IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.10.2020

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. Nos.5760 & 35246 of 2019
and
WMP. Nos.6581, 6583, 36045 and 36047 of 2019

M/s. Transsys Solutions Private Limited
Represented by its Director
Venkata Krishnan S.
Plot Super A 16-17
RR Tower IV, 8th Floor,
TVK Industrial Estate, Guindy,
Tamil Nadu – 600 032. …Petitioner in both WPs

Vs

1.Assistant Commissioner of Income Tax
Corporate Circle 3(1), Chennai
Chennai – Wanarpathy Block,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

2.Assistant Commissioner of Income Tax
TPO Circle 3(2), Chennai
Income Tax Office – BSNL Tower
No.16, Greams Road,
Chennai – 600 006. …R1 & R2 in both WPs

3.Deputy Commissioner of Income Tax,
Corporate Circle 3(1), Chennai
Chennai – Wanarpathy Block,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034. ...R3 in WP.35246 of 2019

Prayer in WP.5760 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying Writ of Certiorari calling for the records on the file of the Respondents in ITBA/TPO/S/92CA/2018-19/1014398051(1) in issuing the notice u/s. 92CA(2) and 92D(3) of the Income Tax Act dated 19.12.2018 by the 2nd Respondent for the Assessment Year 2016-17, pursuant to the reference made by the 1st Respondent and quash the same as illegal, arbitrary and bad in law.
Prayer in WP.35246 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying Writ of Certiorari calling for the records on the file of the 3rd Respondent in

Order No.ITBA/AST/F/144C/2019-20/1021197909(1) in passing the Draft order u/s. 144C of the Income Tax Act dated 27.11.2019 by the 3rd Respondent for the Assessment Year 2016-17, and quash the same as illegal, arbitrary and bad in law.

For Petitioner : Mr.R.Sivaraman

For Respondents : Mrs.Hema Muralikrishnan
Senior Standing Counsel

COMMON ORDER

The petitioner is a private limited company engaged in the business of providing Software Business and Technology Solutions to its clients. The challenge in WP.No.5760 of 2020 is to an order passed by the 2nd respondent/Assistant Commissioner of Income Tax dated 19.12.2018 under the provisions of Sections 92CA(2) and 92D(3) of the Income Tax Act, 1961 (in short 'Act') for assessment year (AY) 2016-17. Initially the petitioner had enjoyed an interim order to the effect that while assessment proceedings may continue, no order of assessment be passed. The interim order was however not extended beyond 29.03.2019.

2. As a result, the 3rd respondent/Deputy Commissioner of Income Tax took up proceedings for continuation and finalization of assessment in the absence of an interim order. A draft order of assessment under Section 144C of the Act came to be passed effectively rendering WP.No.5760 of 2019 infructuous. The draft order of assessment came to be challenged in WP.No.35246 of 2019. Since the learned counsel for the petitioner had challenged the basis of reference to the Transfer Price Officer (TPO), the first writ petition was also kept pending and both matters were taken up for final hearing together.

3. The challenge to the order of assessment relates back to the reference made to the TPO dated 19.12.2018 and I am thus called upon to decide on the legality or otherwise of this reference. If the reference dated 19.12.2018 is found to have been issued in excess of jurisdiction, then the notice for assessment and all proceedings thereafter would be rendered invalid. If on the other hand, I find that notice dated 19.12.2018 had been validly issued, there would be no infirmity in the proceedings for assessment finalised thereafter.

4. The agreed sequence of dates and events are set out below:

(i) The petitioner filed an Income Tax Return on 15.10.2016 within time for AY 2016-17.

(ii) Notice dated 27.07.2017 issued under Section 143(2) by R1 states that the following issue has been identified for scrutiny contains the heading 'Limited scrutiny (Computer Aided Scrutiny Selection) and whether value of international transactions are correctly shown in Form-3CEB and return of income'.

(iii) R1 has sought approval on 17.07.2017 from the Principal Commissioner of Income Tax (PCIT) for making a reference to the TPO.

It is here that the difference of opinion arises between the petitioner and the revenue. According to the petitioner, the assessment was taken up for scrutiny only 'limited' basis and what needed to be ascertained was merely a comparison of the value of the international transactions as reflected in the Form-3CEB with the value in the return of income. According to the revenue, the reference was for the purpose of determining the Arms Length Price (ALP) of the international transactions and the use of the word 'value' should not be restricted to a mere arithmetical comparison but should be seen to connote a determination of the pricing methodology of the international transactions.

(iv) On 24.07.2017 PCIT recorded satisfaction for the reference sought and granted approval to the AO to make a reference to the TPO.

Once again, according to the petitioner, the approval granted by the PCIT is for a different reason from that stated in the notice under Section 143(2).

(v) On 06.08.2018 R1 makes a reference to R2 to compute the ALP of Specified Domestic Transactions (SDT).

(vi) Since the petitioner had not engaged in SDT, R1 issued an amended reference to R2 to compute the ALP of international transactions.

(vii) Impugned notice dated 19.12.2018 was issued by R1 to R2.

(viii) On 03.01.2019, the petitioner objected to the reference vide communication dated 19.12.2018, raising the very dispute as raised in this writ petition, that the limited scrutiny notice dated 27.07.2017 only necessitated a reconciliation between Form-3CEB and the return of income filed, and this exercise did not involve the examination of Transfer pricing risk parameters. There was thus no necessity to make a reference to the TPO to determine ALP. Reliance in this regard was placed on a Instruction issued by the Central Board of Direct Taxes (CBDT) bearing No.3 of 2016 dated 10.03.2016. The relevant portion of the Instruction reads as follows:

3.2. All cases selected for scrutiny, either under the Computer Assisted Scrutiny Selection (CASS) system or under the compulsory manual selection system (in accordance with the CBDT’s annual instructions in this regard for example, instruction No.6/2014 for selection in F.Y.2014-15 and Instruction No.8/2015 for selection in F.Y 2015-16), on the basis of transfer pricing risk parameters (in respect of international transactions or specified domestic transactions or both) have to be referred to the TPO by the AO, after obtaining the approval of the jurisdictional Principal Commissioner of Income-tax (PCIT) or Commissioner of Income-tax (CIT). The fact that a case has been selected for scrutiny on a TP risk parameter becomes clear from a perusal of the reasons for which a particular case has been selected and the same are invariably available with the jurisdictional AO. Thus, if the reason or one of the reasons for selection of a case for scrutiny is a TP risk parameter, then the case has to be mandatorily referred to the TPO by the AO, after obtaining the approval of the jurisdictional PCIT or CIT.

In Paragraph No.3.3 onwards, the Board states that the selection for scrutiny in cases not involving transfer pricing risk parameters but where the assessee has engaged in international transactions or SDT shall only be in certain specified circumstances. Such circumstances are (i) where the assessee has not filed a Section 92 report or where the international transactions are not disclosed in the report filed and the Assessing Officer comes to know about the international transaction/SDT entered into by the assessee, (ii) where a TP adjustment in excess of rupees ten crores for an earlier assessment year has been upheld by the authorities or is pending in appeal and (iii) where search and seizure or survey operations have been carried out and findings have been recorded by the Investigation Wing or the AO in regard to TP issues or SDT. The aforesaid circumstances do not, according to the petitioner, arise in the present case.

(ix) On 03.01.2019 and 25.01.2019, written submissions were filed by the petitioner before R2.

(x) On 22.02.2019, the writ petitioner filed WP.No.5760 of 2020 challenging the reference made by R1 to R2 dated 19.12.2018 and obtained interim protection against finalization of assessment on 28.02.2019, 08.03.2019 and 14.03.2019 effective till 29.03.2019, The interim protection was not extended thereafter.

(xi) On 11.10.2019, a show cause notice was issued by R2 for the purpose of determining ALP to which a reply was filed on 29.03.2019 by the petitioner.

(xii) On 31.10.2019 R2 passes the Transfer pricing order under Section 92CA of the Act.

(xiii) A draft order of assessment came to be passed by R3 under Section 144C of the Act on 27.11.2019 and the aforesaid order came to be challenged in WP.No.35246 of 2019.

(xiv) The narration in the impugned order is to the effect that the assessment 'has been selected through CASS with the reason large aggregate value of total employee cost in comparison to aggregate value of international taxation as per books of accounts'. According to the petitioner, the reasons adduced for selection of the assessment for scrutiny as per the draft order of assessment varies with the reasoning reflected in the scrutiny notice dated 27.07.2017.

(xv) On 24.12.2019, the petitioner has approached the Dispute Resolution Panel (DRP) objecting to the draft order dated 27.11.2019. The assumption of jurisdiction by the TPO however, is not a matter of challenge before the DRP.

5. The learned revenue counsel has circulated a copy of Instruction No.15 of 2015 issued by the Board on 16.10.2015 which sets out the revised and updated Guidance notes for implementation of T.P. provisions. The Instruction mandates that in order for the AO to make a reference to the TPO, he should first ascertain that the assessee in question has entered into international transactions, and gather basic details in connection therewith from the Form-3CEB, such as the associated enterprises with which the transaction is entered into, the documents maintained and the methodology followed.

6. Upon an examination of the aforesaid documents and details, the Assessing Officer should arrive at a prima facie belief on whether a reference to the TPO is at all required. This is a preliminary stage which does not require detailed enquiry or scrutiny to verify the correctness of otherwise of the ALP. As an added safeguard, since not all cases of international transactions are liable to be referred to the TPO, the approval of the Principal Commissioner or Commissioner is to be sought by the AO prior to making the reference to TPO.

7. Para 3.4 of Instruction 15/2015 reads as follows:

> '3.4. Before making a reference to the TPO, the AO has to seek the approval of the Principal Commissioner or Commissioner as provided in the Act. The provisions of Section 92CA of the Act,

inter-alia, refer to the international transaction. Hence, all international transactions, in relation to which a reference to the TPO is considered necessary, have to be explicitly mentioned in the letter through which the reference is being made.'

8. In this case, the revenue has filed extracts of the records of assessments in compilation dated 18.02.2020 that reveal the following:

Reason for selection by CASS (Computer Aided Search Selection)
'CASS Selection Reason and issue
PAN AADCT4603N Name TRANSSYS SOLUTIONS PRIVATE LIMITED
2016-17

Reason Code	Reason Description	Issue	Underlying Information Elements	Rationale
TP0104 .	Large Aggregate value of total employee cost is comparison to Aggregate value of international transactions as per books of accounts (T.P. Risk Parameter) (S. No. 8 of Form 3CEB and Part A-P&L of ITR)	Whether value of international transactions are correctly shown in Form 3CEB and return of income		

9. Though initially a reference was made to the determination of value of SDT, upon ascertaining that the petitioner had not engaged in SDT, the AO seeks approval from the PCIT to make a reference to the TPO. The reason for reference at column-4 cites the T.P. risk parameters as per CASS description extracted above. The approval sought is specifically in regard to the aggregate value of total employee cost in comparison to aggregate value of international transactions as per books of accounts.

10. The condition at para-3.4 of the Instruction is to the effect that the issue on which a reference was thought to be necessary has to be explicitly mentioned in the AOs letter seeking a reference to TPO. Such letter of the AO dated

17.07.2018 is found to have complied with the aforesaid condition and is extracted below:

PAN: AADCT4603N/2018-19 Dated: 17/07/2018

To

The Principal Commissioner of Income-tax,
Chennai-3,
Chennai.
THROUGH THE ADDL. CIT, CORPORATE RANGE-3, CHENNAI
Respected Sir,\
Sub: Computation of Arms Length Price - Request for approval - reference to Transfer Pricing Officer (TPO) - in the following case - AY 2016-17 - Reg.

*****

For the A.Y. 2016-17, the following scrutiny case has been selected for Limited scrutiny through CASS and notice u/s 143(2) was duly served on the assessee. On examination of Form 3CEBN in this case, it is observed that the assessee has entered into international transactions with its associated enterprises as mentioned below:

S.No.	Name of the Assessee	PAN	A.Y.	CASS Reason
1	M/s.Trans sys Solutions Pvt. Ltd.	AADCT4603N	2016-17	(v) Large Aggregate value of total employee cost in comparison to aggregate value of International transactions as per books of accounts. (Form 3CEB)

Name and address of the associated enterprise with whom the International transaction has been entered into.		*Description of services provided/availed to/from the associated enterprise*			*Amount paid/received or payable/receivable for the services provided/taken.*		*Method used for determining the arm's length price [Sec section 92C(1)]*
Name	*Address*	*Type*	*Description*	*Type*	*As per Books Account*	*As computed by the assessee having regard to the arm's length price*	
Transsys solutions FCZUAE	*UAE*	*Provided to AE*	*Software solutions*	*Received/ Receivable*	*217203133*	*217203133*	*Comparable uncontrolled price method*

2. In view of the above, it is considered necessary that a reference u/s. 92CA(1) be made to the Transfer Pricing Officer for determination of Arm's length Price for the said Transactions. As per Sec.92CA(1) of the IT Act, a reference to TPO could be made only with the prior approval of the Commissioner of Income-tax. Hence, it is requested that the necessary approval may kindly be granted for referring the case to the TPO.

3. Copies of Form 3CEB and CASS reasons screen shot in the above mentioned case are enclosed herewith for your kind reference.'

11. A perusal of the above documents leads me in no doubt that the proper procedure has been followed by the Assessing Officer in approaching the PCIT seeking approval for reference. The PCIT, on 24.07.2018 grants approval in the following terms:

'Letter dated 19.7.18 received from Addl CIT Corp.3 requesting approval of Pr.CIT to refer the following cases to TPO for computation of Arms Length Price from International and specified domestic transactions

1. M/s. Trivent Systems Pvt Ltd

2. M/s. Trimble Information Technologies India Pvt Ltd

3. M/s. Takato India Pvt Ltd

4. M/s. Transsys Solutions Pvt Ltd.

5. M/s. Toshiba JSW Power Systems Pvt Ltd

6. M/s.Taeyang Metal India Pvt Ltd

7. M/s. Thinkbig Edu-Venture (India) Pvt Ltd

8. M/s. The Deal India Pvt Ltd.

Addl CIT has submitted that as per Para 3.2 of Inst. No.3/2016 all the cases selected for scrutiny on TP risk parameter have to be referred to TPO after obtaining approval of Pr.CIT.

File put up for Pr.CIT approval

I have gone through the proposals and for the reasons given therein, approve the reference to TPO in all the above mentioned 8 cases for AY 2016-17.'

The petitioner is assessee No.4 in the list of eight cases approved by the PCIT.

12. The petitioners' submission to the effect that the reason for selection of scrutiny by CASS only involves a numerical reconciliation is, in my view an over simplification of the reason stated for selection. Perhaps the officer might have been more detailed in the choice of words employed so as to specifically refer to the issue of total employee cost. However non-reference to this is not fatal as the reason for selection by CASS has been produced and placed on record by the Officer while seeking approval of the PCIT for reference of the matter to the TPO.

13. I may also incidentally point out that after the expiry of the interim protection by this Court on 29.03.2019 the Assessing Officer has issued a show cause notice dated 11.10.2019 in response to which the petitioner has replied on 23.10.2019 enclosing various details on the computation of the ALP as sought for by the Officer. The affidavit filed in support of the writ petition however, is silent in regard to these facts. The petitioner has thus not only co-operated and participated in the conduct of assessment but has also filed objections before the DRP that are pending disposal.

14. In the light of the discussion as above, I find no merit in these writ petitions and dismiss the same. No costs. Connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

vs

To

1.Assistant Commissioner of Income Tax
Corporate Circle 3(1), Chennai
Chennai - Wanarpathy Block,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

2.Assistant Commissioner of Income Tax
TPO Circle 3(2), Chennai
Income Tax Office - BSNL Tower
No.16, Greams Road,
Chennai - 600 006.

3.Deputy Commissioner of Income Tax,
Corporate Circle 3(1), Chennai
Chennai - Wanarpathy Block,
No.121, Mahatma Gandhi Road,
Nungambakkam, Chennai-600 034.

W.P. Nos.5760 & 35246 of 2019
and
WMP. Nos.6581, 6583, 36045 and 36047 of 2019

SRA(CO)

CB(08/12/2020)