IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.01.2021

PRONOUNCED ON : 27.05.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.32751 of 2017
and W.M.P.No.36089 of 2017

M/s Durr India Private Limited
Represented by its Director
Mr.Micheal Berger
Ground and Second Floor, Prestige Polygon
471, Anna Salai, Nandanam
Chennai – 600 035. .. Petitioner

vs.

1.The Assistant Commissioner of Income Tax
Corporate Range-1
4th Floor, Aayakar Bhawan, Wanaparthy Block
121, Mahatma Gandhi Road
Nungambakkam, Chennai – 600 034.

2.The Deputy Commissioner of Income Tax
Transfer Pricing Officer-1(2)
Room No.505, Tower-1, BSNL Building
No.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 Certiorari to call for the records on the file of the first respondent for the AY 2009-10 and quash the impugned order in PAN No.AAACD3568P/2009-10 dated 14.11.2017.

For Petitioner : Mr.Vikram Vijayaraghavan for
M/s Subbaraya Aiyar Padmanabhan

For Respondents : Ms.Hema Murali Krishnan
Sr. Standing Counsel

O R D E R

The petitioner has filed the present writ petition challenging impugned order dated 14.11.2017 passed by the 1st respondent assessing officer for the assessment years 2009-10.

2.The impugned order has been passed by the 1st respondent pursuant to order dated 14.8.2017 of the 2nd respondent Transfer Pricing Officer.

3.These orders were passed by the respective respondents pursuant to an order dated 21.12.2017 of the Income Tax Appellate Tribunal in ITA Nos. 754/Mds/2014; 972/Mds/2015 and 455/Mds/ 2016for the assessment years 2009-10; 200010-11 and 2011-12.

4.The main contention of the petitioner in the present writ petition is that after a Transfer Pricing Order dated 14 8.2017 was passed by the 2nd respondent Transfer Pricing Officer after the case was remanded back by the Income Tax Appellate Tribunal by its common order dated 21.12.2017 in ITA Nos. 754/Mds/2014; 972/Mds/2015 and 455/Mds/ 2016, for AY 2009-10, 2010-11 and 2011-12 and therefore it was incumbent on the part of the 1st respondent to have passed a Draft Assessment Order under section 143 (3) read with section 92CA (4) and section144C(1)of the Income Tax Act, 196.

5.It is submitted that, instead of passing a Draft Assessment Order, the 1st respondent has directly passed the impugned Assessment Order dated 14.11. 2017 bypassing the statutory safeguards prescribed under the provisions of the Income Tax Act, 1961. It is therefore submitted that impugned order was without jurisdiction and is not only contrary to the provisions of the Income Tax Act, 1961 but also deprives the opportunity to petitioner approach the Dispute Resolution Panel under section 144C of Income Tax Act, 1961.

6.Appearing on behalf of the petitioner, the learned counsel for the petitioner reliance on the following decisions of the court:-

1.Nokia India Pvt. Ltd Vs. ACIT (WP (C) No.3692/2017 & CM aPPL 15963/2017 Delhi HC), as affirmed by the Hon'ble Supreme Court in ACIT Vs. Nokia India Pvt. Ltd. (SLP Diary No.7302/2018 dated 14.05.2018 SC),

2.Control Risks India Private Limited Vs. DCIT,(WP (C) No.5722/2017 & CM No.23860/2017 Delhi HC) as affirmed by the Hon'ble Supreme Court in DCIT Vs. Control Risks India Private Limited (SLP Diary No.7090/2018 dated 16.03.2018 SC)

3.PCIT Vs. Andrew Telecommunicaitons Pvt. Ltd., (Tax Appeal No.144 of 2017, Bombay HC)

4.Vijay Television Pvt. Ltd., Vs. DRP & Ors (89 CCH 245 Chennai HC)

5.JCB India Ltd., Vs. Deputy Commissioner of Income Tax.

6.Zuari Cement in W.P.No.5557 of 2012 dated 21.02.2013.

7. CIT Vs. Zuari Cement in SLP (CC) No.16694 of 2013 dated 27.09.2013.

8.ESPN Star Sports Mauritius S.N.C. ET Compagnie Vs. UoI.

9.Dimension Data Asia Pacific Pvt Ltd., Vs. DCIT (WP No.921 of 2018 Mumbai HC)

10.Stryker India Pvt. Ltd., Vs. ACIT (WP (C).11325 of 2017 Delhi HC)

11.Turner International India Pvt. Ltd., Vs. DCIT (WP (C) No.4260 of 2015 Delhi HC).

12.The Pr.Commissioner of Income Tax Vs. Headstrong Services India Pvt. Ltd.

7.The learned counsel for the petitioner therefore prays for quashing of the impugned order by remitting the case back to the 2nd respondent to pass a Draft Assessment Order under the Provisions of the Income Tax Act, 1961.

8.Defending the impugned order, learned counsel for the respondents has made submissions on the merits of the case. That apart, for the learned counsel for the Respondent-Income tax Department submits that under section 144 C(1) of the Income Tax Act, 1961, the requirement of passing a Draft Assessment Order would arise only in the 1st instance and not when the case is remanded back for passing a fresh order.

9.It is submitted that order has been passed pursuant to remanded order passed in ITA Nos. 754/Mds/2014; 972/Mds/2015 and 455/Mds/ 2016 by the Income Tax Appellate Tribunal and there was no necessity to pass a Draft Assessment Order. The learned counsel for the respondent has into distinguished the cases cited on behalf of the petitioner.

10.I have considered the arguments advanced by the learned counsel, the petitioner and the counsel for the Income Tax Department. I have perused the impugned order and the orders which form the basis of the impugned order and the provisions of theIncome Tax Act, 1961. I have also considered judgement cited on behalf of the petitioner and the 2nd respondent- Income Tax Department.

11.The present dispute is confined to the assessment year 2009-10. This court is really not concerned with the merits of the transaction between the petitioner and its associated enterprises under Article 226 of the Constitution of India.

12.The impugned order has been purportedly passed pursuant to Order dated 21.12.2017 in ITA Nos. 754/Mds/2014; 972/Mds/2015 and 455/Mds/ 2016 of the Income Tax Appellate Tribunal for the assessment years 2009-10; 200010-11 and 2011-12.

13.The only point that arises for consideration in the present writ petition is whether the 1st respondent was justified in passing the impugned order dated 14.11.2017 without passing a Draft Assessment Order as was done in the 1st round of the litigation. The earlier proceedings eventually culminated in an order dated 21.12.2016 of the Income Tax Appellate Tribunal in ITA Nos. 754/Mds/2014; 972/Mds/2015 and 455/Mds/ 2016.

14.The Income Tax Appellate Tribunal by it's order dated 21.12.2016 of the Income Tax Appellate Tribunal in ITA Nos. 754/Mds/2014; 972/Mds/2015 and 455/Mds/ 2016 remanded the case back to the respective respondent's following observations:-

> "In the case of Frigoglass India (P) Ltd (supra) Delhi Bench of the Tribunal had held CUP method could be adopted after discarding TNMM only when a comparable product or service is available. Ld. TPO and ld. DRP were not able to identify a single uncontrolled comparable for bench marking R & D fees and management fees paid by the assessee. This may be due to the difficulties in finding another entity that had rendered services which were identical to what were given to the assessee by M/s. Durr Systems Gmbh, Germany, that too in an uncontrolled set of circumstance. In such a situation in our opinion assessee could not be faulted in insisting that the TNMM method adopted by it for analyzing its international transactions with Associated Enterprises, for the impugned assessment years should be accepted. Nevertheless, we find that lower authorities having rejected the TNMM method did not verify the appropriateness of the comparable selected by the assessee in its TP study. Functional profile of the comparables and that of the assessee were never verified. Lower authorities did not verify whether the Arms Length Price analysis done by the assessee based on TNMM was correctly done and whether any modification in the comparables selected or the PLI computed were necessary. Thus, while setting aside the orders of the lower authorities for all the impugned assessment years, we remit the issue of fixing the Arms Length Price of the international transactions of the assessee under TNMM, back to the fiel of the ld. Assessing Officer / ld. TPO for consideration afresh in accordance with law."

15.Earlier, a Transfer Pricing Order dated 23.1.13 was passed by the 2nd respondent for the assessment year 2009-10. Pursuant to the aforesaid Transfer Pricing Order, the 1st respondent passed a Draft Assessment Order dated 6.2.2013. Against the aforesaid Draft Assessment Order, the petitioner filed an application before the Dispute Resolution Panel, under Section 144C of the Income Tax Act, 1961.

16.The Dispute Resolution Panel thereafter passed its Order dated 20.11.2013 pursuant to which, 1st respondent passed an Assessment Order dated 27.1.2013 under section 144C read with section 143 (3) of the Income Tax Act, 1961.

17.Against the aforesaid Assessment Order dated 27.1.2013 under section 144C read with section 143 (3) of the Income Tax Act, 1961, the petitioner preferred an appeal before the Income Tax Appellate Tribunal. The said appeal came to be disposed along with the appeal for the other assessment years as well in ITA Nos. 754/Mds/2014; 972/Mds/2015 and 455/Mds/ 2016.

18.The remand order dated 21.12.2016 of the Income Tax Appellate TribunalITA Nos. 754/Mds/2014; 972/Mds/2015 and 455/Mds/ 2016 is categorical. It has made it clear that the respective respondent shall pass orders in accordance with law.

19.When the law mandates a particular thing to be done in a particular manner, then it has to be done in the manner. In this connection, attention is drawn to the decision of the Privy Counsil in Nazir Ahmed Vs. King Emperor [AIR 1936 PC 253] which dictum has been followed by the Honourable Supreme Court in UPSC Vs. Papiah [(1997) 7 SCC 614] and many other cases, TN Medical Officers Association [2020 SCC Online 699] and State of Jharkhand Vs. Amhag Cements [(2005) 1 SCC 368].

20.Therefore, once the case was remitted back to the respondents, it was incumbent on the part of the 1st respondent to have passed a draft Assessment Order under section 143 (3) read with Section 92CA (4) and Section 144C (1) of theIncome Tax Act, 1961.

21.It was not open for the 1st respondent to bypass the statutory safeguards prescribed under the Act and thereby deny the right of the petitioner to approach the Dispute Resolution Panel. It is only thereafter, Final assessment order can be passed by the 1st respondent to Assessing Officer.

22.It would have been different if the appeal that was dismissed by the Income Tax Appellate Tribunal in first round of litigation in ITA Nos. 754/Mds/2014; 972/Mds/2015 and 455/Mds/ 2016.

23.Therefore, I find sufficient force in the arguments advanced by the learned counsel for the petitioner. In my view, the impugned order has been passed without jurisdiction. It was passed by bypassing statutory safeguards prescribed under the provisions of theIncome Tax Act, 1961. Therefore, the present Writ Petition deserves to be allowed.

24.In the result, the impugned order is quashed and case is remitted back to the 1st respondent to pass a Draft Assessment Order. Since the dispute pertains to the assessment years 2009-10, the 1st respondent shall endeavour to pass Draft Assessment Order within period of 3 months from date of receipt of this order. No cost. Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1.The Assistant Commissioner of Income Tax
Corporate Range-1
4th Floor, Aayakar Bhawan, Wanaparthy Block
121, Mahatma Gandhi Road
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Transfer Pricing Officer-1(2)
Room No.505, Tower-1, BSNL Building
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+1cc to M/s.Subbaraya Aiyar, Advocate (SR No.27320)

+1cc to M/s.Hema Muralikrishna, Advocate (SR No.27317)

W.P.No.32751 of 2017
and W.M.P.No.36089 of 2017

CP (CO)

PR (05/08/2021)