

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 19073 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE B.N. KARIA

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

MEHSANA DISTRICT CO-OPERATIVE

Versus

DEPUTY COMMISSIONER OF INCOME TAX

Appearance:

MR MANISH J SHAH for the PETITIONER(s) No. 1

ADVOCATE NAME DELETED(26) for the RESPONDENT(s) No. 1

DS AFF.NOT FILED (N) for the RESPONDENT(s) No. 1,2

MR.MANISH BHATT , SR COUNSEL WITH MR VARUN K.PATEL for the RESPONDENT(s) No. 1,2

CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE B.N. KARIA

Date : 06/03/2018

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitioner has challenged a reference made by respondent no.1 Deputy Commissioner of Income Tax to respondent no.2 Transfer Pricing Officer (“TPO” for short) in case of the petitioner and consequential order dated 15.9.2017 passed by the TPO in which he made no upward adjustment on the “specified domestic transactions” of the petitioner.
2. Brief facts are as under. The petitioner is a District level Cooperative Milk Producers' Union and is engaged in collection and processing of milk from the member societies who in turn would be cooperative milk societies at Village and Taluka levels. For the assessment year 2014-2015, the petitioner filed return of income on 29.9.2015. Since the petitioner had entered into certain specified domestic transactions and was desirous of opting for safe harbour, the petitioner applied for such purpose in a prescribed format duly certified by the Chartered Accountant. Such application was filed along with the return itself.
3. Case of the petitioner is and to which no dispute is raised by the Revenue that the Assessing Officer did not raise any objection to the petitioner's application for safe harbour nor passed any order declaring that the petitioner had not validly opted for safe harbour.
4. The return of income filed by the petitioner was taken in scrutiny by the Assessing Officer. He issued a notice under

section 143(2) of the Income Tax Act("the Act" for short) on 28.8.2015. In the course of such scrutiny assessment, the petitioner received various notices from the Assessing Officer and replied to the same. As per the normal assessment procedure, the last date for completing the assessment in case of the petitioner for the said assessment year 2014-2015 would be 31.12.2016.

5. On 8.12.2016, the petitioner wrote to the Assessing Officer and preempted any attempt on his part of making reference to the TPO. The petitioner referred to CBDT instructions no.3/2016 dated 10.3.2016 and contended that the case of the petitioner does not fall in any other criteria for making reference. The petitioner conveyed that despite this, if the Assessing Officer was inclined to make such a reference, the petitioner's objections may be called for before making any reference in this regard.
6. On 13.12.2016, without informing the petitioner, respondent no.1 Assessing Officer of the petitioner made reference to the TPO of the petitioner's specified domestic transactions to ascertain the arm's length price.
7. On 29.12.2016, the petitioner wrote to the Principal Commissioner of Income-tax and pointed out that the petitioner had made an application dated 8.12.2016 to the Assessing Officer in connection with Domestic Transfer Pricing and further that the petitioner had opted for safe harbour. The petitioner requested the Principal Commissioner to do the needful in the matter.

8. On 20.2.2017, the TPO issued the notice to the petitioner asking the petitioner to produce evidence in support of computation of arm's length price in relation to the petitioner's specified domestic transactions. This should be done latest by 7.3.2017.
9. On 7.4.2017, the petitioner wrote to the TPO and pointed out that the petitioner had opted for safe harbour, a copy of application filed by the petitioner for such purpose under the prescribed form was attached and requested the TPO to take the same into account.
10. On 19.6.2017, the TPO once again wrote to the petitioner asking the petitioner to provide necessary information latest by 10.7.2017 for computation of arm's length price. Eventually, TPO passed the impugned order dated 15.9.2017 making no adjustments for the arm's length price of the petitioner's specified domestic transactions.
11. Case of the petitioner is that the action of respondent Assessing Officer of referring the petitioner's case to the TPO itself was wholly illegal and invalid when the petitioner had applied for safe harbour and when such application was deemed to have been accepted in terms of the relevant rules. The petitioner's further contention is that the Assessing Officer had made such a reference merely to ensure extended period of limitation for completing the assessment. Our attention was drawn to the sequence of events noted above. It was pointed out that at the fag end of the period for framing the assessment, the Assessing

Officer had made the reference to the TPO on 13.12.2016 totally unknown to the petitioner. This was despite the petitioner's objection to any such reference raised in the petitioner's letter dated 8.12.2016. Under the circumstances, according to the petitioner, even when the TPO has not suggested any upward adjustment in price of the petitioner's specified domestic transactions, the order of the TPO is required to be quashed, failing which, the Assessing Officer could claim extended limitation for completing the assessment which has otherwise become time-barred.

12. On the other hand, learned counsel for the department opposed the petition contending that the Assessing Officer had acted on the CBDT circular no.3/2016 dated 10.3.2016 under which the Assessing Officer was required to make reference to the TPO under certain circumstances. Since the petitioner's case was covered by the said circular, reference was made. Counsel further submitted that the TPO has not made any upward adjustment of the price of the petitioner's specified domestic transactions. The order passed by the TPO not being adverse to the petitioner need not be quashed.

13. Short question, in the present case is whether the reference made by the Assessing Officer to the TPO of the petitioner's specified domestic transactions was valid?

14. In order to decide this question, we may refer to relevant statutory provisions. Section 92C of the Act pertains to computation of arm's length price. By

amendment made in the Finance Act 2012, with effect from 1.4.2013, under section 92C, transfer pricing mechanism would apply also in relation to certain specified domestic transactions. Section 92CA of the Act refers to reference to Transfer Pricing Officer. In terms of sub-section(1) of section 92C, where any person, being an assessee, who has entered into an international transaction or specified domestic transaction in any previous year and the Assessing Officer considers it necessary or expedient to do so, he could with the previous approval of the Principal Commissioner or Commissioner, refer the computation of the arm's length price in relation to such international transaction or specified domestic transaction to the Transfer Pricing Officer and thereupon rest of the provisions contained in the said section will apply.

15. As can be gathered from CBDT circular no.5/2010 dated 3.6.2010 in order to reduce the number of transfer pricing audits and prolonged disputes, since number of cases identified for audit and the transfer pricing adjustments which were locked up in disputes have increased, section 92CB was inserted to the Act to provide for safe harbour rules.

16. Section 92CB which pertains to power of Board to make safe harbour rules reads as under :

“92CB (1) The determination of arm's length price under section 92C or section 92CA shall be subject to safe harbour rules.

(2) The Board may for the purposes of sub-section(1), make rules for safe harbour.

Explanation-For the purposes of this section “safe harbour” means circumstances in which the income-tax authorities shall accept the transfer price declared by the assessee.”

17. In terms of section 92CA, Part DC to Chapter II to the Income Tax Rules, 1962 (“the said Rules” for short) pertaining to Safe Harbour Rules for specified domestic transactions was inserted by Income Tax (Second Amendment) Rules, 2015 with effect from 4.2.2015. Rule 10THA of the said Rules, specifies an 'eligible assessee' as under :

“10THA The “eligible assessee” means a person who has exercised a valid option for application of safe harbour rules in accordance with the provisions of rule 10THC, and

(i) is a Government company engaged in the business of generation, supply, transmission or distribution of electricity; or

(ii) is a co-operative society engaged in the business of procuring and marketing milk and milk products.”

18. Rule 10THB pertains to eligible specified domestic transaction and reads as under :

“10THB The “eligible specified domestic transaction” means a specified domestic transaction undertaken by an eligible assessee and which comprises of :-

(i) supply of electricity; or

(ii) transmission of electricity; or

(iii) wheeling of electricity; or

(iv) purchase of milk or milk products by a co-operative society from its members.”

19. Rule 10THC pertains to safe harbour and reads as under :

10THC (1) Where an eligible assessee has entered into an eligible specified domestic transaction in any previous years relevant to an assessment year and the option exercised by the said assessee is treated to be validly exercised under rule 10THD, the transfer price declared by the assessee in respect of such transaction for that assessment year shall be accepted by the income-tax authorities, if it is in accordance with the circumstances as specified in sub-rule(2).

(2) The circumstances referred to in sub-rule(1) in respect of the eligible specified domestic transaction specified in column(2) of the Table below shall be as specified in the corresponding entry in column (3) of the said Table:-

SL No.	Eligible specified domestic Transaction	Circumstances
1	Supply of electricity, transmission of electricity, wheeling of electricity referred to in clause(i), (ii) or (iii) of rule 10THB, as the case may be	The tariff in respect of supply of electricity, transmission of electricity, wheeling of electricity, as the case may be is determined or the methodology for determination of tariff is approved by the Appropriate Commission in accordance with the provisions of the Electricity Act, 2003 (36 of 2003).

2	Purchase of milk or milk products referred to in clause (iv) of rule 10THB.	The price of milk or milk products is determined at a rate which is fixed on the basis of the quality of milk, namely, fat content and Solid Not Fat (SNF) content of milk; and - (a) the said rate is irrespective of - (i) the quantity of milk procured; (ii) the percentage of shares held by the members in the cooperative society; (iii) the voting power held by the members in the society; and (b) such prices are routinely declared by the co-operative society in a transparent manner and are available in public domain
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(3) No comparability adjustment and allowance under the second proviso to sub-section(2) of section 92C shall be made to the transfer price declared by the eligible assessee and accepted under sub-rule(1).

(4) The provisions of sections 92D and 92E in respect of a specified domestic transaction shall apply irrespective of the fact that the assessee exercises his option for safe harbour in respect of such transaction.”

20. Rule 10THD lays down the procedure for safe harbour and reads as under :

“10THD. (1) For the purposes of exercise of the option for safe harbour, the assessee shall furnish a Form 3CEFB, complete in all respects, to the Assessing Officer on or before the due date specified in Explanation 2 to sub-section (1) of section 139 for furnishing the return of income for the relevant assessment year:

Provided that the return of income for the relevant assessment year is furnished by the assessee on or before the date of furnishing of Form 3CEFB:

Provided further that in respect of eligible specified domestic transactions, other than the transaction referred to in clause (iv) of rule 10THB, undertaken during the previous year relevant to the assessment year beginning on the 1st day of April, 2013 or beginning on the 1st day of April, 2014 or beginning on the 1st day of April, 2015,

Form 3CEFB may be furnished by the assessee on or before the 31st day of March, 2016:

Provided also that in respect of eligible specified domestic transactions, referred to in clause (iv) of rule 10THB, undertaken during the previous year relevant to the assessment year beginning on the 1st day of April, 2013 or beginning on the 1st day of April, 2014 or beginning on the 1st day of April, 2015, Form 3CEFB may be furnished by the assessee on or before the 31st day of December, 2015.

(2) On receipt of Form 3CEFB, the Assessing Officer shall verify whether -

(i) the assessee exercising the option is an eligible assessee; and

(ii) the transaction in respect of which the option is exercised is an eligible specified domestic transaction,

before the option for safe harbour by the assessee is treated to be validly exercised.

(3) Where the Assessing Officer doubts the valid exercise of the option for the safe harbour by an assessee, he may require the assessee, by notice in writing, to furnish such information or documents or other evidence as he may consider necessary and the assessee shall furnish the same within the time specified in such notice.

(4) Where-

(a) the assessee does not furnish the information or documents or other evidence required by the Assessing Officer; or

(b) the Assessing Officer finds that the assessee is not an eligible assessee; or

(c) the Assessing Officer finds that the specified domestic transaction in respect of which the option referred to in sub-rule (1) has been exercised is not an eligible specified domestic transaction; or

(d) the tariff is not in accordance with the circumstances specified in sub rule (2) of rule 10THC,

the Assessing Officer shall, by order in writing, declare the option exercised by the assessee under sub-rule (1) to be invalid and cause a copy of the said order to be served on the assessee:

Provided that no order declaring the option exercised by the assessee to be invalid shall be passed without giving an opportunity of being heard to the assessee.

(5) If the assessee objects to the order of the Assessing Officer under sub-rule (4) declaring the option to be invalid, he may file his objections with the Principal Commissioner or the Commissioner or the Principal Director or the Director, as the case may be, to whom the Assessing Officer is subordinate, within fifteen days of receipt of the order of the Assessing Officer.

(6) On receipt of the objection referred to in sub-rule (5), the Principal Commissioner or the Commissioner or the Principal Director or the Director, as the case may be, shall after providing an opportunity of being heard to the assessee, pass appropriate orders in respect of the validity or otherwise of the option exercised by the assessee and cause a copy of the said order to be served on the assessee and the Assessing Officer.

(7) For the purposes of this rule,-

(i) no order under sub-rule (4) shall be made by an Assessing Officer after expiry of a period of three months from the end of the month in which Form 3CEFB is received by him;

(ii) the order under sub-rule (6) shall be passed by the Principal Commissioner or Commissioner or Principal Director or Director, as the case may be, within a period of two months from the end of the month in which the objection filed by the assessee under sub-

rule (5) is received by him.

(8) If the Assessing Officer or the Principal Commissioner or the Commissioner or the Principal Director or the Director, as the case may be, does not pass an order within the time specified in sub-rule (7), then the option for safe harbour exercised by the assessee shall be treated as valid.”

21. From the above statutory scheme, it can be seen that in order to avoid the number of transfer pricing audits and prolonged disputes, section 92CB was inserted to the Act providing for Safe Harbour Rules. Entire mechanism of safe harbour is prescribed in part DC to Chapter-II of the said Rules. Rule 10THA specifies the eligible assessee. As per this rule, the eligible assessee would mean a person who has exercised a valid option for application of safe harbour rules and who is either a Government company engaged in the business of generation, supply, transmission or distribution of electricity or is a co-operative society engaged in the business of procuring and marketing milk and milk products. Undisputedly, the petitioner satisfied both the conditions. The petitioner had exercised valid option for safe harbour and also is a cooperative society engaged in the business of procuring and marketing milk and milk products. Rule 10THB, in turn, specifies the eligible specified domestic transaction. Though this rule does not say in so many words, clearly this eligibility of specified domestic transaction is in relation to the safe harbour procedure. Clause (iv) of Rule 10THB specifies purchase of milk or milk products by a cooperative society from its members as eligible specified domestic transaction. Thus the assessee in the present

case, was an eligible assessee as specified in rule 10THA and the specific domestic transaction with respect to which the petitioner desired to opt for safe harbor was eligible specified domestic transaction in terms of rule 10THB. Sub-rule 10THC provides that where an eligible assessee has entered into an eligible specified domestic transaction in any previous years relevant to the assessment year and the option exercised by said assessee is treated to be validly exercised, the transfer price declared by the assessee in respect of such transaction for that particular assessment year shall be accepted by the income-tax authorities, if it is in accordance with the circumstances as specified in sub-rule(2). The petitioner's contention is that the petitioner's case would fall under second clause of sub-rule(2) pertaining to purchase of milk or milk products referred to in clause (iv) of rule 10THB, since the petitioner satisfied all the circumstances under 3rd column of the table below sub-rule(2) of rule 10THC. The Revenue has not pointed out anything to the contrary. In other words, it is not even the case of the Assessing Officer that in case of the petitioner, the circumstances referred to in sub-rule(2) of rule 10THC were not satisfied and that therefore, despite the petitioner's application for safe harbour, the price indicated by the petitioner could be rejected.

22. Rule 10THD of the said Rules lays down the procedure for making application for safe harbour and consideration of such application by the revenue authorities. This rule being important, we have reproduced the said rule in entirety in this judgment. Under sub-rule(1) of rule 10THD, an eligible assessee desiring to opt

for safe harbour would furnish application in prescribed form to the Assessing Officer on or before the due date for furnishing the return. Under sub-rule(2), on receipt of such an application, the the Assessing Officer would verify whether the assessee is an eligible assessee and the transaction in respect of which the option is exercised is an eligible specified domestic transaction before the option for safe harbour by the assessee can be treated to be validly exercised. Under sub-rule(3), if the Assessing Officer has any doubt about the valid exercise of the option for the safe harbour by an assessee, he would require the assessee to furnish the information within the specified time. Under sub-rule (4), if the assessee does not furnish such information or the Assessing Officer finds that the assessee is not an eligible assessee or the specified domestic transaction is not an eligible transaction or the tariff is not in accordance with the circumstances specified in sub rule (2) of rule 10THC, the Assessing Officer shall, by order in writing, declare the option exercised by the assessee. Before doing so, he would given an opportunity of being heard to the assessee. Under sub-rule (5) of the said Rule, if the assessee wants to object to the order passed by the Assessing Officer under sub-rule (4), he may approach the Principal Commissioner, the Commissioner, the Principal Director or the Director to whom the Assessing Officer is subordinate, within fifteen days of receipt of the order of the Assessing Officer. Under sub-rule(6), upon receipt of such objection, the concerned authority after granting an opportunity of being heard to the assessee, pass appropriate orders.

23. Sub-rule(7) and sub-rule(8) of Rule 10THD are of importance. Sub-rule(7) provides that no order under sub-rule (4) shall be made by an Assessing Officer after expiry of a period of three months from the end of the month in which Form 3CEFB, i.e. application for safe harbour in prescribed form, is received by him and further an order under sub-rule (6) shall be passed by concerned authority within a period of two months from the end of the month in which the objection filed by the assessee under sub-rule (5) is received by him. Sub-rule (8) further provides that if the Assessing Officer or the Principal Commissioner or the Commissioner or the Principal Director or the Director, as the case may be, does not pass an order within the time specified in sub-rule (7), then the option for safe harbour exercised by the assessee shall be treated as valid.
24. Sub-rule (7) of rule 10THD thus lays down the time limit for the Assessing Officer to pass an order under sub-rule(4) and for the concerned competent authority to pass an appropriate order under sub-rule(6). We may recall under sub-rule(4), the Assessing Officer may declare that the option exercised by the assessee for safe harbour was invalid. Under sub-rule(6), the concerned authority would dispose of the assessee's objection to any such order that the Assessing Officer may have passed under sub-rule(4). The rules do not rest at merely laying down such time limit. Sub-rule(8) in fact, mandates that if either the Assessing Officer or the concerned competent authority does not pass the order within the time specified in sub-rule(7), then the option for safe harbour exercised by the assessee shall be treated as valid. Sub-rule(8) thus gives

rise to a deeming fiction where in absence of any order passed by the Assessing Officer under sub-rule(4) declaring the option exercised by an assessee as invalid, same shall be treated as valid. In fact, even if the Assessing Officer has passed such an order under sub-rule(4) and the assessee objected to such order before the concerned authority within the time permitted and such authority fails to dispose of such objection within the time specified in clause(ii) of sub-rule(7) of Rule 10THD, in such a case, the option exercised by the assessee shall be treated as valid.

25. In the present case, admittedly, after the petitioner exercised such an option, the Assessing Officer passed no order under sub-rule(4) of rule 10THD declaring that the exercising of option was invalid. In terms of sub-rule(7) and sub-rule(8) of the said rule, therefore, the option exercised by the assessee would be treated as valid.

26. Once this conclusion is reached, it follows as a natural and necessary corollary that the Transfer Pricing regime would not apply. That being the case, the Assessing Officer had no authority to make any reference to the TPO to ascertain the arm's length price of the petitioner's specified domestic transactions. Reference itself was therefore, invalid. CBDT's circular dated 10.3.2006 could not have and does not lay down anything to the contrary. The circular merely prescribes the circumstances under which the Assessing Officer would make reference to the TPO. Nowhere does the circular provide that as soon as such circumstances exist, the Assessing Officer would make a reference to the TPO, irrespective of the fact that

the assessee had opted for safe harbour and such option was treated or deemed to be treated as validly exercised. Legally speaking, CBDT could not have given any such directive. Eventually no such directive can be discerned from the circular.

27. In the result, the petition is allowed. Reference made by the Assessing Officer to the TPO in the present case is quashed. Resultantly, the order dated 15.9.2017 passed by the TPO on such invalid reference is set aside.

28. Petition is disposed of.

(AKIL KURESHI, J.)

(B.N. KARIA, J.)

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