

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.01.2021  
PRONOUNCED ON : 02.06.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.30606 of 2018  
and M.P.Nos.12512 of 2019 & 35686 of 2018

M/s.Bonfiglioli Transmission Private Limited,  
Represented by its Authorised Signatory  
Mr.Balaji G.A.  
Plot No.AC7-AC11, SIDCO Industrial Estate,  
Thirumudivakkam, Chennai - 600 044.

..Petitioner

vs

1.The Deputy Commissioner of Income Tax,  
Transfer Pricing Officer - 1(1),  
5<sup>th</sup> Floor, Tower - 1, BSNL Building,  
No.16, Greams Road, Chennai - 600 006.

2.The Deputy Commissioner of Income Tax,  
Corporate Circle 1 (2),  
Chennai.

..Respondents

Prayer: Writ petition filed under Article 226 of the  
Constitution of India praying to issue a writ of Certiorari, to  
call for the records comprised in the impugned order bearing  
File No.B-105/TPO-1(1)/A.Y.2015-16 dated October 30, 2018 made  
under Section 92CA(3) of the Income Tax Act, 1961 for the  
Assessment Year 2015-16 on the file of the First Respondent,  
quash the same.

For Petitioner : Mr.N.V.Balaji

For Respondents : M/s.Hema Muralikrishnan  
Senior Standing Counsel

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O R D E R

The petitioner is aggrieved by the impugned order dated  
13.10.2018 passed by the 1<sup>st</sup> respondent Deputy Commissioner of  
Income Tax, Transfer Pricing Officer for the assessment year  
2015-16.

2.By the impugned order, it has been concluded that Arm's  
Length Price (ALP) towards Corporate Service Fee was considered

as "Nil" thereby resulting in a downward adjustment of Rs.5,83,25,839/- towards corporate support service fees.

3.By the impugned order, the 1<sup>st</sup> respondent has concluded that the petitioner had failed to substantiate receipt of service and demonstrate the economic and commercial benefits on account of the payments made to its associated enterprise.

4.The main contention of the petitioner in this writ petition is that despite a precedent on the very same issue for the assessment year 2013-14 vide order dated 14.5.2018 in ITA.No.2977/CHNY/2017, the 1<sup>st</sup> respondent has passed the impugned order dated 30.8.2018 under Section 92 CA(3) of the Income Tax Act, 1961.

5. The learned counsel for the petitioner submits that an identical issue came up for consideration before the Tribunal in the above case in ITA.No.2977/CHNY/2017. It is submitted that the Tribunal vide order dated 14.5.2018 in ITA.No.2977/CHNU/2017 answered the issue in favour of the petitioner with the following observation:-

II. Application of TNMM:

3. The lower authorities have, in the facts and circumstances of the case and in law, erred in incorrectly computing the operating margin of the appellant and those of the comparable companies selected for benchmarking purposes.

4. The lower authorities have, in the facts and circumstances of the case and in law, erred in choosing certain comparable companies despite such companies failing the legally required parameter such as, but not limited to, functional dissimilarity, quantitative filters and non-availability of data.

5. The lower authorities have, in the facts and circumstances of the case and in law, erred in rejecting certain companies selected by the appellant, on incorrect parameters.

6. The lower authorities have, in the facts and circumstances of the case and in law, erred in not admitting the comparability adjustments considered by the appellant, including but not limited to, adjustment for idle capacity.

7. The lower authorities have, in the facts and circumstances of the case, erred in not considering the supporting information and

supplemental analysis regarding to the economic circumstances and market conditions experienced by the appellant; such as to the corroboration of capacity utilization based on manufacturing sector wide information (Reserved Bank of India's Report), the analysis of profits in connection with subsequent years, among others.

8. the lower authorities have, in the facts and circumstances of the case and in law, erred in disregarding the arm's length analysis prepared by the appellant on the basis of cash profit margins, based on incorrect parameters.

9. the lower authorities have, in the facts and circumstances of the case and in law, erred in disregarding the financial information and analysis provided by the appellant, including but not limited to the segmented financial information, and the internal TNMM analysis submitted by the appellant.

10. The lower authorities have, in the facts and circumstances, erred in disregarding the relevance of the use of multiple-year data to iron but the differential impact of business cycle between the appellant and the comparable companies.

III. Considering corporate services availed from Aes as 'NIL'

11. The lower authorities have, in the facts and circumstances of the case and in law, erred in not accepting that the corporate services availed by the appellant are closely linked to the appellant's business and inherent to the centralization of functions that normally occurs within Multinational Groups (such as the case of the Bongfiglioli Group) and have erred in not considering the aggregation approach adopted by the appellant in its TP documentation.

12. The lower authorities have, in the facts and circumstances of the case and in law, erred in considering the value of corporate services availed as 'Nil' purportedly under the CUP method, without bringing on record any benchmarking exercise using comparable companies and as such exceeded their jurisdiction.

13. The lower authorities have, in the facts and circumstances of the case and in law, erred in disregarding the evidence provided by the appellant for availing corporate services and has erred in concluding that no tangible/direct benefits accrued to the appellant from such services.

6.The Tribunal has considered the same and the necessary issue in para 10 is as follows:-

10..... The services referred under 'Corporate Services' are intrinsically linked to its manufacturing and sales activity. These two services cannot be separately demarcated. Corporate services are the services rendered, which has helped the assessee in generating the business in respect of marketing and trading. This being so, in view of the decision of Hon'ble Delhi High Court in the case of CIT vs. EKL Appliances Ltd., referred to supra, the id. Assessing Officer is directed to allow the assessee's claim of the Corporate Services expenditure incurred by assessee. Consequently, Grounds Nos.11 to 13 of the assessee stand allowed."

7. It is submitted that the impugned order dated 30.10.2018 passed by the first respondent viz., Deputy Commissioner of Income Tax Transfer Price Officer (TPO) was contrary to the decision of the Hon'ble Supreme court in Motor India Ltd., vs. DCIT (2018) 96 taxmann.com 497 (Madras.) and another decision of the Hon'ble Supreme Court in Motor India Ltd., vs. DCIT (2020) 119 Tamann.com 302.

8.The learned counsel for the petitioner further submits that in the impugned order, there is no whisper about the order of the Tribunal dated 14.05.2018, for the Assessment Year 2013-14 and therefore the impugned order passed under Section 92 C A of the Income Tax Act, 1961 was liable to be quashed.

9. The learned counsel for the petitioner also submits that the respondent was only concerned with the value of services provided to an associated enterprise and the authority to determine as to whether there was a necessity for utilization of such service or not was only vested with the Assessing Officer and therefore the order passed by the first respondent was clearly without jurisdiction and therefore was liable to be set aside.

10. For the failure to follow the order passed for the Assessment Year 2013-14 during the Assessment Year 2015-16 by the Tribunal, while passing the impugned order, the decisions of the Courts in the following cases were invited:-

i) Union of India vs. Kamalakshi Finance Corporation Ltd., (1992) 1992 taxmann.com 16(SC)

ii) East India Commercial Co., Ltd., Calcutta vs. Collector of Customs, Calcutta, (1983) 13 ELT 1342 (SC)

iii) HDFC Bank Ltd., vs. Deputy Commissioner of Income Tax 2(3) Mumbai, (2016) 67 taxmann.com 42 Bombay

iv) Vodafone India Services Pvt. Ltd., vs. Union of India through the Secretary, Ministry of Finance & Others, (2014) Taxcorp(DT) 58662 (BOMBAY)

v) Voest-Alpine Ind. GmbH vs. Income Tax Officer, (2002) 122 Taxman 413 (Calcutta)

11. It is therefore submitted that as a lower authority of the Income Tax Department, the 1<sup>st</sup> respondent was bound by order dated 14.5.2018 in ITA.No.2977/CHNY/2017 of the Tribunal.

12. The learned counsel for the petitioner submits that as per the decision of the Supreme Court in Union of India vs. Kamalakshi Finance Corporation Ltd., (1992) 1992 taxmann.com 16 (SC= 1995(91) ELT 433 (SC), the principles of judicial discipline requires that the orders of the higher appellate authority should be followed unreservedly by the subordinate authorities.

13. It is further submitted that merely because the order of the appellate authority was not acceptable to the Department itself was held to be an objectionable phrase and was the subject matter of an appeal can furnish no ground for not following it unless its operation has been stayed or suspended by a competent Court.

14. It is submitted that though the order of the Tribunal has now been appealed, it is no ground for not following the same in absence of the stay by the Court.

15. It is further submitted that the 1<sup>st</sup> respondent Transfer Pricing Officer is only concerned with the determination of the value of the service and the payments made for the purpose of computation of the Income Tax and was really not concerned with the issue as to whether the service for which amounts were paid necessary or unnecessary. It is submitted that these are to be

determined only by the Assessing Officer and not by the 1<sup>st</sup> respondent Transfer Pricing Officer.

16. Defending the impugned order passed by the respondent, the learned counsel for the IT Department submits that the writ petition is liable to be dismissed on the ground of alternate remedy. It is submitted that the statutory remedy against the impugned order is available inasmuch as consequent the impugned order of the first respondent, the 2<sup>nd</sup> respondent will pass a draft assessment order incorporating the content of the order of the 1<sup>st</sup> respondent/Transfer Pricing Officer and the petitioner can approach the Dispute Resolution Panel against the same under Section 144C of the Income Tax Act, 1961. Only after disposal of the appeal of the petition or case by the Dispute Resolution Panel and after giving the order of the Dispute Resolution Panel, a draft order of the 2<sup>nd</sup> respondent becomes the final assessment order.

17. It is further submitted that it is open to the petitioner to file an appeal before the Income Tax Appeal after receiving final assessment order passed by the 2<sup>nd</sup> respondent. It is therefore submitted that the writ petition is liable to be dismissed.

18. As far as the decision of the Income Tax Appellate Tribunal in its order dated 14.05.2018 for the assessment year 2013-14 is concerned, the learned counsel for the IT department submits that these an order of the Dispute Resolution Panel dated 27.09.2017 as a consequence of Transfer Pricing Officer passed under Section 92 CA dated 28.10.2016 for the same assessment order came to be challenged. It has been categorically stated in Section 92 CA order that the findings and discussions made in the order was appealable only in respect of reference received for the Assessment Year 2013-14 and not for subsequent Assessment years.

19. The learned counsel for the respondent also referred to the impugned order dated 30.10.2018 of the 1<sup>st</sup> respondent wherein also it is stated that the order impugned was only with reference to the assessment year 2015-16 and not for the subsequent assessment year. It is further submitted that the argument of the learned counsel for the petitioner that the order of the respondent can be revised under Section 263 of the Act cannot be countenanced as Section 263 applies only against an order passed by the Assessing Officer.

20. By way of rejoinder, the learned counsel for the petitioner submits that the respondents cannot improvise the case in the counter. In this connection, a reference was made to the decision of the Hon'ble Supreme Court in Mohinder Singh Gill vs. Chief Election Officer (1978) 1 SCC 405, wherein in para 8 it has been held that the orders are not like old wine

becoming better as they grow older. Para 8 which was relied reads as under:-

8. By way of re-joinder to the submission of the learned counsel for the petitioner, the respondent drew my attention to the counter of the respondent, wherein it held as under :-

The learned senior counsel submitted that the so-called ' reasons to believe stated in the impugned proceedings are sought to be supplemented by new reasons stated in the counter affidavit which according to the learned senior counsel is not permissible in view of the law laid down by the Hon'ble Supreme Court of India. The Hon'ble Supreme Court in the case of Mohinder Singh Gill vs. Chief Election Commission (1978) 1 SCC 405 has laid down in paragraph 8 as follows:-

The second equally relevant matter is that when a statutory functionary makes an order dated on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J., in Commissioner of Police vs. Gordhandas Bhanji AIR 1952 SC 16.

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to effect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language in the order itself.

Orders are not like old wine becoming better as they grow older".

21. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondent. Payments made during each of the assessment year may differ. Therefore, the orders passed by the Tribunal in respect of reference made against an order passed under Section 92C(A)

for a particular assessment year is not binding for the subsequent assessment years. The decision of the Supreme Court in Union of India vs. Kamalakshi Finance Corporation Ltd., (1992) 1992 taxmann.com 16 cannot be quoted as an authority to quash the impugned order of the 1<sup>st</sup> respondent. There the order of the Assistant Collector's was set aside by the Appellate Collector and the matter was remitted back to the Assistant Collector to pass a speaking order.

22. Instead of following the said order of the Appellate Collector, there the Assistant Collector reiterated the order which had been set aside. It was in that context the decision of the Hon'ble Supreme Court made the above observations.

23. In this case, the assessment years are different and the transactions are different and the nature of payments are different. During the assessment year 2013-14 the issue was pertaining to certain payments made to the associated enterprises alone. Whereas the impugned order there are indications that there are adjustments of payments made for the services received and services provided to the associated enterprises. Therefore, it cannot be said that the said order of the Tribunal was binding for the assessment year in question.

24. That apart, the challenge to the impugned order is premature. The petitioner has options under the Act to approach the Dispute Resolution Panel and if such orders are passed the order, liberty is always available by way of statutory appeal before the income tax appellate Tribunal.

25. This view is fortified by the decision of the Division Bench of this Court in Hyundai Motor India Ltd., vs. Deputy Commissioner of Income Tax, (2018) 96 taxmann.com 497, wherein it was held as under:

23. Considering the above Judgments of the Apex Court, this Court is of an opinion that the writ petition has not established that there is a violation of principles of natural justice nor there is an error apparent on record. No exceptional circumstances have been established in the present writ petition. If at all, the writ petitioner is aggrieved in respect of the fixing of average rate of royalty payment, then it is left open to them to approach the Disputes Resolution Panel and thereafter, if they are further aggrieved in respect of the fixing of average rate of royalty payment, then they are liberty to approach the ITAT constituted for the purpose of adjudicating the issues. This being the efficacious remedy available under the statute

for the writ petitioner, there is no reason to entertain a writ petition under Article 226 of the Constitution of India , so as to adjudicate the merits and the demerits now raised before this Court in the present writ petition in respect of fixing of average rate of royalty payment.

26.The leaned counsel for the respondent has relied on the decision of the Hundai Motor India Ltd., vs. Deputy Commissioner of Income Tax, (2020) 119 taxmann.com 302, (Madras), wherein it was the appeal of the assessee was dismissed and held as under:-

10. In the instant case, the only question which arises for our consideration and decision is whether the High Court was justified in interfering with the order passed by the Assessing Authority under Section 148 of the Act in exercise of its jurisdiction under Article 226 when an equally efficacious alternate remedy was available to the assessee under the Act".

" 16. Statutory remedy:-

When in a fiscal statute, hierarchy of remedy of appeals are provided, the party has to exhaust them instead of seeking relief by invoking the jurisdiction of this Court under Article 226 of the Constitution of India and as held in Commissioner of Income Tax and Others vs. Chhabil Dass Agarwal, (2014) 1 SCC (603), the Court will have to take into consideration of the legislative intent enunciated in the enactment in such cases. It is not as if the alternative remedy is neither efficacious nor effective".

27. Therefore, I am not convinced with the present writ petition. Accordingly, this writ petition is dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

-s/d-

Assistant Registrar (CO)

True Copy

Sub-Assistant Registrar

kkd

To

1.The Deputy Commissioner of Income Tax,  
Transfer Pricing Officer - 1(1),  
5<sup>th</sup> Floor, Tower - 1, BSNL Building,  
No.16, Greams Road, Chennai - 600 006.

2.The Deputy Commissioner of Income Tax,  
Corporate Circle 1 (2),  
Chennai.

+1 CC to M/s. Hema Muralikrishnan, Advocate sr 27374

+1 CC to Mr.N.V. Balaji, Advocate sr 27377.

W.P.No.30606 of 2018  
and M.P.Nos.12512 of 2019  
& 35686 of 2018

RP(CO)  
SP(05/07/2021)



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