* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 15 February 2024**
Judgment pronounced on: 20 May 2024

\+ W.P.(C) 2322/2021

NEW DELHI TELEVISION LIMITED ..... Petitioner

Through: Mr. Sachit Jolly, Ms. Disha Jham, Ms. Soumya Singh & Mr. Devansh Jain, Advs.

Versus

DISPUTE RESOLUTION PANEL 2 & ANR...... Respondents

Through: Mr. Zoheb Hossain, SSC with Mr. Sanjeev Menon, JSC & Mr. Vivek Gurnani, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

J U D G M E N T

YASHWANT VARMA, J.

1. The writ petitioner impugns the order of the **Dispute Resolution Panel**[1] dated 29 January 2021 and which has negated its objections to the draft assessment order framed on 31 March 2013. The said draft assessment order came to be made pursuant to an order made by the **Transfer Pricing Officer**[2] on 29 October 2019. The petitioner appears to have contended before the DRP that the reference to the TPO on 27

[1] DRP
[2] TPO

December 2018 essentially amounted to a second reference made to purportedly give effect to the order of the **Income Tax Appellate Tribunal**[3] dated 14 July 2017. This was so urged since the TPO had earlier framed an order dated 17 October 2017 to give effect to the aforenoted order of the ITAT.

2. Although the TPO had framed an order on 17 October 2017, the record would reflect that no corresponding order as envisaged under Section 92CA(4) of the **Income Tax Act, 1961**[4] was framed. The petitioner had urged for the consideration of the DRP that the reference made on 27 December 2018 and the consequential order dated 29 October 2019 framed by the TPO seeking to give effect to the original order of the ITAT dated 14 July 2017 were clearly barred by the prescription of limitation as embodied in Section 153(3) of the Act.

3. The petitioners had argued that the period of nine months when computed from the passing of the order of the ITAT would have come to an end on 31 December 2018. It was in the aforesaid light that it was urged that there was no authority which inhered in the **Assessing Officer**[5] to pass further orders referable to Section 92CA(4) of the Act.

4. The DRP, however, refused to entertain the objection of limitation noting that Section 144C(8) restricts its jurisdiction to confirming, reducing or enhancing the variations proposed in the draft order. It essentially appears to have taken the position that a jurisdictional challenge when raised by way of an objection under

[3] ITAT
[4] Act
[5] AO

Section 144C(2) of the Act could not be entertained by it. It is aggrieved by the aforesaid action that the instant writ petition has come to be instituted.

5. Before proceeding to notice the submissions which were addressed by Mr. Jolly, learned counsel appearing for the petitioner and Mr. Hossain, learned counsel who represented the respondents, we deem it apposite to take note of the following essential and undisputed facts.

6. The petitioner filed its Return of Income for **Assessment Year**[6] 2009-10 on 30 September 2009 declaring a loss of INR 64 crores. Taking note of certain international transactions, the AO after obtaining requisite approvals is stated to have made a reference to the TPO. The TPO proceeded to determine the transfer pricing adjustments liable to be made in terms of an order dated 30 January 2013.

7. As would be evident from Para 22 of that order, it called upon the AO to make the following adjustments:-

> "**22. Summary: Following adjustments are required to be made:**
> Adjustment on A/c of Business Support Segment: Rs.1,53,73,846/-
> Adjustment on A/c of Corporate Guarantee: Rs.10,87,56,000/-
> **TOTAL ADJUSTMENT- Rs.12,41,29,846/-**"

8. Based on the above, a draft assessment order came to be issued on 30 March 2013 by the AO in accordance with Section 144C of the Act. Aggrieved by the aforesaid adjustments, the petitioner filed objections before the DRP on 31 December 2013. The DRP disposed of

[6] AY

those objections by an order of 31 December 2013 according partial relief to the petitioner. This led to a final assessment order coming to be drawn on 21 February 2014. In terms of that final assessment order, the total income of the assessee came to be computed in the following terms:-

> "10. With these remarks, the total income of the assesse company is computed as follows:-

"Total loss (as declared by the assesse)	Rs. (-) 64,83,91,422
Add:-	
(i) Disallowance u/s 14A [as per para 5]	Rs. 78,40,990
(ii) Transfer pricing adjustments u/s 92CA(3) (as per para 7)	Rs.5,09,65,629
(iii)Unexplained Money u/s 69A [as per para 8)	Rs.6,42,54,22,000
(iv) Unexplained unsecured loans u/s 68 (as per para 9)	Rs. 254,75,00,000
Total income	**Rs. 838,33,37,197**
Total Income rounded off	**Rs. 838,33,37,197"**

9. Both the respondents as well as the petitioner herein aggrieved by the final assessment order proceeded to institute appeals before the ITAT. The ITAT upon consideration of the challenges so made, by a final order dated 14 July 2017 confirmed the additions made by the AO under Section 69A of the Act. The additions on account of disallowance under Section 14A of the Act as well as those made with the reference to Section 68 of the Act on account of unexplained secured loans were set aside and the matter remitted to the AO for fresh adjudication. Insofar as the transfer pricing adjustments were

concerned, those were set aside and the matter remitted to the TPO. It becomes pertinent to note that the ITAT while dealing with the adjustment with respect to business support services observed as follows:-

> "132. Ground No. 12, 13 of the appeal are with respect to computation of arm's length price with respect to the business support services where the ALP was determined an adjustment of Rs. 7463229/- was made. The contention of the assessee is that price received was Rs. 74687177/- is taken instead of Rs. 75277881/-. The Id AR submitted that assessee has been denied the benefit of working capital benefit considering the adjustment. He further submitted that the objection were raised before the ld Dispute Resolution Panel, however, same were not considered by the ld DRP.
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> 133. The ld DR fairly agreed that if the assessee is entitled for working capital adjustment then the Id Transfer Pricing Officer may be given an opportunity to examine the claim of the assessee and if same is found in accordance with the law then it may be granted.
>
> 134. We have carefully considered the rival contentions. The only claim of the assessee is to grant assessee the adjustment on account of working capital. The d DR has also fairly agreed to that. Therefore, we set aside ground Nos. 12 and 13 of the appeal of the assessee back to the file of the ld TPO with a direction to the assessee to submit the details of working capital adjustment to the ld Transfer Pricing Officer and if the ld TPO find it after examination in accordance with the law then same may be granted to the assessee. In the result ground Ns. 12 and 13 of the cross objection are allowed with above direction."

10. The petitioner also appears to have questioned the characterization of certain assurances amounting to a corporate guarantee and thus falling in the category of an international transaction. It appears that an identical issue in the case of the writ petitioner itself was at that time pending consideration before a Special Bench of the ITAT. In view of the aforesaid, the ITAT while disposing

of the appeals on 14 July 2017 framed the following directions insofar as the subject of corporate guarantee was concerned:-

> "135. Ground No. 14 of the appeal is with regard to an addition of Rs. 43502400/- in respect of alleged international transaction of provision of corporate guarantee on the ground that appellant has been compensated from providing such alleged guarantee. The assessee has also challenged that merely giving an undertaking to provide guarantee on behalf of its associated enterprise does not amount to providing any guarantee.
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> 136. Both the parties agreed that whether corporate guarantee is an international transaction or not is a matter pending before the Special Bench of the Tribunal. In view of this both the parties requested to setting aside this ground of appeal to file of TPO with a direction to decide after the order of the Special Bench.
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> 137. We have carefully considered the request of both the parties, which is fair and proper. As the matter is pending before the special bench it would also not be proper for us to decide the issue now. in view of this we set aside this ground of cross objection of the assessee to the file of the ld TPO with a direction to decide the issue after the decision of the Special Bench of tribunal. In the result ground No. 14 of the CO is allowed with above direction."

11. Pursuant to the aforesaid order, the AO on 26 July 2017 proceeded to draw an appeal effect order dealing with the subjects and heads which were remitted for its consideration. In terms of this order, the tax demand of the writ petitioner was revised to INR 428,93,32,536/-. The said order of the AO came to be challenged by the writ petitioner by way of W.P.(C) 6483 of 2017 and on which the Court by an order of 01 August 2017, upon finding that the petitioners had been able to establish a prima facie case directed that no coercive steps would be taken pursuant to the demands which had been raised. The said writ petition continues to remain pending on the board of the Court.

12. In the meanwhile and more particularly on 23 August 2017, the Special Bench answered the Reference by observing as under:-

> "The Ld. AR submitted at the outset that the question proposed for consideration and decision before this special bench does not arise in the present appeal. He submitted that the assessee only gave an undertaking and not a corporate guarantee for the Bonds issued by its Associated Enterprise. To fortify the point, he referred to certain clauses of the Agreement. This was Opposed by the Ld. DR.
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> We have extensively heard both the sides. in our opinion, the assessee only incurred an obligation by giving an undertaking, which is short of guarantee. As such, the question before the special bench - as to whether the giving of corporate guarantee is an international transaction? - does not arise in the instant appeal. This reference is accordingly returned to be placed before the Hon'ble President for taking an appropriate decision in this regard."

13. Pursuant to the aforesaid opinion rendered by the Special Bench, the appeal itself appears to have been directed to be placed before the appropriate Bench of the ITAT for disposal in terms of the conclusions as rendered. It would be pertinent to recall that the ITAT on 14 July 2017 had while dealing with the subject of corporate guarantee remanded the issue for the consideration of the TPO with the caveat that the said question would await the decision to be rendered by the Special Bench in the pending reference.

14. However, on 22 August 2017 and 05 September 2017 as well as 15 September 2017, the TPO issued notices for initiating the process of hearing on matters which had been remitted for its consideration by the ITAT. The petitioner is stated to have filed its replies in response to the aforesaid notices.

15. It also becomes relevant to note that the petitioner aggrieved by

the judgment of the ITAT dated 14 July 2017 and insofar as it had affirmed the additions made with reference to Section 69A of the Act, filed an appeal before this Court which stands registered as ITA No.866/2017.

16. On 17 October 2017, the TPO proceeded to pass an order in purported compliance with the judgment of the ITAT dated 14 July 2017. Although in terms of this order, transfer pricing adjustments were computed at INR 509.50 crores, the TPO observed that insofar as the issue of corporate guarantee is concerned, the same would have to await final orders being passed by the ITAT. That reservation appears to have been necessitated by the fact that although the Special Bench had rendered its opinion on 23 August 2017, the appeal of the petitioner had till then not been formally disposed of by the Bench of the ITAT.

17. Subsequently, and on 02 January 2018, the respondents too proceeded to mount a challenge to the original order of the ITAT dated 14 July 2017 by preferring appeals before this Court which stand numbered as ITA Nos. 136/2018 and 137/2018. Both the appeals of the petitioners as well as the Revenue have since then been admitted and presently remain pending in the list of Regulars.

18. Although and as noticed hereinabove, the TPO had proceeded to draw an order dated 17 October 2017 to give effect to the order of the ITAT dated 14 July 2017, the AO on 27 December 2018 drew up a fresh reference for the consideration of the TPO. Since the terms of that reference would have some material bearing on the challenge which stands raised, we deem it apposite to extract the same hereinbelow:-

"2. Pursuant to the direction of Dispute Resolution Panel ('**DRP**") for AY 2009-10, final order was passed u/s 144C(13) read with Section 144 of the Act on 21.02.2014, wherein the following additions were made to the taxable income of the assesse.

Total loss (as declared by the assesse) (**in INR)**	(-)64,83,91,422
Add :-	
(i) Disallowance u/s 14A	78,40,990
(ii) Transfer pricing adjustment u/s 92CA(3)	5,09,65,629
(iii) Unexplained Money u/s 69A	642,54,22,000
(iv) Unexplained unsecured loan u/s 68	254,75,00,000
Total Income	**838,33,37,197**

3. The assessee filed appeal against the assessment order dated 21.02.2014 before the Hon'ble Income Tax Appellate Tribunal ("**ITAT**") which vide order dated 14.07.2017 passed in ITAs No. 1212 & 2658/Del/2014 and CO No. 233/Del/2014, decided as under:

Additions made in Final Order	Decision of ITAT
Add :-	
(i) Disallowance u/s 14A	Set aside to AO
(ii) Transfer pricing adjustment u/s 92CA(3)	Set aside to TPO
(iii) Unexplained Money u/s 69A	Confirmed
(iv) Unexplained unsecured loan u/s 68	Set aside to AO

4. Therefore, in accordance with para 3.5 of Instruction No. 3 of 2016 dated 10.03.2016 issued by the CBDT, the case is necessarily to be referred to the TPO u/s 92CA(1) of the Act. The relevant para of the said Instruction is reproduced below:-

> "3.5 In addition to the cases to be referred as per paragraph 3.2 and 3.3, a case involving a transfer pricing adjustment in an earlier assessment year that has been fully or partially set-aside by the ITAT, High Court or Supreme Court on the issue of the said adjustment shall invariably be referred to the TPO for determination of the ALP."

5. In view of the above, it is required to refer this case to Transfer Pricing Officer for determination of Arm's Length Price as per the provisions of section 92C of the Income-tax Act.1961 in view of the Instruction no. 3/2016 dated 10.03.2016. Accordingly, necessary approval has been obtained from Pr.CIT-6 in this regard vide order F.No. PCIT-06/2018- 19/2344 dated 27.12.2018 (copy of approval is enclosed herewith).

6. Therefore, this case is being referred to you for necessary action at your end as per the provisions of Section 92C of the Income-tax Act, 1961."

19. Based on the aforesaid reference, the TPO proceeded to draw proceedings afresh and in purported compliance of the order of the ITAT dated 14 July 2017. The TPO in terms of that order proceeded to frame the following directions:-

"In view of the order of the Hon'ble ITAT, the revised transfer pricing adjustment is as below-

Segments	Adjustment(Rs.)
Adjustment on A/c of Business Support Segment	74,76,325
Adjustment on A/c of Corporate Guarantee (No change, effect will be given on receipt of ITAT's final order on this issue)	4, 35,02,400
TOTAL	**5,09,78,725**

20. Acting in terms of the aforesaid, the AO proceeded to draw a draft order on 27 December 2019. It was in respect of this order that the petitioner preferred objections before the DRP on 24 January 2020. One of the principal grounds which was taken in these objections was with respect to the legality of the subsequent reference made by the AO, the adjudication undertaken by the TPO and the framing of the consequential draft assessment order being barred by limitation by virtue of the provisions contained in Section 153 of the Act.

21. In the meanwhile and during the pendency of those objections as made to the DRP, the appeal of the petitioner with respect of corporate guarantee came to be disposed of by a Bench of the ITAT on 16 June 2020. That order of the ITAT presently forms subject matter of challenge in ITA No. 204/2020.

22. The petitioner on 06 January 2021 moved the DRP requesting it

to adjourn consideration on the aspect of corporate guarantee since the same was pending before this Court in the appeal aforenoted. It also appears to have addressed a request for being provided copies of the reference that may have been made by the AO under Section 92CA(1) of the Act along with any other supportive material. The aforesaid request appears to have been based on the petitioner taking the position that since the ITAT had directly made a reference to the TPO, the need for a separate and independent reference in terms of Section 92CA(1) of the Act being clearly obviated.

23. Thereafter, the impugned order came to be passed by the DRP on 29 May 2021. Insofar as the aspect of limitation and its jurisdiction to deal with the same is concerned, the DRP held as follows:-

> "2.3 The submissions have been perused along with the materials available on record. Though the TP issues were directly set aside by the Hon'ble ITAT to the TPO, in addition to corporate tax issues which were set aside to the AO, the draft assessment order will be passed by the Assessing Officer alone and not by the TPO. Upon reference to the TPO as recorded in Para 7 of the draft assessment order pursuant to approval by PCIT-6, Delhi, the limitation in this case therefore stood extended by one year. Under sub-section (4) of section 153 of the Act, in the event of any reference made to the TPO, the limitation mentioned in sub-section (3) of section 153 stands extended by another one year. To the extent that the said provision has been followed in this case, there is no infirmity in procedure. However, in terms of the provisions of sub-section (8) of section 144C of the Act, the ORP can only confirm, reduce or enhance the variation proposed in the draft order. It cannot give directions in respect of legality or otherwise of the proceedings as it is beyond the scope of DRP's powers under the Act / DRP Rules, 2009, In view of the same, the objection of the assessee under this ground is dismissed."

24. Assailing the aforesaid Mr. Jolly, learned counsel appearing in support of the writ petition, at the outset, submitted that as would be evident from a reading of the order of the ITAT dated 14 July 2017, the

reference to the TPO was with the consent of parties. Mr. Jolly also underlined the undisputed fact that the respondents had not challenged the order dated 14 July 2017 insofar as it pertained to the reference made to the TPO and thus consequently being disentitled to assail or question the correctness of the procedure as adopted by the ITAT in making that reference.

25. It was further highlighted by Mr. Jolly that although the respondents on 02 January 2018 preferred appeals against the order dated 14 July 2017 of the ITAT, those appeals stand confined to the merits of the various issues which came to be decided. Even in those appeals Mr. Jolly submitted, the respondents do not assail or question the correctness of the action of the ITAT in remitting the matter to the TPO.

26. Mr. Jolly submitted that as is well settled in law, neither the AO nor the TPO can possibly be recognized to have the authority to act contrary to the terms of the remand as the ITAT may choose to frame. It was his submission that once the ITAT had itself remanded the matter to the TPO, there existed no justification or requirement in law for a reference being made by the AO on 27 December 2018. The fact that the respondents had never questioned the validity of the aforesaid order of the ITAT according to Mr. Jolly is evident from the various notices which were issued by the AO as well as the TPO and are dated 18 August 2017, 22 August 2017, 05 September 2017 and 15 September 2017.

27. Mr. Jolly then argued that a bare reading of the first order of the

TPO dated 17 October 2017 would itself establish that the said authority had proceeded to act in terms of the directions of the ITAT and in order to give effect to and implement the order of 14 July 2017.

28. It was then submitted by Mr. Jolly that once the TPO acting in compliance with the direction of the ITAT had proceeded to pass an order on 17 October 2017, it clearly stood divested of any authority or jurisdiction to undertake an identical exercise while purporting to act in terms of the reference which came to be subsequently made by the AO on 27 December 2018. It was pointed out by Mr. Jolly that the second reference which the AO chose to draw on 27 December 2018, was itself more than a year after the first order had been passed by the TPO. In any case, according to learned counsel, such a reference was wholly unnecessary bearing in mind the admitted position of the ITAT itself having remitted identified issues for the consideration of the TPO.

29. The reference and the assumption of jurisdiction by the TPO was then assailed on the ground of limitation as constructed in terms of Section 153 of the Act. Mr. Jolly submitted that undisputedly in terms of the order of 14 July 2017, and which would clearly be liable to be read as requiring a fresh assessment being undertaken, the time frame within which the AO or the TPO could have concluded that exercise would be governed by Section 153(3) of the Act. Viewed in that light, learned counsel submitted that the limitation for drawing up a draft appeal effect order would have expired on 31 December 2018. This, according to Mr. Jolly, would clearly flow from the plain language of Section 153(3) of the Act.

30. According to learned counsel, the reference which was made by the AO on 27 December 2018 was clearly mala fide and an attempt to overcome the statutory closure which was to come about by virtue of Section 153(3) of the Act and which prescribes the limitation to be nine months from the date of the order of the ITAT made under Section 254 of the Act.

31. Notwithstanding the above, it was Mr. Jolly's submission that sub-section (4) of Section 153 of the Act clearly has no application since the TPO was to undertake a transfer pricing study based on the directions made by the ITAT as per its order of 14 July 2017. There was, according to learned counsel, thus no occasion or justification for an independent reference being made by the AO. In view of the aforesaid, it was the submission of Mr. Jolly that the extended period of twelve months as prescribed in sub-section (4) of Section 153 of the Act did not stand attracted.

32. Mr. Jolly also assailed the validity of the second order passed by the TPO contending that the same is rendered wholly arbitrary since, and as is is ex facie apparent, it is a mere replication of the order originally made on 17 October 2017. The reference of 27 December 2018 was additionally assailed by Mr. Jolly in light of the conclusions rendered by the Special Bench of the ITAT and which had categorically held that the petitioner had only incurred an obligation while furnishing an undertaking and which fell short of a guarantee.

33. It was lastly urged by Mr. Jolly that the order of the ITAT remanding the matter to the TPO cannot possibly be construed as

falling within the ambit of Section 153(4) of the Act. Mr. Jolly questioned the correctness of a contention which was canvassed on behalf of the respondents of the said order being liable to be construed as a "deemed reference" referable to that provision. Contesting the correctness of that stand, Mr. Jolly submitted that no provision of the Act disables or restrains the ITAT from remitting matters for fresh adjudication to the TPO. That power of the ITAT, according to learned counsel, cannot be made dependent upon a reference being made by the AO in terms of Section 92CA(1) of the Act.

34. In any case, Mr. Jolly, submitted the argument of deemed reference is clearly fallacious when one bears in mind the significant amendments which came to be introduced in Section 153 of the Act with effect from 01 April 2022 and when the words "*or fresh order under Section 92CA(1) as the case may be*" came to be inserted. According to learned counsel, the aforesaid amendments as introduced by virtue of Finance Act, 2022 are clarificatory and thus bound the TPO to frame an order within a period of nine months from the end of the financial year in which the said order of the ITAT was received.

35. It was Mr. Jolly's submission that sub-section (4) of Section 153 of the Act would be applicable only where a reference under Section 92CA(1) of the Act were to be made during the course of proceedings for assessment or reassessment. According to learned counsel, if the stand of the respondents were to be accepted, the period of limitation as comprised in Section 153(3) of the Act and which would apply in case where matters were to be remanded by the ITAT would never come into play, since all such references, as per the respondents, would be

liable to be treated as a deemed reference falling within sub-section (4).

36. Countering the aforenoted submissions, Mr. Zoheb Hossain, learned counsel appearing for the respondents, firstly raised a preliminary objection and contended that the writ petition ought not to be entertained against the directions of the DRP. Mr. Hossain submitted that in terms of the scheme underlying Section 144C of the Act, the statute creates a special mechanism to deal with cases where variations may arise as a result of transfer pricing adjustments. Mr. Hossain submitted that in all such cases, eligible assessees are furnished a draft assessment order against which the statute entitles them to prefer objections before the DRP. It was pointed out that once the DRP disposes of those objections, the matter stands placed before the AO who would then proceed to pass an assessment order.

37. According to learned counsel, it is only when a final assessment order in accordance with the direction of the DRP comes to be framed that an assessee could be recognised to have a right to assail the action of the respondents or take recourse to a legal remedy. Mr. Hossain submitted that the adjudication of objections by the DRP is only a step in aid of assessment in the case of an eligible assessee and does not result in a creation of a liability. A tax liability, according to learned counsel would arise only once a final assessment order is passed and which is appealable before the ITAT.

38. Mr. Hossain also alluded to courts having noticed the aforesaid distinctive features underlying assessments undertaken in terms of Section 144C of the Act and desisting from invoking their

extraordinary jurisdiction, bearing in mind the remedy available to an assessee and which would be available to be pursued once a final assessment order is framed. Reliance in this respect was placed on the judgment of this Court in **Sabic India Private Limited vs. Union of India and Ors.**[7] where the following observations were made:-

> "15. At this stage, we are not to scrutinize the direction of the DRP as an Appellate Court. There are reasons given by the DRP for upholding the action of the TPO and we cannot analyse the same, while exercising writ jurisdiction. The aforesaid reasoning would have to be tested before the appropriate forum. The factual background would have to be necessarily evaluated by the AO while framing the assessment order. Therefore, in the instant case, we cannot say that directions are 'non-speaking' and there is a breach of principles of natural justice. The objections and the material placed by the Petitioner have been examined, but for the reasons noted above, the DRP has taken a different view. Even if we were to assume for the sake arguments that this view is erroneous, we cannot hold it be an error of jurisdiction. Every error of an authority is not open to judicial review merely by terming it to be a 'jurisdictional error', although the same may, at a later stage, be set aside for being erroneous. Accepting the contention raised by Mr. Vohra would mean that we will have to venture into the factual matrix of the case and come to a conclusion on whether the findings of the DRP are proper, and comment on the methodology behind the determination of the ALP. There cannot be any denying the fact that each assessment year is an independent proceeding and therefore the factual finding given by the DRP while agreeing with the TPO with regard to the method to be applied for determining the ALP will have to be examined by the appropriate forum. Further, on the aspect of the Petitioner not being afforded an opportunity of hearing, we may only observe that it is not the case of the Petitioner that a hearing was not held. In fact, the Petitioners have averred that on 1st December, 2020, the final hearing in the matter was conducted by Respondent No. 2. The Petitioner had also filed its written submissions before Respondent No. 2 on the subject matter, raising the plea of consistency. Besides, detailed submissions on merit, along with the relevant materials have also been filed in support thereof. Thus, we cannot attribute any violation of breach of natural justice to the DRP on the ground of not affording an opportunity of hearing.

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[7] 2021 SCC OnLine Del 3577

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17. We hasten to add that we have not examined the merits of the grounds urged by the Petitioner and the views expressed hereinabove are only for the purpose of deciding the present petition. It shall be open to the Petitioner to raise all pleas relating to the merits of the case, including those raised herein, while exercising its statutory remedy, as and when the directions under Section 144C(5) of the Act ripen into an order or are given effect to, by the AO.

18. In view of the above, we find no merit in the present petition and accordingly the same is dismissed. No costs."

39. Reliance was further placed on the judgment of the High Court of Madras in **Hyundai Motor India Lt. vs. Secretary, Income Tax Department & Ors.**[8] wherein the following was observed:

"12. The direction issued by the DRP, (impugned direction) binds the Assessing Officer and in essence, the assessment order would be an order giving effect to the direction issued by the DRP. Against such order of assessment, the petitioner has an effective alternate remedy of filing an appeal before the Income Tax Appellate Tribunal (ITAT).

13. Section 144C was inserted in the Income Tax Act by Finance Act, 2009, with a view to provide speedy disposal and to create an alternate dispute resolution mechanism within the income tax department (see notes on clauses to Finance Bill, 2009). Prior to insertion of Section 144C, the assessee could file an appeal to the CIT (Appeals) challenging the assessment order. On creation of the DRP, one more option is given to the assessee to approach the DRP raising objections against the variations made by the Assessing Officer. 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, to enable the assessing officer to complete the assessment. The directions so issued by the DRP is only after opportunity to the assessee. The directions given by the DRP are binding on the Assessing Officer. Thus, the proceedings before the DRP is not an appeal over the draft assessment order, but an alternate mechanism provided to the assessee, a corrective mechanism. With this view in mind the legislation has fixed a time

[8] (2017) SCC OnLine Mad 32229

> frame of nine months.
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> xxxx xxxx xxxx
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> 18. Therefore, it would be too far fetched plea on the part of the petitioner to state that sans facts, the decision in Mobis, and other cases, (Firestone, Il Jin Electronics etc) should be applied and the finding with regard to the adjustment of the ALP should be set aside, is a proposition, which cannot be acceded to. The DRP while issuing directions has directed adjustment by examining the facts. This direction is required to be implemented by the Assessing Officer after which it ripens into an assessment order open to challenge in terms of the provision of the Act. This appears to be precisely the reason for terming the impugned order as a direction under Section 144C (5) of the Act and it ripens into an order on being given effect to by the Assessing Officer. Therefore, I am convinced that the decisions cited by Mr. N. Venkatraman, cannot be applied, at this juncture, as the factual position requires to be considered, which obviously cannot be done in a Writ Petition and therefore, the impugned direction issued by the DRP has to be given effect to and the third respondent has to pass an order of assessment, which can be questioned by the petitioner by filing an appeal before the Tribunal.
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> 19. For all the above reasons, the Writ Petition is dismissed with direction to the third respondent to give effect to the directions issued by the DRP, dated 13.12.2016, by passing an assessment order, after which, it is open to the petitioner to challenge the same before the Tribunal. All contentions are left open. No costs. Consequently, connected Miscellaneous Petition is closed."

40. It was then submitted that the challenge as laid to the directions of DRP is misconceived since the said authority clearly stands denuded of the jurisdiction to examine objections of limitation or other jurisdictional challenges that may be raised. It was submitted that as would be evident from Section 144C(8) of the Act, the power of the DRP stands restricted to "*confirming, reducing or enhancing the variations proposed*". That power, according to Mr. Hossain, cannot possibly be recognized as being akin to or equated with a power to set aside. It was the submission of Mr. Hossain that a statutory authority, as

is well settled, is bound to exercise its jurisdiction within the four corners of the statute. Mr. Hossain submitted that since the DRP derives its power from Section 144C(8) of the Act, it cannot possibly be construed to have the authority to rule on every portrayed illegality or aspects pertaining to asserted jurisdictional errors. Reliance in this respect was firstly laid upon the following observations as appearing in the decision in **V.K. Ashokan vs. Assistant Excise Commissioner**[9]:

> "54. It is furthermore a well-settled principle of law that a statutory authority must exercise its jurisdiction within the four corners of the statute. Any action taken which is not within the domain of the said authority would be illegal and without jurisdiction."

41. Reliance was also placed on the judgment of **Iqbal Singh Narang vs. Veeram Narang**[10] where in the context of the authority of rent controllers it was held:

> "10… the consistent view which has been taken is that the Rent Controller, being a creature of statute, has to act within the four corners of the statute and could exercise only such powers as had been vested in him by the statute."

42. The aforesaid aspect was further sought to be underlined with Mr. Hossain drawing our attention to the following observations as appearing in the decision of the Supreme Court in **Transcore vs. Union of India**[11]:-

> "67… The DRT is a tribunal, it is the creature of the statute, it has no inherent power which exists in the civil courts."

43. Mr. Hossain then proceeding to the merits of the question which stands posited submitted that the draft assessment order dated 29 December 2019 cannot be said to be time barred bearing in mind

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[9] (2009) 14 SCC 85

[10] (2012) 2 SCC 60

[11] (2008) 1 SCC 125

provisions contained in Section 153(4) of the Act. It becomes pertinent to note that while Mr. Hossain did not dispute the prescription of nine months as appearing in Section 153(3) of the Act or the fact that if that provision were acknowledged to be applicable, the time for the passing of a draft assessment order would have expired on 31 December 2018, it was his submission that the aspect of limitation would have to be examined on the anvil of Section 153(4) of the Act alone. Viewed in that light, Mr. Hossain submitted that it would be manifest that the draft assessment order was made within a period of twelve months which would have come to an end on 31 December 2019.

44. The respondents also questioned the legality of the original order passed by the TPO dated 17 October 2017 contending that since the same had come to be passed without a reference having been made by the AO, it is liable to be viewed as *non est*. Mr. Hossain, in this respect, drew our attention to the following provisions as contained in the **Central Board of Direct Taxes**[12] Instruction No. 3/2016 dated 10 March 2016:-

> "3.1 The power to determine the Arm's Length Price (ALP) in an international transaction or specified domestic transaction is contained in sub-section (3) of Section 92C. However, Section 92CA provides that where the Assessing Officer (AO) considers it necessary or expedient so to do, he may refer the computation of ALP in relation to an international transaction or specified domestic transaction to the TPO. For proper administration of the Income-tax Act, the Board has decided that the AO shall henceforth make a reference to the TPO only under the circumstances laid out in this Instruction.
>
> xxxx xxxx xxxx
>
> 4.1 The role of the TPO begins after a reference is received from the AO. In terms of Section 92CA, this role is limited to the

[12] CBDT

determination of the ALP in relation to international transactions or specified domestic transactions referred to him by the AO. However, if any other international transaction comes to the notice of the PO during the course of the proceedings before him, then he is empowered to determine the ALP of such other international transactions also by virtue of Section 92CA (2A) and (28). The transfer price has to be determined by the TPO in terms of Section 92C. The price has to be determined by using any one of the methods stipulated in sub-section (1) of Section 92C and by applying the most appropriate method referred to in Sub-section (2) thereof. There may be occasions where application of the most appropriate method provides results which are different but equally reliable. In all such cases, further scrutiny may be necessary to evaluate the appropriateness of the method, the correctness of the data, weight given to various factors and so on. The selection of the most appropriate method will depend upon the facts of the case and the factors mentioned in Rule 10C. The TPO, after taking into account all relevant facts and data available to him, shall determine the ALP and pass a speaking order."

45. Learned counsel also relied upon the judgment of the Supreme Court in **Principal Commissioner of Income Tax-4, Mumbai vs. S.G. Asia Holdings (India) Private Limited**[13], where upon taking note of those instructions, the Supreme Court had held as follows:-

> "7. In view of the guidelines issued by CBDT in Instruction No. 3/2003 the Tribunal was right in observing that by not making reference to TPO, the assessing officer had breached the mandatory instructions issued by CBDT. We do not find the conclusion so arrived at by the Tribunal to be incorrect.
>
> 8. However, the Tribunal ought to have accepted the submission made by the departmental representative as quoted in para 16.2 of its order and the matter ought to have been restored to the file of the assessing officer so that appropriate reference could be made to TPO. It would therefore be up to the authorities and the Commissioner concerned to consider the matter in terms of sub section (1) of Section 92-CA of the Act.
>
> 9. We, therefore, allow this appeal to the aforesaid extent and direct that it would now be up to the assessing officer to take appropriate steps in terms of Instruction No. 3/2003. The appeal is allowed to the aforesaid extent. No costs."

[13] (2019) 13 SCC 353

46. In view of the aforesaid, it was Mr. Hossain's submission that the role of the TPO begins only once a reference is made by the AO. According to learned counsel, the TPO could not have undertaken a transfer pricing study in the absence of a reference having been made by the AO. According to Mr. Hossain, bearing in mind the admitted position that the said reference by the AO came to be made only on 27 December 2018, it becomes apparent that the first order as made by the TPO on 17 October 2017 was wholly illegal and cannot possibly be countenanced in law.

47. It was further contended that as per the respondents the extended period of limitation of twelve months as enshrined in Section 153(4) of the Act comes to be attracted the moment a reference is made to the TPO. It was Mr. Hossain's submission that without prejudice to the contentions noticed hereinabove, a reference even if made by the ITAT and if assumed for the sake of argument to be valid, would also be liable to be construed as one falling within the ambit of Section 153(4) of the Act. It was Mr. Hossain's contention that a reading of Section 153(4) of the Act would establish that the provision is not restricted in its application only to cases where a reference to the TPO is made by the AO. In view of the above, it was contended that Section 153(4) of the Act would also apply to those cases where a reference may be made to the TPO by the ITAT.

48. Reliance in this respect was placed upon the judgment of the Karnataka High Court in **TE Connectivity India Pvt. Ltd. vs. Deputy**

Commissioner of Income[14] with Mr. Hossain seeking to draw sustenance from the following observations as appearing therein:-

> "2. It is submitted that the Income-tax Appellate Tribunal has passed the order dated November 3, 2016 setting aside the impugned order and has remanded the proceedings to the Assessing Officer/Transfer Pricing Officer/Dispute Resolution Panel for a fresh decision.
>
> 3. The admitted facts as made out are that the Principal Commissioner of Income-tax has received the copy of the order on December 29, 2016. The time period for completion of assessment proceedings in terms of section 153(3) would be nine months from the end of the financial year in which, the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be. If that were to be so, the order was required to be passed by December 31, 2017 as the financial year ending would have been March 31, 2017.
>
> 4. It is further to be noticed that in so far as the Transfer Pricing Officer is concerned, the order was required to be passed sixty days prior to the time prescribed under section 153 for completion of the proceedings in terms of section 92CA(3A) of the Income-tax Act. Further, under section 153(4), the time prescribed would stand extended by twelve months, if during the course of proceeding for assessment, the reference is made under sub-section (1) of section 92CA of the Income tax Act. If that were to be so, the period under section 153(3) read with section 153(4) would stand extended till December 31, 2018 in terms of section 92CA(3A) and the Transfer Pricing Officer would then be required to pass an order as on October 31, 2018."

49. It was lastly submitted that once the ITAT chose to frame an order of remit to the TPO and as a consequence the said authority being assumed to having been empowered to proceed directly in exercise of the statutory powers conferred by Section 92CA of the Act, then notwithstanding the absence of a reference having been made as per the procedure prescribed, all legal consequences would follow. Such legal consequences, according to learned counsel, would include the

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[14] 2022 SCC OnLine Kar 1762

extended period of limitation for completion of assessment under Section 153(4) of the Act becoming applicable.

50. It is the aforesaid rival submissions which fall for our consideration. We deem it apposite and before proceeding further, to note that learned counsels appearing for respective parties had proceeded to address submissions on the basis of Section 153 of the Act as it stands in the statute book post the amendments introduced in it by Finance Act, 2022. The respondents did not dispute the applicability of Section 153 of the Act as it exists in its present avatar.

51. However, and for the sake of completeness, we deem it appropriate to take note of that provision as it existed pursuant to amendments made by virtue of Finance Acts, 2014, 2016 and 2022. We deem it expedient to extract the relevant clauses of Section 153 insofar as they pertain to the framing of assessments in accordance with directions issued by the ITAT or revisional authorities and insofar as the said Section made provisions referable to Section 92CA.

52. The prescription of limitation for framing an order of fresh assessment pursuant to an order of the ITAT was in terms of Finance Act, 2014 regulated by sub-section (2A). Section 153(2A) of the Act as it stood then is reproduced hereinbelow:-

> "[(2A) Notwithstanding anything contained in sub-sections (1) [, (1A), (1B)] and (2), in relation to the assessment year commencing on the 1st day of April, 1971, and any subsequent assessment year, an order of fresh assessment in pursuance of an order under section 250 or section 254 or section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of one year from the end of the financial year in which the order under section 250 or section 254 is received by the **[***Principal Chief Commissioner or***]** Chief Commissioner or **[***Principal Commissioner*

> *or*] Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the [*Principal Chief Commissioner or*] Chief Commissioner or [*Principal Commissioner or*] Commissioner"

53. The aspect of reference under Section 92CA of the Act interceding assessment or reassessment proceedings were provisioned for in the Second and Third Provisos to Section 153(1) and are extracted hereunder:-

> "[**Provided further** that where the order under section 254 is received by the [*Principal Chief Commissioner or*] Chief Commissioner or [*Principal Commissioner or*] Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the [*Principal Commissioner or*] Commissioner on or after the 1st day of April, 2005 [but before the 1st day of April, 2011], the provisions of this sub-section shall have effect as if for the words "one year", the words "nine months" had been substituted:]
>
> [**Provided also** that where the order under section 254 is received by the [*Principal Chief Commissioner or*] Chief Commissioner or [*Principal Commissioner or*] Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the [*Principal Commissioner or*] Commissioner on or after the 1st day of April, 2006 [but before the 1st day of April, 2010], and during the course of the proceedings for the fresh assessment of total income, a reference under sub-section (1) of section 92CA—
>
> (*i*) was made before the 1st day of June, 2007 but an order under sub-section (3) of section 92CA has not been made before such date; or
>
> (*ii*) is made on or after the 1st day of June, 2007,
>
> the provisions of this sub-section shall, notwithstanding anything contained in the second proviso, have effect as if for the words "one year", the words "twenty-one months" had been substituted:]"

54. Section 153 was again amended by Finance Act, 2016 and the subject of fresh assessment pursuant to an order of the ITAT came to be included in sub-section (3). The said amending Act also introduced specific provisions with respect to limitation in cases where a reference

under Section 92CA may be made in the course of assessment or reassessment. Sections 153(3) and 153(4) as amended in terms of Finance Act, 2016 are extracted hereinbelow:-

> "(3) Notwithstanding anything contained in sub-sections (1) and (2), an order of fresh assessment in pursuance of an order under section 254 or section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of nine months from the end of the financial year in which the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Commissioner or Commissioner.
>
> (4) Notwithstanding anything contained in sub-sections (1), (2) and (3), where a reference under sub-section (1) of section 92CA is made during the course of the proceeding for the assessment or reassessment, the period available for completion of assessment or reassessment, as the case may be, under the said sub-sections (1), (2) and (3) shall be extended by twelve months."

As would be evident from the aforesaid extract, it is by virtue of Finance Act, 2016 that the nine and twelve months period of limitation came to be prescribed.

55. Post the promulgation of Finance Act, 2022 sub-sections (3) and (4) of Section 153 came to read as follows:-

> "(3) Notwithstanding anything contained in sub-sections (1) and (2), an order of fresh assessment in pursuance of an order under section 254 or section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of nine months from the end of the financial year in which the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Commissioner or Commissioner:
>
> [**Provided** that where the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Commissioner or Commissioner on or after the 1st day of April,

> 2019, the provisions of this sub-section shall have effect, as if for the words "nine months", the words "twelve months" had been substituted.]
>
> (4) Notwithstanding anything contained in sub-sections (1), (2) and (3), where a reference under sub-section (1) of section 92CA is made during the course of the proceeding for the assessment or reassessment, the period available for completion of assessment or reassessment, as the case may be, under the said sub-sections (1), (2) and (3) shall be extended by twelve months."

56. Although we had in the introductory parts of this decision noted that both Mr. Jolly as well as Mr. Hossain had addressed submissions on the basis of Section 153 as it appears on the statute book presently and post the amendments introduced by Finance Act, 2022, we had chosen to briefly digress and examine the various amendments introduced in that provision commencing from Finance Act, 2014 principally to underline the following two fundamental aspects.

57. Firstly, the 'nine' and the 'twelve' months window governing assessments to be made post remit by the ITAT and in cases where a reference under Section 92CA(1) of the Act may be made during the course of an ongoing assessment came to be introduced and structured for the first time in terms of the provisions forming part of Finance Act, 2016. The second aspect of some significance is that Section 153 post Finance Act, 2014 duly acknowledged and made provisions with respect to assessments that may have to be made in accordance with the procedure prescribed by Section 92CA of the Act.

58. Section 153 of the Act as it exists in its present form is thus a reiteration and at best a clearer exposition on the various steps that may be involved in assessment and be viewed as steps in aid thereof. The provision thus makes appropriate provision for all contingencies

including those which would ensue when an assessment were to follow the Section 92CA route. This is clearly reflected in sub-sections (3) and (4) of Section 153 of the Act. Mr. Jolly thus appears to be correct in his submission that the amendments which came to be introduced in Section 153 by virtue of Finance Act, 2022 are essentially clarificatory.

59. Having sketched out the broad contours of the issues that arise, we deem it appropriate to consider the preliminary objection which was addressed by Mr. Hossain. To recall, Mr. Hossain had submitted that the petitioner merely challenges an order passed by the DRP and which in any case creates no liability. The submission essentially was that in the absence of a consequential order of assessment having been framed, there would exist no justification for this Court to invoke its jurisdiction conferred by Article 226 of the Constitution. We find ourselves unable to sustain that objection for the following reasons.

60. While it is true that a direction framed by the DRP is in one sense inchoate and remains latent till it comes to be transformed into an actual order of assessment, we are in the present writ petition concerned with a challenge raised on the ground of limitation. The petitioner today questions the very jurisdiction of the AO to proceed to frame an order of assessment pursuant to any direction that the DRP may frame. This in light of their contention that an order of assessment could have been made only within the period of nine months computed from 14 July 2017 and since that period has expired the respondents would stand denuded of the authority to pass an assessment order itself. The petitioner principally contends that post 31 December 2018, the respondents stand deprived of the authority to frame an order of

assessment. It is in this respect that an appropriate declaration is sought from the Court. If we were to ultimately hold in their favour on this score, it would be apparent that the power to assess would itself stand eclipsed. We note that if we were to ultimately come to the conclusion that the respondents no longer have the authority to frame a consequential order of assessment pursuant to the order of the ITAT or if we were to eventually find that the second reference under Section 92CA(1) of the Act is itself misconceived and untenable, the petitioner would be entitled to succeed. The challenge which stands raised here thus is clearly distinct from the position which obtained in *Sabic India* and *Hyundai Motor*.

61. Consequently and bearing in mind the challenge on the ground of limitation which stands raised and which undoubtedly would strike at the very foundation of the right of the respondents to assess, we negate the preliminary objection as canvassed by Mr. Hossain.

62. In order to appreciate the rival submissions which were addressed, we firstly deem it expedient to preface our decision with a brief evaluation of the statutory scheme underlying Section 92CA. Section 92CA reads thus:-

> "**92CA.** (1) Where any person, being the assessee, has entered into an international transaction [or specified domestic transaction] in any previous year, and the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the [Principal Commissioner or] Commissioner, refer the computation of the arm's length price in relation to the said international transaction [or specified domestic transaction] under section 92C to the Transfer Pricing Officer.
>
> (2) Where a reference is made under sub-section (1), the Transfer Pricing Officer shall serve a notice on the assessee requiring him to produce or cause to be produced on a date to be specified therein,

any evidence on which the assessee may rely in support of the computation made by him of the arm's length price in relation to the international transaction [or specified domestic transaction] referred to in sub-section (1).

[(2A) Where any other international transaction [other than an international transaction referred under sub-section (1)], comes to the notice of the Transfer Pricing Officer during the course of the proceedings before him, the provisions of this Chapter shall apply as if such other international transaction is an international transaction referred to him under sub-section (1).]

[(2B) Where in respect of an international transaction, the assessee has not furnished the report under section 92E and such transaction comes to the notice of the Transfer Pricing Officer during the course of the proceeding before him, the provisions of this Chapter shall apply as if such transaction is an international transaction referred to him under sub-section (1).]

[(2C) Nothing contained in sub-section (2B) shall empower the Assessing Officer either to assess or reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year, proceedings for which have been completed before the 1st day of July, 2012.]

(3) On the date specified in the notice under sub-section (2), or as soon thereafter as may be, after hearing such evidence as the assessee may produce, including any information or documents referred to in sub-section (3) of section 92D and after considering such evidence as the Transfer Pricing Officer may require on any specified points and after taking into account all relevant materials which he has gathered, the Transfer Pricing Officer shall, by order in writing, determine the arm's length price in relation to the international transaction [or specified domestic transaction] in accordance with sub-section (3) of section 92C and send a copy of his order to the Assessing Officer and to the assessee.

[(3A) Where a reference was made under sub-section (1) before the 1st day of June, 2007 but the order under sub-section (3) has not been made by the Transfer Pricing Officer before the said date, or a reference under sub-section (1) is made on or after the 1st day of June, 2007, an order under sub-section (3) may be made at any time before sixty days prior to the date on which the period of limitation referred to in section 153, or as the case may be, in section 153B for making the order of assessment or reassessment or recomputation or fresh assessment, as the case may be, expires:]

[**Provided** that in the circumstances referred to in clause (*ii*) or clause (*x*) of *Explanation 1* to section 153, if the period of limitation available to the Transfer Pricing Officer for making an order is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to have been extended accordingly.]

[(4) On receipt of the order under sub-section (3), the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of section 92C in conformity with the arm's length price as so determined by the Transfer Pricing Officer.]

(5) With a view to rectifying any mistake apparent from the record, the Transfer Pricing Officer may amend any order passed by him under sub-section (3), and the provisions of section 154 shall, so far as may be, apply accordingly.

(6) Where any amendment is made by the Transfer Pricing Officer under sub-section (5), he shall send a copy of his order to the Assessing Officer who shall thereafter proceed to amend the order of assessment in conformity with such order of the Transfer Pricing Officer.

(7) The Transfer Pricing Officer may, for the purposes of determining the arm's length price under this section, exercise all or any of the powers specified in clauses (*a*) to (*d*) of sub-section (1) of section 131 or sub-section (6) of section 133 [or section 133A].

[(8) The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of determination of the arm's length price under sub-section (3), so as to impart greater efficiency, transparency and accountability by—

(a) eliminating the interface between the Transfer Pricing Officer and the assessee or any other person to the extent technologically feasible;

(b) optimising utilisation of the resources through economies of scale and functional specialisation;

(c) introducing a team-based determination of arm's length price with dynamic jurisdiction.

(9) The Central Government may, for the purpose of giving effect to the scheme made under sub-section (8), by notification in the Official Gazette, direct that any of the provisions of this Act shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification:

> **Provided** that no direction shall be issued after the 31st day of March, **[**_2025_**]**.
>
> (10) Every notification issued under sub-section (8) and sub-section (9) shall, as soon as may be after the notification is issued, be laid before each House of Parliament.]
>
> *Explanation.*—For the purposes of this section, "Transfer Pricing Officer" means a Joint Commissioner or Deputy Commissioner or Assistant Commissioner authorised by the Board[38] to perform all or any of the functions of an Assessing Officer specified in sections92C and 92D in respect of any person or class of persons.]"

63. As is manifest from a reading of Section 92CA(1) of the Act, upon the AO noticing an international transaction or a specified domestic transaction having been undertaken by an assessee, the said authority is statutorily obliged to make a reference to the TPO for the purposes of computation of **Arm's Length Price**[15]. On receipt of that reference, the TPO is obliged to place the assessee on notice and proceed to determine the ALP in respect of the international transactions in question. The TPO while undertaking that evaluation also stands enabled by virtue of Section 92CA(2B) to take into consideration any international transaction which though not disclosed in the report under Section 92E by the assessee may come to its notice.

64. Ultimately, and on conclusion of the adjudicatory process, the TPO in terms of sub-section (3) would proceed to pass an order determining the ALP in relation to the international transaction. The order under Section 92CA(3) which the TPO frames is undoubtedly binding on the AO and who in terms of sub-section (4) thereof is required to compute the total income of the assessee in conformity with

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[15] ALP

the ALP as determined by the TPO.

65. Section 92CA(1) of the Act speaks of a reference being made to the TPO by the concerned AO alone. However, and by virtue of the status and position which stands conferred upon the ITAT, we find no justification to doubt its authority to make such a reference while considering an appeal that may come to be laid before it. This, since in terms of Section 253 of the Act, an assessee is entitled to question a direction framed by the DRP and which may have come to be translated into an actual order of assessment. Consequently, once such an appeal were to be laid before the ITAT, it would stand empowered to not only examine the correctness of the directions framed by the DRP with respect to international transactions but also to such other and additional aspects and which may not necessarily be confined to only international transactions as decided by the AO. We thus find ourselves unconvinced to hold that the ITAT under the statutory scheme of the Act should not be recognised to have the power to remit the matter directly to the desk of the TPO.

66. Our conclusion in this respect stands fortified from a reading of Section 153(3) which speaks of an order of the ITAT requiring a *"fresh assessment"* or a *"fresh order under Section 92CA"*. It is pertinent to note that the word "order" in the context of Section 92CA is undoubtedly a reference to the adjudication undertaken by the TPO. This in light of Section 92CA (3) using the phrase *"....the Transfer Pricing Officer, shall, by order in writing, determine...."*. Similarly, Section 92CA (4) uses the expression *"On receipt of the order under sub-section (3)"*. The extent of the authority of the AO is thereafter

explained by that provision to be *"…to compute the total income of the assessee….".* It is thus manifest that the order which is envisaged under Section 92CA is the one made by the TPO. We thus find on a conjoint reading of Section 92CA (3) and Section 153(3) that it would be well within the authority of the ITAT to remit a matter directly to the TPO. There would appear to be no justification for the ITAT being compelled or required to first remit the matter to the AO and for a consequential reference being framed if issues pertaining to an international transaction itself constituted the subject matter of an appeal.

67. In any case, and as would be evident from the undisputed facts which obtain in the instant matter, the order of the ITAT dated 14 July 2017 and to the extent that certain aspects were remanded for the consideration of the TPO directly were neither questioned nor assailed at any time by the respondents. In fact, and as the writ petitioners have rightly pointed out, the aforesaid directions as framed were duly acknowledged and accepted and which fact becomes evident from not only the various notices which were issued by the jurisdictional AO and form part of our record such as Annexure P-12, P-14, P-15 and P-16 but also by the action of the TPO itself which had proceeded to pass an order on 17 October 2017. It thus becomes apparent that the principal order of the ITAT dated 14 July 2017 had come to be duly implemented by the TPO on 17 October 2017 itself.

68. It is pertinent to highlight at this juncture that although the respondents had thereafter instituted ITA Nos. 136/2018 and 137/2018 before this Court, those appeals were confined to the merits of the order passed by the ITAT. This becomes evident when one views our order of

21 May 2018 as passed in those appeals and to the questions of law on which they ultimately stood admitted. The substantial questions which were accepted for consideration in ITA Nos. 136/2018 and 137/2018 are reproduced hereinbelow:-

> "In **ITA 136/2018**, the following question of law arises:
>
> *"Did the ITAT fall into error in holding that the disallowance under Section 40(A)(i) of the Income Tax Act, 1961 was not justified in the facts and circumstances of this case?*
>
> In **ITA 137/2018**, the following question of law arises:
>
> *"Whether the ITAT erred in law in remanding back the issue of reversal of ESOP expenditure worth ₹83,31,1501- to the books of the AO for reconsideration without appraising the fact that no such expenses were claimed by the Assessee in the year under consideration in the return of income?"*

69. We are thus of the considered opinion that once the TPO had proceeded to pass the order of 17 October 2017, all that the AO was obliged to do was pass an assessment order in accordance with the procedure prescribed in Section 92CA(4) of the Act.

70. Section 153(3) of the Act in unambiguous terms sets out the time frame within which a fresh assessment is liable to be completed once a matter is remanded by the ITAT in terms of a judgment rendered and referable to Section 254 of the Act. The order of the ITAT contemplated under Section 153(3) of the Act is one which may have set aside or cancelled an assessment. As is manifest from a reading of the operative directions that were framed by the ITAT, it had while remanding certain items for re-consideration to the AO, remitted the issues pertaining to ALP directly to the TPO. It becomes pertinent to note that the aforesaid reference to the TPO and for it undertaking a fresh adjudication was based on the consent of parties. Even the aspect

of corporate guarantee and whether it would be an international transaction was an issue which was remanded directly to the TPO subject to the rider that the same would be taken up for consideration after the Special Bench had rendered its decision.

71. It thus become apparent that the original order of assessment dated 21 February 2014 ceased to exist in light of the directions as framed by the ITAT on 14 July 2017. Consequently and in terms of the aforesaid order of the ITAT, a fresh order of assessment was liable to be drawn before the expiry of nine months from the end of the relevant financial year. It is conceded on behalf of the respondents that the aforesaid period undoubtedly came to an end on 31 December 2018.

72. We, additionally, find that the prescription of nine months would also be applicable to a fresh order which is liable to be made in accordance with Section 92CA of the Act. This since Section 153 of the Act speaks not merely of assessments but also orders that are liable to be framed under Section 92CA. The order which is spoken of in Section 92CA of the Act, as explained above, is the one which the TPO may come to make in accordance with sub-section (3) thereof. It is thus manifest that the assessment exercise was liable to be concluded within a period of nine months when computed from 14 July 2017.

73. The only aspect which could not have been conclusively determined on or before 31 December 2018 was the issue pertaining to corporate guarantee and this since although the Special Bench had answered the reference on 23 August 2017, the appeal of the assessee came to be disposed of by the Bench of the ITAT only on 16 June

2020.

74. As is evident from a reading of Para 63 of that order, the ITAT on that occasion chose to remit the matter to the desk of the jurisdictional AO with a direction to frame an appropriate reference for the consideration of the TPO. The aforesaid procedure appears to have been adopted by the ITAT based on its understanding of the decision of the Supreme Court in *SG Asia Holdings*.

75. In *SG Asia Holdings*, the Supreme Court was called upon to examine the correctness of the view taken by the ITAT and which was affirmed by the Bombay High Court which had negated a prayer made by the departmental representatives for the matter being remitted for consideration afresh by the TPO consequent to the ITAT finding that the AO had failed to act in accordance with the order made by the former. The ITAT had in that case taken the position that the reference to the TPO was essentially an administrative issue and that it could not cure any lapse made by the AO.

76. While dealing with the correctness of the aforesaid view as taken as also the judgment of affirmation rendered by the Bombay High Court, the Supreme Court ultimately held as follows:-

> "7. In view of the guidelines issued by CBDT in Instruction No. 3/2003 the Tribunal was right in observing that by not making reference to TPO, the assessing officer had breached the mandatory instructions issued by CBDT. We do not find the conclusion so arrived at by the Tribunal to be incorrect.
>
> 8. However, the Tribunal ought to have accepted the submission made by the departmental representative as quoted in para 16.2 of its order and the matter ought to have been restored to the file of the assessing officer so that appropriate reference could be made to TPO. It would therefore be up to the authorities and the

> Commissioner concerned to consider the matter in terms of sub-section (1) of Section 92-CA of the Act."

77. The aforesaid observations as appearing in *SG Asia Holdings* are liable to be appreciated bearing in mind the refusal of the ITAT to even accord liberty to the AO to frame a reference for the consideration of the TPO. We are, however, in the present case, concerned with a situation where the procedure as adopted by the ITAT, namely, of making a reference directly to the TPO, had never been subjected to challenge or for that matter the correctness thereof ever doubted.

78. Reverting then to the facts of the present case, we find that although the TPO had acted in pursuance of the order of the ITAT and proceeded to pass an order on 17 October 2017, the jurisdictional AO for reasons unknown and undisclosed, chose not to pass a consequential assessment order as mandated by Section 92CA(4) of the Act. What the AO, however, chose to do was make a fresh reference on 27 December 2018 requiring the TPO to pass an order in accordance with the judgment of the ITAT dated 14 July 2017. That reference was clearly unmerited since the TPO was obliged to act in accordance with the directions of the ITAT. It had in any case already taken all consequential steps in terms thereof and passed an order on 17 October 2017.

79. We are therefore of the firm opinion that in light of the directions as were formulated by the ITAT and stood embodied in its order of 14 July 2017, no fresh reference as the AO chose to make was warranted. Once the ITAT had chosen to remit the matter directly to the TPO, the said authority was legally obliged to proceed in accordance therewith

and did not need to derive any authority from a reference being independently made by the AO.

80. It becomes pertinent to observe that the Section 92CA(1) reference rests solely upon the AO being of the opinion that a reference is required to be made to the TPO for computation of ALP. That power stands conferred upon the AO and is available to be exercised in the course of assessment. However, and as is plainly evident from Section 153(3) of the Act, the statute does not deprive the ITAT of the authority and jurisdiction to require a fresh order under Section 92CA being made. As we had observed hereinabove, Section 153(3) of the Act speaks of assessments as well as orders under Section 92CA that may be required to be made pursuant to an order passed by an ITAT in exercise of its appellate jurisdiction comprised in Section 254 of the Act. In our considered opinion, the reference which the AO proceeded to frame on 27 December 2018 was thus clearly superfluous and in any case cannot be sustained on the basis of Section 153(4) of the Act.

81. It is pertinent to note that sub-section (4) of Section 153 is concerned with a reference referable to Section 92CA(1). That provision, as noticed hereinabove, is confined to a reference to the TPO that may be made by the AO. The limited application of Section 153(4) is also evidenced from that provision using the expression *"made during the course of the proceeding for the assessment or reassessment"*. Sub-section (4) is thus clearly confined to a reference that the AO may choose to make in the course of assessment. Sub-section (3) of Section 153 of the Act, on the other hand, deals specifically with assessments and orders under Section 92CA that the

concerned authority may be liable to make in terms of directions issued by the ITAT. Consequently, it would be the principle of *generalia specialibus non derogant* which would stand attracted and be determinative of the question that stands posited.

82. That leaves us to examine the argument of a deemed reference which was advanced by Mr. Hossain. According to Mr. Hossain, the order of 14 July 2017 should be construed as being a reference governed by Section 153(4) of the Act and consequently the expanded period of limitation of twelve months becoming applicable.

83. We find ourselves unable to sustain that submission bearing in mind the indubitable position which emerges from a plain reading of Section 153(3) of the Act and which encompasses and makes adequate provisions for a fresh order under Section 92CA(4) being liable to be made pursuant to an order of the ITAT under Section 254 of the Act. Since the aforesaid contingency is already provisioned for in sub-section (3), there would exist no justification for such an order of the ITAT being placed or viewed as traceable to sub-section (4) of Section 153 of the Act.

84. Mr. Hossain had additionally contended that there exists no justification to interfere with the order of the DRP and which had refused to examine the challenge of limitation bearing in mind the fact that in terms of Section 144C(8) of the Act, its power and jurisdiction stands confined to either confirming, reducing or enhancing variations that may be proposed in the draft order. The submission was that the DRP does not stand conferred with the authority to rule on

jurisdictional challenges that may be raised by an assessee and the same being restricted by virtue of Section 144C(8) of the Act.

85. According to Mr. Hossain, the words *"confirm, reduce and enhance"* which define the extent of the power that may be exercised by the DRP cannot possibly be construed as empowering it to set aside a draft assessment order itself. While Mr. Hossain may be correct to the aforesaid extent, we find that the writ petitioner not only questions the order of the DRP dated 29 January 2021, it additionally seeks the framing of an appropriate order or direction restraining the AO from passing a final assessment order. That relief is founded on the challenge based on limitation. Thus, even though the DRP may not have erred in refusing to examine or render any definitive conclusion on the issue of limitation, the same would not detract from the right of the petitioner to seek an appropriate declaration from this Court in exercise of Article 226 of the Constitution.

86. Tested on the undisputed facts, we find that the period of nine months when reckoned from 14 July 2017 undoubtedly came to an end on 31 December 2018. Once that terminal point was reached, the respondent clearly stood deprived of jurisdiction or authority to pass an order of assessment pursuant to the directions of the ITAT. We have already found that the TPO had acting in terms of the directions as framed by the ITAT already passed a consequential order on 17 October 2017. All that was required of the respondents thereafter was for the AO to frame an order of assessment in accordance therewith.

87. This, for reasons unfathomable, was something which the AO

failed to do. The second reference which was thereafter framed by the AO and was dated 27 December 2018 for reasons aforenoted was clearly unwarranted and in any case cannot be viewed as conferring a fresh lease of life to the power to assess.

88. That leaves us to lastly deal with the submission of Mr. Hossain and which principally rested on the decision of the Supreme Court in *S.G. Asia*. Although, the respondents do not appear to have questioned the validity of the order of the ITAT remitting the matter to the TPO itself at any stage of the proceedings and in fact and to the contrary acted in terms thereof, since that question was raised before us we deem it appropriate to deal with the same so as to render a quietus to the controversy.

89. As was observed in the preceding parts of this decision in *S.G. Asia*, the Supreme Court was essentially concerned with the validity of the action of the AO which had proceeded to make transfer pricing adjustments itself and having failed to refer the matter for the consideration of the TPO. It was in that backdrop that the ITAT had held that the order of assessment so framed was rendered unsustainable being contrary to the mandatory CBDT Instructions. However, it had refused to accede to the request for the matter being remitted to the AO in order to enable that authority to frame a reference.

90. It was this refusal by the ITAT which came to be interfered with by the Supreme Court when it held that the aforenoted prayer ought to have been accepted and the matter remitted to the AO so that an appropriate reference could have been made. The appeal came to be

allowed with liberty reserved to the appellant to proceed further in accordance with the CBDT Instructions.

91. In our considered opinion, *S.G. Asia* and the various observations appearing therein are firstly liable to be appreciated bearing in mind the facts of that case. It would be wholly incorrect to recognise that decision as holding that the ITAT cannot draw or make a reference to the TPO if circumstances so warrant. That issue, in fact, neither arose for the consideration of the Supreme Court nor was one which was raised. In any view of the matter, the plain language in which Section 153(3) stands couched would warrant negation of this argument. This since that provision makes unambiguous provisions for such an eventuality when it uses the expression *"…fresh assessment or fresh order under Section 92CA, as the case may be,…..".* We consequently find ourselves unable to sustain the contention of Mr. Hossain.

92. We further find that the judgment rendered by a learned Single Judge of the Karnataka High Court in *TE Connectivity* was concerned with an order of the ITAT which had remitted the matter to the "Assessing Officer/Transfer Pricing Officer/Dispute Resolution Panel". In any case the High Court in that case had ultimately held in favour of the assessee. We find ourselves unable to discern any observation or conclusion appearing in that decision which could possibly be viewed as lending credence to the submissions addressed by the respondents in this proceeding.

93. Accordingly, and for all the aforesaid reasons, while we refuse to interfere with the order of the DRP impugned herein, we allow the

instant writ petition and hold that the second respondent stands barred in law from passing any further orders of final assessment pertaining to AY 2009-10. The petitioner shall consequently be entitled to all consequential reliefs.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MAY 20, 2024/neha/RW