

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI I BENCH, NEW DELHI  
[Coram: Pramod Kumar AM and C. M. Garg JM]**

I.T.A. No.: 16/Del/13  
Assessment year: 2007-08

***XL India Business Services Pvt Ltd***  
*FF101, Building No G-11, Sarines Sonia Sadan  
Community Centre, Vikaspuri,  
New Delhi 110 018 [PAN: AAACX0309A]*

***.....Appellant***

***Vs.***

***Assistant Commissioner of Income Tax  
Circle 18(1), New Delhi***

***.....Respondent***

**Appearances by:**

**Deepak Chopra, Harpreet Ajmani and Nitin Narang, for the appellant**  
**Y K Verma, for the respondent**

**O R D E R**

**Per Pramod Kumar:**

1. This appeal is directed against the order dated 29<sup>th</sup> October 2012 passed by the Deputy Commissioner of Income Tax, Circle 18(1), New Delhi (*hereinafter referred to as 'the Assessing Officer'*) under section 143 (3), read with section 144(C), of the Income Tax Act, 1961 (*hereinafter referred to as 'the Act'*), for the assessment year 2007-08.

2. The assessee has raised an interesting preliminary issue challenging validity of reopening of assessment on the facts of this case. The related grounds of appeal, which we will take up together for disposal, are as follows:

1. *The final assessment order dated October 31, 2012 passed by the Assistant Commissioner of Income Tax, Circle 18(1) New Delhi ('Learned AO') pursuant to the directions of the Hon'ble Dispute Resolution Panel ('DRP'), draft assessment order dated December 28, 2011 passed by Learned AO and the orders dated October 15, 2010 and October 11, 2012 passed by Additional*

*Commissioner of Income Tax, Transfer Pricing-II(2), New Delhi ('Learned TPO'), are bad in law and void-ab-initio.*

2. *That on the facts and circumstances of the case and in law, the DRP/AO have grossly erred in not appreciating that the assessment under section 147 of the Act is barred by limitation as per the provisions of section 153(2) of the Act.*
3. *That on the facts and in law, the Learned AO has erred in computing the total income of the Appellant at Rs.27,806,100 as against the returned income of Rs.5,433,580 by making an upward adjustment of Rs.22,372,524 with respect to transfer pricing ("TP") matters.*
4. *That on the facts and in circumstances of the case and in law, the Learned AO grossly erred in :*
  - (i) *assuming jurisdiction while issuing notice under section 148 of the Act, in the absence of any material to form his belief that certain income has escaped assessment.*
  - (ii) *assuming jurisdiction for re-opening the assessment under section 147 of the Act, thereby taking section 147 as a recourse to substitute the regular assessment proceedings under section 143(2)/143(3) of the Act.*
5. *That on facts and circumstances of the case and in law, the DRP/AO have grossly erred in making assessment under section 143(3) read with section 144C(4)/147/148 of the Act since:*
  - (i) *the reference under section 92CA(1) made by Learned AO on December 24, 2009 to the TPO based on which the Learned AO has computed the arm's length price in the draft order was an invalid reference as the same was made before the initiation of the reassessment proceedings under section 147 of the Act without the pendency of any assessment proceedings;*
  - (ii) *learned AO has himself stated in the order dated November 21, 2011, disposing off the objections to the initiation of the reassessment proceedings that "by an inadvertent mistake, the case was referred to the Transfer Pricing Officer (TPO) for determining the Arm's Length Price of the International Transaction of the assessee on 24.12.2009";*
  - (iii) *the Appellant, is not an eligible assessee as defined in section 144C(15)(b) of the Act, as the variation in the income of the Appellant proposed by the Learned AO is not in consequence of an order passed under section 92CA(3) which ought to have been passed by the TPO on the basis of a valid reference under section 92CA(1) of the Act during the course of the reassessment proceedings;*
  - (iv) *no reference was made by the Learned AO under section 92CA(1) to the TPO during the assessment proceedings under section 147 of the Act.*

3. In order to adjudicate on this issue, a few material and undisputed facts need to be taken note of. There is no dispute that the assessee filed the return of income of 29<sup>th</sup> October 2007, and that the time limit for issuance of notice, under section 143(2), selecting the case for scrutiny assessment expired on 30<sup>th</sup> September 2008. It is also an admitted position that it was only on 24<sup>th</sup> December 2009 that the Assessing Officer made a reference, under section 92CA(3), to the Transfer Pricing Officer for determination of arm's length price of the international transactions entered into by the assessee with its associated enterprises. This reference to the TPO, and the resulted proceedings before him, culminated in the order dated 15<sup>th</sup> October 2010 proposing an arm's length price adjustment of Rs 2,80,91,619. As there were no proceedings pending before the Assessing Officer, nor was, for that purpose, the case of the assessee was even picked up for scrutiny assessment under section 143(3), the Assessing Officer proceeded to reopen the assessment, which had by then achieved finality, by reopening the assessment. While doing so, as evident from the letter dated 7<sup>th</sup> October 2011 issued by the Assessing Officer- copy filed before us at page 128 of the paper-book, the Assessing Officer recorded the reasons as follows:

***"In this case, return of income was filed on 29.10.2007 declaring income of Rs 54,33,850. The same was processed under section 143(1) of the Income Tax Act, 1961.***

***As per form 3CB, the international transactions entered into by the assessee with the associated enterprises were of Rs 40,11,86,678. To ascertain as to whether the international transactions with the AEs were at arm's length, reference was made under section 92 CA(3) of the Act to TPO-II(4) New Delhi vide order dated 15/10/2010. The TPO-II(4) found that the international transactions of the assessee with its associated enterprises were not at arm's length and an adjustment of Rs 2,80,91,619 was directed to be made to the income of the assessee. As per the order u/s 92CA(3) of the Act, the income of the assessee has to be enhanced by Rs 2,80,91,619.***

***Considering the above fact of the case, as the assessee has not valued its international transactions with associate enterprises at arm's length, resulting under assessment of income by an amount of Rs 2,80,91,619 should have been added to the income.***

4. The assessee objected to this initiation of reassessment proceedings. It was contended that the time limit for issuance of notice under section 143(2) had expired and the proposed reassessment proceedings are indeed used as a substitute for section 143(2) which, according to the assessee, was not permissible in view of judicial precedent in the case of ACIT vs. M/s. Muthoot Leasing and Finance Ltd., 21 SOT 281. It was also pointed out that reference to Transfer Pricing Officer was made at a point of time when no proceedings were pending before the Assessing Officer, whereas it is *sine qua non* that such a reference can only be made "*in the course of any proceedings*". Reliance was also placed on Hon'ble Supreme Court's dismissal of the SLP in the case of ITO vs. Master Keshav Suri 228 ITR (Statute) 156 against Delhi High Court's judgment in CM No. 1162 of 1997 on the question, whether action permissible under section 143(2) on the basis of information available in the return, but not taken and in respect of which limitation expired, cannot legally be taken under section 147/148 if the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment. A reference was also made to the decision of this Tribunal in the case of ACIT Vs OP Chawla 114 ITD 69 wherein it was observed that in case tax authorities are permitted to reopen the case without there being tangible reasons and existence of belief, it would deem that the provisions of section 147 would be rendered as substitute for section 143(2), an object which that section was not intended to achieve. It was in this backdrop and relying upon Hon'ble Supreme Court judgment in the case of GKN Drive Shafts India Ltd, 259 ITR 19 that the assessee urged the Assessing Officer to drop the reassessment proceedings. None of these submissions, however, impressed the Assessing Officer. He dismissed the objections so raised by the assessee and conveyed the same to the assessee vide his letter dated 21.11.2011, which, inter alia, observed as follows:

*"2. The first objection of the assessee is that the reference to TPO in absence of notice u/s 143(2) was bad in law hence void ab initio. Thus the basic premise of issuing notice u/s 148 does not exist. This objection of the assessee is not sustainable. The common law position in relation to the admissibility of evidence emphasizes on the relevance of the evidence rather than how it was obtained. For example, in R v Leatham, we find the oft-quoted statement of Crompton J., "It matters not how you get it; if you steal it even, it would be admissible". Similar view was token in English*

*Law in case of R v Song , where it was stated that there was “no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. .... ”. There is a catena of other decisions of Indian Courts also which support this proposition.*

*In view of the above, it may be inferred that the reference to TPO was invalid but it does invalidate the findings of the TPO which are based on the facts of the case. The assessee itself appeared before the TPO from time to time and did not contest or, the notice issued by the TPO to compute the arm's length price. Thus the directions of the TPO even on an irregular reference, form a valid ground to reopen the proceedings for reassessment.*

*In the case of Kalyanji Mavji & Co. Vs, CIT (SC) 102 ITR 287 the Hon'ble Apex Court clarified that It cannot be disputed that the object of the Act was to see that the tax collecting machinery is made as perfect and effective as possible so that the taxpayer is not allowed to get away with escaped income-tax. It was further observed that it, therefore, follows that information may come from external sources or even from material already on the record or may be derived from the discovery of new and important matter or fresh facts. On the Same lines, Hon'ble Apex Court again reiterated in the case of Kelvinator India 2010- TIOL-06-5C-SC-IT-LB that the provision should not be construed so as to give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion" but Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. The report of TPO is tangible and substantive evidence of the fact that the income of assessee had escaped assessment to the tune of Rs. 2,80,91,619/-.*

3. *It has been further objected that sec. 148 cannot be used to substitute sec. 143(2). This observation of the assessee is erroneous. The notice u/s. 148 was not sent to substitute notice u/s. 143(2). In fact notice u/s. 143(2) was never issued, therefore, it is wrong to presume that reassessment proceedings u/s. 148 were to substitute the proceedings as sated by the assessee.*

4. *The next ground of objection is that re-assessment should be based on fresh material/information. In this regard the attention is drawn to decision of Hon'ble apex Court in the case of Kelvinator India 2010-TIOL-06-SC-SC-IT-LB wherein it was observed that Assessing Officer has power to reopen, provided there is “tangible material” to come to the conclusion that there is escapement of income from assessment. The Hon'ble Apex Court did not stress on requirement of fresh material the only thing that was required was availability of tangible material to come to a conclusion that income has escaped assessment. Such material may be already available on file or may be fresh evidence. Even otherwise, the report of TPO forms a tangible fresh material information for a reasonable man to form an opinion that income had escaped assessment.*

*The assessee further relied on order of Dharma construction Co. wherein Hon'ble Apex Court observed that a case cannot be reopened on the basis of opinion of DVO. This contention of the assessee also does not hold ground. The assessee failed to*

*appreciate that the opinion of DVO cannot be compared to directions of TPO. The observations of DVO are merely observations which are not binding on the Assessing Officer. They only have persuasive value, whereas the findings of TPO are based on a set of facts and are binding on the Assessing Officer.*

*5. In view of the above, the objection filed by you against the initiation of re-assessment proceedings is rejected. You are requested to comply with the re-assessment proceedings and file your return in compliance to notice U/s. 148 on the reassessment shall be framed ex-parte."*

5. It was in this backdrop that the Assessing Officer, despite objections by the assessee proceeded with reassessment proceedings and, thus, finalized the draft assessment order. Aggrieved by the stand so taken by the Assessing Officer, the assessee raised objection against the same before the Dispute Resolution Panel (DRP), but without any success. The DRP was of the view that once the Transfer Pricing Officer's report was available to the Assessing Officer and the said report indicated that an adjustment of Rs.2,80,91,619 was required to be made to the Arm's Length Price of international transaction entered into by the assessee, there was indeed sufficient material on record to form a belief that income of the assessee has escaped assessment. As regards the assessee's reliance on the decision in the case of Dharia Construction Co. (*supra*), the DRP was of the view that the facts of the case were distinguishable, in as much as, while the DVO's report is not binding on the Assessing Officer, a Transfer Pricing Officer's report is binding on the Assessing Officer. The DRP then took note of the recent judicial precedent in support of the proposition that at the stage of initiation of reassessment proceedings it would not be necessary for the Assessing Officer to come to the conclusion that income had indeed escaped assessment, but as long as there are reasons for the Assessing Officer to believe that income has escaped assessment, it meets the requirement of law. Reliance was also placed to Hon'ble Supreme Court judgment in the case of Kalyanji Mavji & Co. vs. CIT, 102 ITR 287 and CIT Vs Kelvinator of India Ltd (320 ITR 561). The DRP also noted that section 92CA(1), which empowers the Assessing Officer to make reference to the Transfer Pricing Officer, does not require pendency of any proceedings before him. It was, according to the DRP, sufficient that the Assessing Officer considers it necessary to make reference. The stand of the Assessing Officer in reopening the assessment was, thus, confirmed and

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approved. Accordingly, the Assessing Officer proceeded to issue the final assessment order, aggrieved by which, the assessee is in appeal before us.

6. Learned counsel for the assessee, apart from reiterating the submissions made before the authorities below, submits that the reassessment proceedings are required to be quashed as these proceedings were initiated on the basis of Transfer Pricing Officer's order, which itself was bad in law, in as much as reference was made to the Transfer Pricing Officer after the end of time limit available for issuance of notice under section 143(2) and before the commencement of reassessment proceedings. It was pointed out that at the point of time when reference to the Transfer Pricing Officer was made, no proceedings were pending before the Assessing Officer. Our attention was then invited to Hon'ble Bombay High Court's judgment in the case of CWT vs. Sona Properties Pvt. Ltd., 327 ITR 592 wherein it was held that reassessment proceedings initiated on the basis of a valuation report obtained after close of assessment proceedings cannot constitute information based on which reassessment proceedings can be initiated. It was also submitted that similar position emerges out of the decision of Hon'ble Supreme Court in the case of ACIT vs. Dharia Construction Co. 328 ITR 515. Learned counsel submitted that no reference could have been made by the Assessing Officer under section 92CA(3) of the Act as there were no proceedings pending before him at any stage. Learned counsel suggested that the provisions of section 92C and 92CA of the Act have to be read in harmony since section 92C relates to computation of Arm's Length Price and section 92CA permits the ITO to make reference for the purpose of determination of Arm's Length Price of the International transactions. It was, thus, imperative that there must be a proceeding for assessment of income in the course of which reference can be made. Reference made without any pending proceeding for assessment of income would be, according to the learned counsel, an exercise in futility since the Assessing Officer was not competent to pass draft order u/s. 144C of the Act. He emphatically argued that reference being made to the Transfer Pricing Officer is not an academic exercise and therefore, unless the Assessing Officer is competent to frame an assessment order, they cannot be bestowing jurisdiction

to make a reference. Learned counsel then raised the plea that even if validity of reassessment proceedings is taken to be existing, the impugned order is not sustainable in law, in as much as, a draft assessment order under section 144C , as has been issued in this case can only be issued in a situation in which Transfer Pricing Officer has passed a valid order under section 92CA(3) during the assessment proceedings. It is pointed out that only order passed by the Transfer Pricing Officer was prior to initiation of reassessment proceedings and as such the assessee could not be treated as an eligible assessee u/s. 144C(15) of the Act. The impact of this issuance of draft assessment order on the validity of the impugned assessment order is that if no draft assessment order could have been issued in the facts of this case, as is assessee's contention, the assessment would have been time barred on 31<sup>st</sup> March, 2012 whereas in the present case assessment order is passed on 31<sup>st</sup> October, 2012. We are thus urged to uphold the reassessment proceedings on the ground that the proceedings itself were bad in law and on the ground that the reassessment order was passed after the limitation period expired. Learned Departmental Representative, on the other hand, relied upon the orders of the authorities below. It was submitted that plain reading of section 92CA(1), under which reference to Transfer Pricing Officer was made, would show that it is not the condition precedent that there must be pending proceedings before the Assessing Officer to make this reference. It was also pointed that once the Assessing Officer receives an order from the Transfer Pricing Officer, which indicates that Arm's Length Price is required to be made to value the international transaction that assessee has entered into with its associate enterprise, it is clearly a case for any reasonable person to come to the conclusion and to hold belief that income has escaped assessment. The reasons of reopening of assessment were, thus, according to the learned Departmental Representative, legally sound and wholly sustainable in law. He emphatically argued that there is no bar on reference being made to the Transfer Pricing Officer by the Assessing Officer whether or not there is any pending proceeding before the Assessing Officer. It was submitted that in the absence of any such restrictions being provided by the statute, it would not be proper for us to read those restrictions into the provisions. It was also submitted that the assessee



has all along co-operated with the proceedings before the Transfer Pricing Officer and thus, it cannot be open to the assessee to object to the logical outcome of proceedings before the Transfer Pricing Officer. It was certainly not an academic exercise. The Transfer Pricing Officer was to ascertain the Arm's Length Price of international transaction. It was, according to the learned Departmental Representative, the natural corollary of the ascertainment of Arm's Length Price of international transaction that is entered by the assessee with its associate enterprise, that additions are required to be made in respect of the transactions where the assessee is found not to have entered such transaction at an Arm's Length Price. As regards the issue that the assessee is not eligible assessee since no order under section 92CA(3) was passed after commencement of assessment proceedings, the learned Departmental Representative submitted that section 144C(15) only refers to the existence of an order under section 92CA(3) and that no way requires that such report must be obtained during the related proceedings. This objection raised by the assessee also, according to the learned Departmental Representative, was not sustainable in law. Learned DR also referred to and relied upon the stand of the authorities below in this regard. It was, thus, urged to confirm the stand of the authorities below in this regard and decline to interfere in the matter. In a short rejoinder, learned counsel for the assessee reiterated his contentions. He once again submitted that all the laws are to be read in holistic manner and so as to make these provisions workable rather than redundant. It was once again reiterated that the reference to the Transfer Pricing Officer was made when no assessment proceedings were pending and that mere co-operation in the proceedings before the Transfer Pricing Officer cannot confer jurisdiction on the Assessing Officer and in any case cannot pre-empt any legal protection available to the assessee. He, thus, submitted that the very foundation that the re-assessment proceeding is wholly based on unsustainable legal propositions and manoeuvring so as to defeat the scheme of limitation envisaged u/s. 143(2). He thus urged to hold that these proceedings are invalid and consequently the impugned order is non-est.

8. The plea of the assessee is indeed well taken. A reference to the Transfer Pricing Officer, in the absence of any proceedings pending before the Assessing Officer, is indeed unsustainable in law. As held by Hon'ble Karnataka High Court, in the case of the **CIT Vs SAP Labs Pvt Ltd [judgment dated 25<sup>th</sup> August 2014 in ITA Nos. 842 of 2008 and 339 of 2010]**, unless an income tax return, in respect of which notice under section 143(2) can be issued, is pending before the Assessing Officer, a reference to the Transfer Pricing Officer cannot be made by the AO. As to what is the relevance of an order passed by the Transfer Pricing Officer's order, in a situation in which the reference itself is unsustainable in law, we find guidance from Hon'ble Bombay High Court's judgment in the case of **CWT Vs Sona Properties (327 ITR 592)**. That was a case in which the Assessing Officer had made a reference to the Departmental Valuation Officer after the end of the assessment proceedings. Their Lordships held that such a reference could not have been made under the scheme of the Act because the assessment proceedings had come to an end before the point of time when such a reference was made, and as such the reference itself was legally invalid. The stand of the revenue was that even if reference to the DVO is to be held to be invalid, the DVO's report constituted information and as such it could be a good basis for coming to the conclusion that wealth has escaped assessment. Rejecting this plea, Their Lordships observed that, **"a report called by an authority having no jurisdiction would be a nullity at law and consequently proceedings based solely on such report considering the requirement of s. 17 would be illegal and will have to be quashed"**. In effect thus, it is held that when reference itself is invalid, the report received as a result of the said reference cannot constitute material for forming the belief that an income or wealth tax escaped assessment. This precisely applies to the situation before us. There is no contrary decision by any of the Hon'ble Courts above, including the Hon'ble jurisdictional High Court. However, this binding judicial precedent is distinguished by the authorities below on the ground that while DVO's report is not binding on the Assessing Officer, the TPO's order is binding on the Assessing Officer. That aspect of the matter, however, is wholly irrelevant inasmuch the reassessment proceedings were quashed in Sona Properties' case (*supra*) for the short reason of illegality for reference rather than on the consequence of the

report obtained as a result of the reference. We are not inclined to accept the plea that the material facts of this case vis-à-vis that of Sona Properties' case, so far as relevant to the principle of law laid down by Hon'ble Bombay High Court, are any different. The distinction being sought to be made out by the revenue authorities is devoid of legally sustainable merits.

9. For the reasons set out above, and respectfully following the law laid down by Hon'ble Karnataka High Court in the case of SAP Labs (supra) and by Hon'ble Bombay High Court in the case of Sona Properties (supra) and as there are no decisions holding anything contrary to these decisions by any of the Hon'ble Courts above, we hold that the very initiation of reassessment proceedings, on the facts of this case, are not sustainable in law. We accordingly set aside the reassessment proceedings. The reassessment order thus stands quashed.

10. As the reassessment proceedings are held to be legally unsustainable, all other grounds of appeal, which deal with the merits of the additions made during the reassessment proceedings, are rendered infructuous. We see no need to deal with these grounds of appeal.

11. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on 25<sup>th</sup> day of November, 2014.

Sd/xx  
**C M Garg**  
(Judicial Member)

Sd/xx  
**Pramod Kumar**  
(Accountant Member)

**New Delhi, the 25<sup>th</sup> day of November 2014**

Copies to : (1) The appellant  
(3) Commissioner  
(5) Departmental Representative  
(6) Guard File

(2) The respondent  
(4) DRP

By order etc

Assistant Registrar  
Income Tax Appellate Tribunal  
Delhi benches, New Delhi