IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.11.2022

CORAM:

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN
AND
THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.A.No.2421 of 2022 and
C.M.P.No.18726 of 2022

M/s.KOSTAL India Private Limited
Plot No.11A, SIPCOT Industrial Complex,
Ranipet, Tamil Nadu- 632 403
Represented by its Power of Attorney holder,
Mr.Suresh Sthanu
residing at No.35/part, May Flower,
Thiruvalam Road, Karnampet,
Katpadi- 632 519. ... Appellant

-vs-

1. The Dispute Resolution Panel-2,
   7th Floor, Income Tax Office,
   BMTC Building, 80 Feet Road
   Koramangala,
   Bangalore – 580 095.

2. The Deputy Commissioner of Income-tax (TPO)
   2(1), 5th Floor, BSNL Building, Tower-1,
   No.16, Greams Road, Chennai- 600 006.

3. The Assistant Commissioner of Income-tax,
   Circle-1,
   Vellore- 632 001.

4. The Principal Commissioner of Income Tax-6,
121, Mahatma Gandhi Road,
Chennai 600 034.

5. The Commissioner of Income Tax (TP),
121, Mahatma Gandhi Road,
Chennai 600 034. ... Respondents

Prayer : Writ Appeal filed under Clause 15 of Letters Patent Act, to set aside the order dated 16.09.2020 passed by this Court in W.P.No.32225 of 2016 and direct the DRP/TPO for fresh determination of the Transfer Pricing issue and allow the Writ Appeal.

For Appellant : Mr. G.Kalyan Jhabakh

For Respondent : Mr.Prabhu Mukunth Arunkumar

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JUDGMENT

This Writ Appeal has been filed challenging the order of the learned Single Judge dated 16.09.2020 passed in W.P.No.32225/2016, in dismissing the Writ Petition filed by the Appellant.

2. The Writ Petitioner is aggrieved by the Impugned Order of the learned Single Judge inasmuch as the order which was impugned in the

Writ Petition was passed by the 1st Respondent was in gross violation of the Principles of Natural Justice.

3. The learned counsel appearing for the Appellant submitted that even though in the counter affidavit filed before the Writ Court the Respondents herein has admitted in paragraph 5 that an opportunity of being heard under Section 144C(11) was given to the Appellant vide order sheet entry dated 22.08.2016, the 1st Respondent Dispute Resolution Panel (DRP) proceeded to pass final order on the very next date i.e., on 23.08.2016.

4. The Impugned Order is defended by the learned counsel for the learned counsel for the Respondents by stating that the order passed by the learned Single Judge is well reasoned one and requires no interference. It is submitted that the learned Single Judge has extracted the order sheets of the 1st Respondent Dispute Resolution Panel on 01.08.2016 and 22.08.2016, which clearly shows that the case was partly heard as on 01.08.2016 and thereafter adjourned to 22.08.2016 to provide detailed working of segmental data and annuals of the comparables by 10.08.2016 and therefore it is clear that the case was

heard after getting necessary documents. In this connection a reference is made to paragraph 9.0 of the order of the 1st Respondent which reads as under:

> ***"9.0. Objection no.14***
> *The TPO has incorrectly quantified the adjustment to the Arm's length price by considering the proportion of gross sales of the AE segment to the net sales of the entity.*
>
> ***9.1****. During hearings before this Panel, the assessee submitted that it does not want to press the above objection. However, the assessee was asked to make its submissions as to why the proportionate adjustment done by the TPO should not be rejected and why the adjustment should not be made on the basis of entire sales. This was submitted by the assessee that it had not raised any such objection and the proportionate adjustment done by the TPO was the correct method of making adjustment in a case where sales were to both AE as well as non AE. This was submitted that the sales to non AE are not international transactions and as such the same need to be excluded while working out ALP.*
> ***9.2****. The submissions of the assessee on this issue have duly been considered. The assessee is selling its products to AE as well as non AE. The profits made from non AE is controlled by the AEs, as discussed supra, as the assessee is not free to charge its own price from its non AE customers. Thus entire business of the assessee is impacted by the decision of the AEs. The AE of the assessee has shifted its burden of losses from non AE segment to the assessee. Thus what is required to be worked out for ALP is the impact on entire profits. Further, as discussed supra in para 3.4 to 3.6, the sales to non AE are also deemed to be international transactions as per provisions of section 92B(2) of the*

Act as there exists a prior agreement in relation to the sales transactions between the assessee and its non AE customers and the terms of sales to these non AE customers is determined in substance by the AEs and the assessee doesn't has any say in the same. Considering above, no proportionate adjustment can be permitted and the adjustment for ALP needs to be worked out on the entire sales of the assessee. The TPO is directed to rework the adjustment on the more sales without any reduction on account of sales to non AEs.

10.0 *Considering above, the objections of the assessee are partly accepted. The directions of this Panel, as per the discussions above, are hereby communicated to the assessee and the departmental authorities concerned as per the provisions of section 144(C) of IT Act.*

5. That apart it is submitted that as per provisions of Section 144C as inserted in the Income Tax Act by Finance Act, 2009 before the Dispute Resolution Panel (DRP), an Assessee can file objections against the variations made by an Assessing Officer and on such objections being filed, the DRP is expected to consider the draft assessment order, objections of the assessee, evidence/records that may be furnished by the assessee, reports if any called for from the Assessing Officer/Valuation Officer/TPO and issue directions, as it thinks fit, after giving opportunity of hearing to the assessee, to enable the assessing officer to complete the assessment. He further submitted that in this case, the Appellant had failed to produce any records and that the case was disposed of after

which it was partly heard on 01.08.2016.

6. We have considered the submissions of the learned counsel for the Appellant and the learned counsel for the Respondents.

7. We are of the view that the order of the learned Single Judge is well reasoned and requires no interference, particularly in the light of the fact that Appellant has not produced documents on 01.08.2016, despite opportunity of being given to the Petitioner. The Appellant has an alternate remedy against the Impugned Order of the 1st Respondent. Therefore, the Petitioner cannot invoke jurisdiction of this Court under Article 226 of the Constitution of India.

8. We are of the view that the Writ Petition was rightly dismissed by the learned Single Judge and therefore the present Appeal also liable to be dismissed.

9. Accordingly, this Writ Appeal stands dismissed. However, it is open to the Appellant to work out his remedy against the impugned order before the Appellate Tribunal in the manner known to law, by filing an Appeal, within a period of thirty days from the date of receipt of a copy

of this order. No costs. Consequently, connected Miscellaneous Petition is closed.

[S.V.N., J.,] **[C.S.N., J]**
29.11.2022

Index: Yes / No
Internet: Yes / No
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