Act. The only reason to buy-back the shares because of new provision introduced vide Section 115QA of the IT Act, viz., Buyback Distribution Tax ["BBDT"] from 01.06.2013 imposing tax at 20% of the buy-back after 01.06.2013. It is alleged that with the singular intention to avoid DDT and BBDT, the petitioners had devised the dubious transaction paying exorbitant amount for the shares, so that it could take undue and unintended benefit of India - Mauritius tax treaty and thereby indulged in treaty abuse.

14. According to the first respondent, Section 46A of the IT Act is applicable only in cases where buy-back shares are for genuine purpose. The first respondent has given the benefit of Section 46A and Indian-Mauritius tax treaty upto the Fair Market Value [hereinafter referred to as "FMV"], viz., Rs.7,990/- and for the payment made over and above this amount, the first respondent denied both the treaty and Section 46A benefit and taxed the same as income from other sources. It is the further case of the first respondent that the valuation that was obtained for the purpose of FEMA is only applicable to RBI application purpose and that has no bearing of the Income Tax applications. It is stated that Arms Length Price and Fair Market Value are different and distinct. In the valuation report, the valuer has disclaimed that DCF valuation is only for the purpose of RBI and shall not be used for any other purpose. For better appreciation, Rule 11UA of the Rules of the IT Act is extracted hereunder:-

"11 U A - Determination of fair market value:-

[(1)] For the purposes of section 56 of the Act, the fair market value of a property, other than immovable property, shall be determined in the following manner, namely,-

(a) valuation of jewellery, -

(i) the fair market value of jewellery shall be estimated to be the price which such jewellery would fetch if sold in the open market on the valuation date;

(ii) in case the jewellery is received by the way of purchase on the valuation date, from a registered dealer, the invoice value of the jewellery

shall be the fair market value;

(iii) in case the jewellery is received by any other mode and the value of the jewellery exceeds rupees fifty thousand, then assessee may obtain the report of registered valuer in respect of the price it would fetch if sold in the open market on the valuation date;

(b) valuation of archaeological collections, drawings, paintings, sculptures or any work of art, -

(i) the fair market value of archaeological collections, drawings, paintings, sculptures or any work of art (hereinafter referred as artistic work) shall be estimated to be price which it would fetch if sold in the open market on the valuation date;

(ii) in case the artistic work is received by the way of purchase on the valuation date, from a registered dealer, the invoice value of the artistic work shall be the fair market value;

(iii) in case the artistic work is received by any other mode and the value of the artistic work exceeds rupees fifty thousand, then assessee may obtain the report of registered valuer in respect of the price it would fetch if sold in the open market on the valuation date;

(c) valuation of shares and securities, -

(a) the fair market value of quoted shares and securities shall be determined in the following manner, namely, -

(i) if the quoted shares and securities are received by way of transaction carried out through any recognized stock exchange, the fair market value of such shares and securities shall be the transaction value as recorded in such stock exchange;

(ii) if such quoted shares and securities are received by way of transaction carried out other than through any recognized stock exchange, the fair market value of such shares and securities shall be, -

(a) the lowest price of such shares and securities quoted on any recognized stock exchange on the valuation date, and

(b) the lowest price of such shares and securities on any recognized stock exchange on a date immediately preceding the valuation date when such shares and securities were traded on such stock exchange, in cases where on the valuation date there

is no trading in such shares and securities on any recognized stock exchange

[(b) the fair market value of unquoted equity shares shall be the value, on the valuation date, of such unquoted equity shares as determined in the following manner, viz., :-

the fair market value of unquoted equity shares = (A+B+C+D - L) × (PV) / (PE), where,  
..... "

Therefore, the first respondent has to independently arrive the valuation of shares under Rule 11UA of the Rules of IT Act.

15. In the counter filed by the first respondent, it is further stated that the repatriation of surplus was converted to capital gains through buy-back of shares under Section 46A of the IT Act read with the India - Mauritius Double Tax Avoidance Agreement and the entire amount was tax free since capital gains is tax except in India-Mauritius ["DTAA"]. This is a classic case of 'tax avoidance mentality' and aggressive tax planning can be deciphered from the various arrangements carried out by the petitioner. The valuation of shares did not reveal the statements recorded by the first respondent from Shri Navin Vohra, Director, Ernst & Young, Merchant Banking Division. CTS India had carried out scheme as approved by the High Court of Madras in June 2016. The valuation approved by the High Court that has been used in current DCF valuation carried out by the first respondent and by using the same Free Cash Flow estimated in DCF valuation for FY-2019 to FY 2023, it is proved that the Fair Market Value was overvalued. The following tabular column is extracted from the counter to show that the shares were overvalued:-

| FY    | Free Cash Flows as per Valuation on FY 13 (A) | Free Cash Flows as per Valuation on FY 16 (B) | Diff in Free Cash Flows (A-B) | % Variation with respect to FY 13 (A) |
|-------|-----------------------------------------------|-----------------------------------------------|-------------------------------|---------------------------------------|
| FY 17 | 26565                                         | 23313                                         | 3252                          | 12%                                   |
| FY 18 | 32375                                         | 27383                                         | 4992                          | 15%                                   |
| FY 18 | 64061                                         | 16942                                         | 47119                         | 74%                                   |
| FY 20 | 69499                                         | 20201                                         | 49298                         | 71%                                   |
| FY 21 | 75530                                         | 12329                                         | 63201                         | 84%                                   |
| FY 22 | 81694                                         | 14311                                         | 67383                         | 82%                                   |
| FY 23 | 83915                                         | 20600                                         | 63315                         | 75%                                   |

16. The first respondent used the High Court Approved Valuation of the Scheme of Arrangement without any changes and

by applying Discounted Cash Flow Method, determined valuation of shares at Rs.7,990/-. The first respondent has further stated that income accruing to a non-resident due to treaty abuse and colourable device needs to be looked into from the application of the Act, DTAA and once there is a sham transaction or a non-genuine transaction, the treaty benefits would be denied to the assessee and only the provisions of the Act would be applicable. The respondents have emphatically denied that the impugned order is premeditated one, even though, the same Deputy Commissioner / second respondent herein, while sitting as a Assessing Officer for CTS India raised the same issue at the assessment of CTS India. It is stated that the principles of res judicata / stare decisis are not applicable to the Income Tax Proceedings. The Income Tax Act recognises that if new information is available to the concerned Assessing Officer, the assessment can be reopened under Section 147 / 148 of the IT Act. The first respondent after unearthing new information like valuation report of the year 2016, Scheme of Arrangement as approved by the High Court, statements of Senior Executives of CTS India and its Auditors, Financials of subsequent years, passed the Draft Assessment Order and the second respondent in her personal capacity cannot be impleaded in view of Section 293 of the IT Act.

17. The second respondent has filed a separate counter affidavit denying the allegations made against her and it is stated that Draft Assessment Orders have been passed in her official capacity, hence she cannot be impleaded in a personal capacity in the Writ Petitions and according to the second respondent, she was impleaded only to browbeat her just because, she passed an adverse order against the petitioners.

18. A detailed rejoinder was filed by the petitioners disputing and denying the allegations made in the counter affidavit. In the rejoinder, the petitioners reiterated the grounds taken in the Writ Petitions and it is further stated that the Fair Market Value and Arms Length Price are always used in accounting parlance as synonymous and interchangeable to show the nature of price agreed to between unrelated parties and the submission of the respondents that the Fair Market Value and Arms Length Price are different concepts is not only anomalous, but is least expected of the Department, which is meant to administer these provisions.

19. In the rejoinder, the petitioners have further stated, that these Writ Petitions are maintainable as the Draft Assessment Orders have been passed not based on the order of TPO; Dispute Resolution Panel [DRP] assumes jurisdiction only after the Assessing Officer passes Draft Assessment Order inconsonance with the TPO's directions; the order of the Assessing Officer is contrary to Section 46A of the IT Act and

CBDT Circular No.3 of 2016. The same transaction has been accepted by Delhi Circle of the respondent-Department and the order was passed in violation of principles of natural justice.

20. With regard to allegation of dragging of the proceedings, it is stated that the notice dated 28.08.2015 was despatched to an incorrect address and for the notice dated 16.09.2015 sent through email, the Authorized representative of the petitioners appeared on 28.09.2015. The informations sought for from the petitioners through notice dated 13.04.2016 were furnished to the respondent on 18.04.2016 and 09.05.2016 and the additional documents were furnished on 08.11.2017, which were sought by the respondent for the first time on 06.11.2017. The buy-back was undertaken in strict compliance with Section 77A of the Companies Act, 1956. The valuation of the shares have not been found fault with by Reserve Bank of India or the Transfer Pricing Officer or by the respondent herein in her previous capacity as an Assessing Officer of the CTSIPL. Since allegations have been made against the Assessing Officer, she has to be impleaded as a party respondent.

21. In the instant case, the respondent re-opened the assessment of the petitioners on the ground that the shares were overvalued. The first respondent held that the Fair Market Value is to be determined under 11UA of the Rules of IT Act and the determination of value of shares under DCF method for the purpose of RBI application is incorrect and passed the Draft Assessment Orders. The Cognizant (Mauritius) Limited seeks exemption in payment of income tax under India - Mauritius Double Tax Avoidance Agreement and in the case of US Company Rs.134,05,06,915/- has been paid as capital gain at the rate of 10%, but the Revenue claims tax at the rate of 30% for the difference paid over and above the Fair Market Value under Section 56(1) of the IT Act.

22. Mr.Gopal Subramaniam, learned Senior Counsel for the petitioners has made the following submissions:-

(i) The petitioners / Cognizant (Mauritius) Limited and Cognizant Technology Solutions Corporation, United States of America are the shareholders of the CTSIPL. The Indian Company had cash surplus in the year 2013 in its commercial wisdom and decided to buy-back of shares. Since the shareholders are non-residents, as per the Regulations issued by the RBI under the FEMA, the value of the shares were determined by appointing a SEBI registered Category-I Merchant Banker by using the DCF Method. The entire transaction was completed on 22.05.2013 and necessary Forms were filed before the concerned Authorities. The income-tax Returns of the petitioners dated 29.09.2014 & 29.11.2014, were accepted by the Authorities.

(ii) The character of income on buy-back of shares is undoubtedly a capital gain. Section 14 of the IT Act describes "Heads of Income" and the capital gains classified as 'E' under 14 of the IT Act. Section 46A of the IT Act also states that the difference between the cost of acquisition and the value of consideration received by the shareholders shall be deemed to be the capital gain arising to such shareholders. The Central Board of Direct Taxes also states that sale of shares would come under capital gain and when the respondent admits this position, the capital gain cannot be bifurcated to bring one portion under capital gains and the remaining income under the income from other sources by using Section 56(1) of the IT Act.

(iii) The Assessing Officer after obtaining orders from the Commissioner of Income Tax, referred the matter to the Transfer Pricing Officer to determine the value of shares. The Transfer Pricing Officer issued show-cause notices, for which, the petitioners submitted materials and thereafter, the Transfer Pricing Officer found that the value per share determined at Rs.23,915/- was correct and recorded a finding that "no adverse inference is drawn". The value fixed under DCF Method at Rs.23,915/- was also accepted as correct by the Income Tax Authority in Delhi.

(iv) The Assessing Officer is bound to pass Assessment Order based on the Arms Length Price fixed by the Transfer Pricing Officer.

(v) The payment made by the Company on purchase of its own shares from the shareholders in accordance with Section 77A of the Companies Act would not come under dividend in view of Section 2(22)(iv) of the IT Act.

(vi) The second respondent, who was an Assessing Officer for CTSIPL raised queries for determining the value per share at Rs.23,915/- and after enquiry, accepted the Income Tax Return submitted by the CTSIPL. However without any other materials, the respondent issued notices contending that the value of the Fair Market Value of the share was Rs.8,612/- and is attempting to tax on the remaining amount under Section 115 QA of the IT Act. Section 115QA was inserted in the Act and came to effect from 01.06.2013 and this Section cannot be retrospectively implemented / applied for imposing tax on the petitioners, which transactions had completed on 22.05.2013.

(vii) Though the respondent issued notice in the year 2017 and the petitioners supplied relevant documents and filed replies, the final show-cause notice was issued only on 22.12.2017, but subsequently, without proving ample opportunity, the Draft Assessment Orders dated 31.12.2017 came

to be passed without any Authority of law; in violation of Rule of law and complete failure of natural justice.

(viii) Section 90 of the IT Act, a Double Taxation Avoidance Treaty was entered between the Government of India and Mauritius and as per the Treaty Agreement, the Cognizant (Mauritius) is entitled for exemption to tax for capital gain and when the Treaty was in force, the respondent has no authority to describe the transaction as dubious and colourable exercise and the transaction as sham so as to bring a portion of the amount to tax under Section 56(1) of the IT Act.

(ix) If the Draft Assessment Order has been passed accepting the Arms Length Price determined by the Transfer Pricing Officer, objections can be filed by the petitioners before the Dispute Resolution Panel. Since the impugned orders came to be passed contrary to Sections 46A and 92CA of the IT Act and Circular issued by the Central Board of Direct Taxes and in violation of the principles of natural justice, these Writ Petitions are maintainable and the petitioners have no other efficacious remedy.

23. Mr.G.Rajagopalan, learned Additional Solicitor General appearing on behalf of the respondents has made the following submissions:-

(i) These Writ Petitions are not maintainable as the petitioners are having an efficacious alternative remedy of filing objections before Dispute Resolution Panel under Section 144 C of the IT Act or to file an appeal against the final assessment orders before the Commissioner of Income Tax (Appeals) under Section 246A of the IT Act.

(ii) Before passing the Draft Assessment Orders, the petitioners were provided with ample opportunity and only after filing their reply to the show- cause notices, the Draft Assessment Orders have been passed in strict compliance of principles of natural justice.

(iii) The Double Taxation Avoidance Agreement is applicable only to genuine cases, but the Treaty Agreement has been abused and the only intention of the petitioners is to avoid payment of tax. The value of shares determined on DCF method applies for RBI applications and as per Rule 11UA of the Rules of the IT Act, the respondent has to independently arrive the value of shares.

(iv) The entire transaction is dubious for the simple reason that even after selling the shares, the share holding has not reduced and their share holdings remain the same.

(v) Tax is not imposed retrospectively under Section 115QA

of the IT Act, but after giving treaty exemption, the excess payments made over and above Fair Market Value are subjected to tax under Section 56(1) of the IT Act.

(vi) The jurisdiction of the Assessing Officer and the Transfer Pricing Officer is distinct. The Assessing Officer unearthed new materials before issuance of show-cause notices to the assesseees to determine the correct value of the shares. Stating so, the learned Additional Solicitor General justified the orders impugned herein.

24. Heard Mr.Gopal Subramaniam, learned Senior Counsel, assisted by Mr.Srinath Sridevan, learned counsel for the petitioners and Mr.G.Rajagopalan, learned Additional Solicitor General, assisted by Mr.Karthik Ranganathan, learned Senior Standing Counsel for Income Tax Department and perused the entire materials placed on record.

25. In the instant case, the questions arise for consideration are whether the principles of natural justice has been violated as alleged by the petitioners and whether these Writ Petitions are maintainable at this stage.

26. It is an admitted fact that the Income Tax Returns of the petitioners were filed on 29.09.2014 and 29.11.2014 respectively. The respondent issued notice under Section 143(2) of the IT Act to the assesseees dated 28.08.2015, directing them to appear for enquiry on 15.09.2015. It is the case of the respondents that no response was forthcoming from the petitioners and hence, intimation was sent to the assesseees on 16.09.2015, through e-mail to file documents in favour of their claim. Again there was no response from the petitioners, but on 28.09.2015, the Authorized Representative of the petitioners was called and a notice was served. It is not disputed that the assessee filed its submissions on 28.12.2015 i.e., after lapse of 91 days. A notice under Section 142(1) of the IT Act was issued to the assessee to appear for enquiry on 18.04.2016. It is also seen that even thereafter the petitioners herein were not vigilant and cooperative to conclude the enquiry, which shows their lethargic attitude to face the enquiry. The issuance of show-cause notice and filing of reply along with the documents to the show-cause notice are not in dispute even in the rejoinder affidavit filed by the petitioners.

27. The learned Senior Counsel for the petitioners relied upon the following decisions in support of his contention that there was a failure in following the principles of natural justice and the referred paragraphs are extracted hereunder:-

(i) Dhakeshwari Cotton Mills Ltd. vs. CIT [(1955) 1 SCR 941

: AIR 1955 SC 65]

"9. In this case we are of the opinion that the Tribunal violated certain fundamental rules of justice in reaching its conclusions. Firstly, it did not disclose to the assessee what information had been supplied to it by the departmental representative. Next, it did not give any opportunity to the company to rebut the material furnished to it by him, and, lastly, it declined to take all the material that the assessee wanted to produce in support of its case. The result is that the assessee had not had a fair hearing. The estimate of the gross rate of profit on sales, both by the Income Tax Officer and the Tribunal seems to be based on surmises, suspicions and conjectures. It is somewhat surprising that the Tribunal took from the representative of the department a statement of gross profit rates of other cotton mills without showing that statement to the assessee and without giving him an opportunity to show that statement had no relevancy whatsoever to the case of the mill in question. It is not known whether the mills which had disclosed these rates were situate in Bengal or elsewhere, and whether these mills were similarly situated and circumstanced. Not only did the Tribunal not show the information given by the representative of the department to the appellant, but it refused even to look at the trunk load of books and papers which Mr Banerjee produced before the Accountant-Member in his chamber. No harm would have been done if after notice to the department the trunk had been opened and some time devoted to see what it contained. The assessment in this case and in the connected appeal, we are told, was above the figure of Rs 55 lakhs and it was meet and proper when dealing with a matter of this magnitude not to employ unnecessary haste and show impatience, particularly when it was known to the department that the books of the assessee were in the custody of the Sub-Divisional Officer, Narayanganj. We think that both the Income Tax Officer and the Tribunal in estimating the gross profit rate on sales did not act on any material but acted on pure guess and suspicion. It is thus a fit case for the exercise of our power under Article 136."

(ii) Mohinder Singh Gill Vs. The CEC [(1978) 1 SCC 405]

"62. So let us examine them each. Speed in action versus soundness of judgment is the first dilemma. Punnuswami has emphasised what is implicit in Article

329(b) that once the process of election has started, it should not be interrupted since the tempo may slow down and the early constitution of an elected parliament may be halted. Therefore, think twice before obligating a hearing at a critical stage when a quick re-poll is the call. The point is well taken. A fair hearing with full notice to both or others may surely protract; and notice does mean communication of materials since no one can meet an unknown ground. Otherwise hearing becomes hollow, the right becomes a ritual. Should the cardinal principle of "hearing" as condition for decision-making be martyred for the cause of administrative immediacy? We think not. The full panoply may not be there but a manageable minimum may make-do.

63. In *Wiseman v. Borneman* [(1967) 3 All ER 1945] there was a hint of the competitive claims of hurry and hearing. Lord Reid said: "Even where the decision has to be reached by a body acting judicially, there must be a balance between the need for expedition and the need to give full opportunity to the defendant to see material against him" (emphasis added). We agree that the elaborate and sophisticated methodology of a formalised hearing may be injurious to promptitude so essential in an election under way. Even so, natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances. To burke it altogether may not be a stroke of fairness except in very exceptional circumstances. Even in *Wiseman* where all that was sought to be done was to see if there was a prima facie case to proceed with a tax case where, inevitably, a fuller hearing would be extended at a later stage of the proceedings, Lord Reid, Lord Morris of Borth-y-Gest and Lord Wilberforce suggested "that there might be exceptional cases where to decide upon it ex parte would be unfair, and it would be the duty of the tribunal to take appropriate steps to eliminate unfairness" (Lord Denning, M.R., in *Howard v. Borneman* [(1974) 3 WLR 660] summarised the observations of the Law Lords in this form). No doctrinaire approach is desirable but the court must be anxious to salvage the cardinal rule to the extent permissible in a given case. After all, it is not obligatory that counsel should be allowed to appear nor is it compulsory that oral evidence should be adduced. Indeed, it is not even imperative that written statements should be called for. Disclosure of the prominent circumstances and asking for an immediate explanation orally or otherwise may, in many cases, be sufficient

compliance. It is even conceivable that an urgent meeting with the concerned parties summoned at an hour's notice, or in a crisis, even a telephone call, may suffice. If all that is not possible as in the case of a fleeing person whose passport has to be impounded lest he should evade the course of justice or a dangerous nuisance needs immediate abatement, the action may be taken followed immediately by a hearing for the purpose of sustaining or setting aside the action to the extent feasible. It is quite on the cards that the Election Commission if pressed by circumstances, may give a short hearing. In any view, it is not easy to appreciate whether before further steps got under way he could not have afforded an opportunity of hearing the parties, and revoke the earlier directions. We do not wish to disclose our mind on what, in the critical circumstances, should have been done for a fairplay of fair hearing. This is a matter pre-eminently for the Election Tribunal to judge, having before him the vivified totality of all the factors. All that we need emphasize is that the content of natural justice is a dependent variable, not an easy casualty."

(iii) S.L.Kapoor vs. Jagmohan [(1980) 4 SCC 379]

"17. Linked with this question is the question whether the failure to observe natural justice does at all matter if the observance of natural justice would have made no difference, the admitted or indisputable facts speaking for themselves. Where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it approves the non-observance of natural justice but because courts do not issue futile writs. But it will be a pernicious principle to apply in other situations where conclusions are controversial, however, slightly, and penalties are discretionary."

(iv) Institute of Chartered Accountants Vs. L.K.Ratna [(1986) 4 SCC 537]

"Chartered Accountants Act, 1949 - Sections 21 and 22-A and Regulation 14 of the Regulations framed under the Act - Enquiry - Hearing - Natural Justice - Delinquent member of Institute of Chartered Accountants of India - Entitled to be afforded an opportunity of hearing by the Council of Institute before taking decision on the question of his guilt, irrespective of the fact that a hearing had already been given to him in proceedings before Disciplinary

Committee and that an appeal lay against the Council's decision before High Court - Decision of the Council, in absence of such an opportunity of hearing, liable to be quashed - Advocates Act, 1961, Section 36, 37, 38, 42 - Labour and Services - Departmental inquiry."

(v) Canara Bank vs. Debasis Das [(2003) 4 SCC 557]

"19. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the facts and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life."

(vi) State of Maharashtra Vs. Jalgaon Municipal Council & Ors. [(2003) 9 SCC 731]

"30. It is fundamental principle of fair hearing incorporated in the doctrine of natural justice and as a rule of universal obligation that all administrative acts or decisions affecting rights of individuals must comply with the principles of natural justice and the person or persons sought to be affected adversely must be afforded not only an opportunity of hearing but a fair opportunity of hearing. The State must act fairly just the same as anyone else legitimately expected to do and where the State action fails to satisfy the test it is liable to be struck down by the Courts in exercise of their judicial review jurisdiction. However, warns Prof. H.W.R. Wade that the principle is flexible.

'The judges, anxious as always to preserve some freedom of manoeuvre, emphasise that 'it is not possible to lay down rigid rules as to when the principles of natural justice are to apply: nor as to their scope and extent. Everything depends on the subject-matter'.

Their application, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. 'In the application of the concept of fair play there must be real flexibility'. There must also have been some real prejudice to the complainant: there is no such thing as a merely technical infringement of natural justice." (Administrative Law, Wade & Forsyth, Eighth Edition, 2000, pp.491-492)' "

(vii) Dharampal Satyapal Ltd. vs. Deputy Comm. of Central Excise & Ors. [(2015) 8 SCC 519]

" 28. It is on the aforesaid jurisprudential premise that the fundamental principles of natural justice, including audi alteram partem, have developed. It is for this reason that the courts have consistently insisted that such procedural fairness has to be adhered to before a decision is made and infraction thereof has led to the quashing of decisions taken. In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass such orders, which affect the liberty or property of an individual but the statute may not contain a provision for prior hearing. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.

45. Keeping in view the aforesaid principles in mind, even when we find that there is an infraction of principles of natural justice, we have to address a further question as to whether any purpose would be served in remitting the case to the authority to make fresh demand of amount recoverable, only after issuing notice to show cause to the Appellant. In the facts of the present case, we find that such an exercise would be totally futile having regard to the law laid down by this Court in R.C. Tobacco (supra).

46. To recapitulate the events, the Appellant was accorded certain benefits under Notification dated July 08, 1999. This Notification stands nullified by Section 154 of the Act of 2003, which has been given retrospective effect. The legal consequence of the

aforesaid statutory provision is that the amount with which the Appellant was benefited under the aforesaid Notification becomes refundable. Even after the notice is issued, the Appellant cannot take any plea to retain the said amount on any ground whatsoever as it is bound by the dicta in R.C. Tobacco (supra). Likewise, even the officer who passed the order has no choice but to follow the dicta in R.C. Tobacco (supra). It is important to note that as far as quantification of the amount is concerned, it is not disputed at all. In such a situation, issuance of notice would be an empty formality and we are of the firm opinion that the case stands covered by 'useless formality theory'."

(viii) Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata-II [(2016) 15 SCC 785]

"Excise - Valuation - Principles of natural justice - Right to cross-examination of witness before adjudicating authority - Denial of, if rendered order against assessee a nullity

- Held, not allowing the assessee to cross-examine the witnesses by the adjudicating authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected."

(ix) Krishna Mohan Medical College & Hospital vs. Union of India (2017) 15 SCC 719

"20. In the predominant factual setting, noted hereinabove, the approach of the Respondents is markedly incompatible with the essence and import of the proviso to Section 10A(4) mandating against disapproval by the Central Government of any scheme for establishment of a college except after giving the person or the college concerned a reasonable opportunity of being heard. Reasonable opportunity of hearing which is synonymous to 'fair hearing', it is not longer res integra, is an important ingredient of audi alteram partem Rule and embraces almost every facet of fair procedure. The Rule of 'fair hearing' requires that the affected party should be given an opportunity to meet the case against him effectively and the right to fair hearing takes within its fold a just decision supplemented by reasons and rationale. Reasonable opportunity of hearing or right to 'fair hearing' casts a steadfast and sacrosanct obligation on the adjudicator to ensure fairness in procedure and

action, so much so that any remiss or dereliction in connection therewith would be at the pain of invalidation of the decision eventually taken. Every executive authority empowered to take an administrative action having the potential of visiting any person with civil consequences must take care to ensure that justice is not only done but also manifestly appears to have been done."

28. The learned Additional Solicitor General by citing the unreported judgments of this Court made in W.P.No.34481 of 2015, dated 20.04.2016 and the judgment of Karnataka High Court passed in W.P.No.5914 of 2018 would submit that there is no violation of principles of natural justice as alleged by the petitioners and the relevant paragraphs are extracted hereunder:-

(i) V.R.Mohanraj Vs. The Commissioner of Service Tax-1 & another [W.P.No.34481 of 2015, dated 20.04.2016]

"10. On a perusal of the impugned order, it is also clear that pursuant to the summons dated 03.09.2013 and 12.11.2013 issued by the Investigating Officer, the petitioner appeared before them on 18.11.2013 and furnished the copies of the Income Tax returns. The petitioner had filed his reply dated 06.07.2015 before the 2nd respondent. The 2nd respondent also afforded personal hearing on 21.07.2015, 06.08.2015 and 12.08.2015. The petitioner was represented by his counsel before the 2nd respondent on 12.08.2015 and submitted that no penalty be imposed in their case since they have paid the entire Service Tax dues prior to issuance of show cause notice. Therefore, it is clear that the 2nd respondent has given an opportunity of personal hearing to the petitioner and he was also represented by his counsel before the 2nd respondent. The petitioner also filed his reply before the 2nd respondent, which was also considered by the 2nd respondent. Therefore, from the above, it is clear that there is no violation of principles of natural justice committed by the respondents. That being the case, the impugned order being an appealable order, the Writ Petition cannot be entertained. The judgment relied upon by the learned counsel for the respondent reported in 2014 (35) S.T.R. 65 (P & H) [Barnala Builders & Property Consultants Vs. Dy. C.C.E & S.T., Dera Bassi] squarely applies to the facts and circumstances of the present case. Therefore, without exhausting the alternative remedy by way of an appeal, the Writ Petition cannot be entertained. Therefore, it is open to the petitioner to challenge the impugned order before the Commissioner (Appeals) by way of an

appeal."

(ii) M/s.Telekom Malaysia Berhad Vs. Union of India  
[ W.P.No.5914 of 2018 (T-IT), dated 12.02.2018]

"10. It cannot be believed that the proceedings initiated right in the Month of March 2016 followed by various notices throughout the period, on 29.03.2016, 02.06.2017, 12.07.2017, 11.10.2017 and 16.10.2017 followed by letter dated 07.11.2017, all Date of Order 12-02-2018 W.P.No.5914/2018 M/s. Telekom Malaysia Berhad Vs. Union of India & Ors. have not been issued or served upon the petitioner- company. The stipulation in this regard in the quoted paras above in the impugned order, is a matter on record and this Court has no reason to disbelieve these facts and treat them as falsehood per se merely because the company wants to contend like this.

11. This is besides the point that once an order has been passed against the assessee, the assessee is bound to take recourse to the appellate forums provided in the Act itself. There is a two tier appellate system under the provisions of Income Tax Act, 1961. The first appeal lies before the CIT (Appeals) under Section 246 of the Act and second appeal lies before the ITAT under Section 253 of the Act. Thereafter, on the question of law, an appeal lies to the High Court under Section 260- A of the Act on the substantial questions of law arising from the orders of the Tribunal.

12. Therefore, the comprehensive Code of Income Tax Act, 1961, provides for a complete mechanism for redressal of grievance of the assesseees including the foreign companies and there is no special reason to allow the foreign companies to bypass these appellate forums to directly approach the constitutional Courts by way of writ jurisdiction under Article 226 of the Constitution of India against the reassessment orders which are ex-facie appealable under the provisions of the Act.

13. The Court is therefore satisfied that there is no good reason to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India and permit the petitioner-company to lay a challenge to the impugned

reassessment order dated 18.12.2017 before this Court at this stage."

29. In the first decision cited by the learned Additional Solicitor General, the assessee in pursuance of the summons dated 03.09.2013 and 12.11.2013 appeared before the Officials on 18.11.2013 and also filed a reply dated 06.07.2015 before the second respondent. The second respondent provided personal hearings on 21.07.2015, 06.08.2015 and 12.08.2015. The assessee was represented by his counsel on 12.08.2015. Considering the above facts, this Court held that there is no violation of principles of natural justice.

30. In the second decision of the Karnataka High Court, the Reassessment Order of the Deputy Commissioner of Income Tax was sought to be assailed directly before the High Court, alleging non-grant of adequate opportunity to raise objections to the Reassessment Proceedings. Taking note of the fact that the petitioner-Foreign Company did not respond to the communications of the Revenue nor raised objections to the proposed reassessment for assessing its income, out of the works executed by it in India, rejected the case of the assessee.

31. Section 115QA of the IT Act, came into force from 01.06.2013. After insertion of the above provision, purchase of its own shares by the Company under the provisions of Section 77A of the Companies Act is chargeable to Income Tax Act as Dividend Distribution Tax (DDT). The position before 01.06.2013 was that buy-back of shares would be taxed as capital gain in the hands of the recipient in accordance with the provisions under Section 46A of the IT Act and the amount paid would not be treated as dividend in view of Section 2(22)(iv) of the IT Act. In the present case, buy-back of shares in accordance with Section 77A of the Companies Act was completed before 01.06.2013 and the Income Tax Returns filed by the petitioners were also accepted by the Assessing Officer, however notice under Section 143(2) of the Act, dated 28.08.2015 and 31.08.2015 were issued and the impugned Draft Assessment Orders came to be passed on 31.12.2017, i.e., nearly about 2 1/2 years after initiation of the proceedings. It is to be noted that the Draft Assessment Orders are required to be passed within the prescribed time. In the meanwhile, the Authorized Representative of the petitioner-Company appeared before the respondent and submitted the documents and a reply to the show-cause notice. The dates and events mentioned in para 11 (supra), would prove that there is no breach of violation of principles of natural justice.

32. In the light of the above facts, in my considered opinion, the decisions relied on by the learned Senior Counsel

for the petitioners do not support the case of the petitioners as they are distinguishable on facts. Further, this Court does not find any merit in the contention that the principles of natural justice has been violated.

33. In view of the above finding, the next question arises for consideration is whether these Writ Petitions are maintainable. It is the contention of the learned Senior Counsel for the petitioners that the Draft Assessment Orders have been passed contrary to the Arms Length Price determined by the Transfer Pricing Officer. In other words, it is contended by the learned Senior Counsel for the petitioners that the Assessing Officer is bound to pass Draft Assessment Orders in tune with the Arms Length Price fixed by the Transfer Pricing Officer and since the Assessing Officer failed to follow the requirement of law and had taken a different view, the Dispute Resolution Panel has no jurisdiction to consider the objection of the petitioners.

34. I do not find any merit in the above submission. Sub-sections 6 and 7 of Section 144 C of the IT Act deals with the duties and powers of Dispute Resolution Panel and for ready reference, it is extracted hereunder:-

"Section 144 C - Reference to dispute resolution panel

"(1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.

(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,-

(a) file his acceptance of the variations to the Assessing Officer; or

(b) file his objections, if any, to such variation with,-

(i) the Dispute Resolution Panel; and

(ii) the Assessing Officer.

(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if-

(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or

(b) no objections are received within the period specified in sub-section (2).

(4) The Assessing Officer shall, notwithstanding anything contained in section 153 [or section 153B], pass the assessment order under sub-section (3) within one month from the end of the month in which,—

(a) the acceptance is received; or

(b) the period of filing of objections under sub-section (2) expires.

(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), 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.

(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),—

(a) make such further enquiry, as it thinks fit; or

(b) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.

(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

[Explanation.—For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.]

(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 [or section 153B], the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

(14) The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.

(14A) The provisions of this section shall not apply to any assessment or reassessment order passed by the Assessing Officer with the prior approval of the Commissioner as provided in sub-section (12) of section 144BA.

(15) For the purposes of this section,—

(a) "Dispute Resolution Panel" means a collegium comprising of three Commissioners of Income-tax constituted by the Board for this purpose;

(b) "eligible assessee" means,—

(i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and

(ii) any foreign company.]"

35. A plain reading of the Sub-section 6 of Section 144 C of the IT Act would make it clear that the Dispute Resolution Panel has wide power to consider all the materials and pass appropriate orders under sub-section 7 of the Act. Reference in this behalf may be made to Ericsson AB v. Addl. Director of Income-tax [(2011) 197 TAXMAN 321 (Delhi)] and Vodafone India Service (P.) Ltd., Vs. Union of India, Ministry of Finance, New Delhi [(2013) 37 Taxmann.com 250 (Bombay) / [(2013) 262 CTR 133 (Bombay)].

36. Further, it is relevant to note that in the case of

Vodafone India Service (P.) Ltd., Vs. Union of India, Ministry of Finance, New Delhi [(2013) 37 Taxmann.com 250 (Bombay) / [(2013) 262 CTR 133 (Bombay)], the High Court of Bombay held that the Assessing Officer is bound to pass orders as per the Arms Length Price determined by the Transfer Pricing Officer. However, the Delhi High Court in the case of Sony India (P.) Ltd., Vs. Central Board of Direct Taxes [(2006) 157 Taxman 125 (Delhi) and in the case of Commissioner of Income-tax-I Vs. Cushman and Wakefield (India) (P.) Ltd., [(2014) 46 taxmann.com 317 (Delhi)], held that the Assessing Officer is not bound to accept the Arms Length Price as determined by the Transfer Pricing Officer. The Assessing Officer can always be persuaded by the assessee at that stage to reject the Transfer Pricing Officer's Report and proceed to determine by the Arms Length Price himself.

37. It is to be noted that the Income Tax Act, 1961 is a complete and contained code as it provides for a complete mechanism for redressal of the grievance of the assessee, including Foreign Companies. In the case of Foreign Companies, the Assessing Officer instead of passing final order under Section 143 (3) of the IT Act, passes the Draft Assessment Orders to enable the assessee to make an objection before the Dispute Resolution Panel, which consists of experts in this field. The Dispute Resolution Panel is empowered by the Act to consider the objections, and pass suitable orders, viz., may confirm, reduce or enhance the variations proposed in the draft order. The Assessing Officer is bound to pass final Assessment Orders in tune with the order of the Dispute Resolution Panel. Against the final order, the First Appeal lies before the Commissioner of Income Tax (Appeals) under Section 246 of the IT Act and Second Appeal lies before the Appellate Tribunal under Section 253 of the IT Act. Thereafter, an appeal lies to the High Court under Section 260A of the IT Act on the substantial questions of law.

38. Indisputably, the assessee determined value of the shares by following the DCF method. It is the contention of the learned Additional Solicitor General that the value determined by the SEBI registered Category-I Merchant Banker was for the purpose of RBI applications and the valuer issued disclaimer statement and according to them, the share value was not determined for the purpose of Income Tax Act. The Revenue, by referring 11UA of the Rules of IT Act, would claim that the share value is to be determined under the Rule and even if the DCF method is accepted, the value determined by the CTSIPL for approving the Scheme of Arrangement and Compromise fixed in the year 2016 has to be accepted. It is not out of place to mention that the value of the share was overpriced exorbitantly, which is evident from the application filed under the Scheme of

Arrangement and Compromise for reduction of capital gain in C.P.No.102 of 2016. The petitioners by using the same method of DCF method, valued the share at Rs.7,990/- and the respondent has also fixed the value of the share at Rs.7,875/- and the difference is only a meger sum of Rs.115/-.

39. From the perusal of the extracts from the tabular column in para 15 (supra), it is evident there is huge variation of determination of share by the Company for the years 2013 and 2016. This complex issue involving fiscal matter requires consideration by the Authorities on the basis of the relevant datas and evidence adduced by the parties.

40. In the matter on hand, it is not the case of the petitioners that the Deputy Commissioner of Income Tax has no Authority to pass Draft Assessment Orders, which are impugned in these Writ Petitions. However, according to the petitioners, the Draft Assessment Orders were not passed in conformity with the Arms Length Price determined by the Transfer Pricing Officer. It is to be further noted that it is the specific case of the respondents that Section 115QA of the IT Act is not implemented retrospectively, but they have determined the value of the shares based on the Fair Market Value and the demand is to collect the price quoted over and above the Fair Market Value under Section 56(1) of the IT Act.

41. The learned Senior Counsel for the petitioners has also cited catena of decisions on the principles of law, rule of law, legal effect of RBI directions and interpretation of taxing statutes, retrospective operation of statutes and taxation. There is no quarrel over the principles laid down therein, but in the considered view of this case, the discussions referred supra, the decisions relied on by the learned Senior Counsel for the petitioners have no application to the facts of this case. Further, it is not appropriate to consider those cases at this stage. The rights and contentions of the parties are left open in any proceedings that may be adopted hereafter.

42. As rightly pointed out in the counter affidavit, the Draft Assessment Orders have been passed in discharging the official duty of the second respondent. Even though the second respondent was an Assessing Officer for the Cognizant Technology Solutions India Private Limited and the Income Tax Returns filed by the Company was accepted, but, later the same Assessing Officer had been posted in incharge of international transactions, hence she is very well within her jurisdiction to initiate the proceedings against the shareholders of the Company / the petitioners herein. But, unfortunately the Assessment Officer has been impleaded in these Writ Petitions and unwarranted comments have been made against her. The petitioners

shall not indulge in this type of practice atleast in future cases.

43. In the decisions relied upon by the Revenue in Commission of Income-tax vs. Chhabil Dass Agarwal [(2013) 36 taxman.com 36 (SC)], Authorized Officer, State Bank of Travancore and another vs. Mathew K.C. [(2013) SCC Online SC 55], Hundai Motor India Ltd. vs. Secretary, Income-tax Department [(2017) 86 taxmann.com 284 (Madras)], Inno Estates (P) Ltd. Vs. Dispute Resolution Panel-2, Bengaluru [(2017) 82 taxmann.com 477 (Madras)], Piramal Healthcare Ltd., Additional Commissioner of Income-tax, Range-7(1) Mumbai [(2012) 26 taxmann.com 56 (Bombay)], Ericsson AB vs. Additional Director of Income-tax [(2011) 197 TAXMAN 321 (Delhi)] and an unreported judgment of Karnataka High Court in M/s.Telekom Malaysia Berhad Vs. Union of India [W.P.No.5914 of 2018 (T-IT), dated 12.02.2018], the Hon'ble Apex Court and the High Courts have consistently held that the assessee before approaching the High Court by way of filing Writ Petitions invoking Article 226 of the Constitution of India, have to exhaust the remedies provided under the IT Act and dismissed the Writ Petitions as not maintainable.

44. In the matter on hand, except the two grounds dealt with supra, no other good reasons pleaded by the petitioners to bypass the statutory remedies. Keeping in mind, the principles laid down in the above decisions and the facts of this case, in my opinion, these Writ Petitions are not maintainable at this stage. In that view, these Writ Petitions fail and they are accordingly dismissed. However, with liberty to the petitioners raise all the issues before the Dispute Resolution Panel within two weeks from the date on which the judgment / order is made ready. It is needless to mention, if objections are made within the time, the Dispute Resolution Panel shall consider the same on merits and in accordance with law. There is no order as to costs. Consequently, connected miscellaneous petitions are closed. सत्यमेव जयते

Sd/-  
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

r n s

To

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+1cc to Mr.Karthik Ranganathan, Advocate sr.52034  
+1cc to Mr.Srinath Sridevan, Advocate sr.53009

W.P.Nos. 1244 & 1245 of 2018 &  
W.M.P.Nos.1553 & 1554 of 2018 &  
W.M.P.Nos.6060 & 6061 of 2018

nr 27/06/2019



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