

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Mr. Justice Biswanath Somadder

WP No. 16340 (W) of 2015

Price Waterhouse & Anr.
-Versus-
Commissioner of Income Tax, Kolkata-8 & Ors.

For the petitioners: Mr. Samaraditya Pal, Sr. Advocate
Mr. Debashis Kundu, Sr. Advocate
Mr. J.P. Khaitan, Sr. Advocate
Mr. Indranil Nandi
Mr. Deba Prasad Samanta

For the Respondents: Mr. Md. Nizamuddin

Judgment on: 6th August, 2015.

Biswanath Somadder, J.

Let the affidavit of service filed in Court today be taken on record.

After considering the submissions made by the learned advocates for the parties and upon perusing the instant application, it appears that the only issue which falls for consideration in the facts and circumstances of the instant case is whether there has been any "international transaction" between the petitioner no.1 on one hand and PricewaterhouseCoopers Services BV on the other, as defined under section 92B of the Income Tax Act, 1961.

A plain reading of sub-section (1) of section 92B of the Income Tax Act, 1961 reveals that “international transaction” means a transaction between two or more “associated enterprises”. Meaning of “**associated enterprise**” (emphasis supplied) has been statutorily elaborated under section 92A of the Income Tax Act, 1961. Clause (a) under sub-section (1) of section 92A of the Income Tax Act, 1961, spells out that one of the three statutory requirements, i.e. **management** or **control** or **capital** are necessary to be fulfilled for an enterprise to be **associated** with another enterprise. The kind of **management** or **control** or **capital** required has been further elaborated in sub-section (2) of section 92A of the Income Tax Act, 1961.

In the facts of the instant case, it is noticed from the records that even after the writ petitioner no.1, by a letter dated 29th April, 2015, replied to the notice dated 24th March, 2015, issued by the Joint Commissioner of Income Tax (Transfer Pricing Officer), Kolkata, taking a specific point that the partnership firm had not entered into any “international transaction” within the meaning of section 92B of the Income Tax Act, during the assessment year 2012 – 2013 nor in any earlier assessment years, the Income Tax authorities have remained conspicuously silent by not furnishing relevant materials based on which it came to a conclusion that there has been an “international transaction” within the meaning of section 92B of the Income Tax Act, 1961. If there is no relevant material in the hands of the Income Tax authorities with which it has come to an incontrovertible conclusion that the petitioner no.1 is an “**associated enterprise**” of PricewaterhouseCoopers Services BV, within the meaning of

section 92A of the Income Tax Act, 1961, the question of issuance of notice dated 24th March, 2015, would not arise. When the petitioner no.1 replied to the said notice by its letter dated 29th April, 2015, the concerned respondent authority ought to have given a reply by supplying such relevant materials with which it come to a conclusion that the petitioner no.1 was an “***associated enterprise***” of PricewaterhouseCoopers Services BV. The reason why furnishing of such relevant materials were singularly important is that if the petitioner no.1 was not an “***associated enterprise***” of PricewaterhouseCoopers Services BV, there cannot be any computation of income from “international transaction” having regard to arm’s length price as envisaged under section 92 of the Income Tax Act, 1961.

Learned advocate appearing on behalf of the Income Tax authorities, however, has referred to a Division Bench judgment of the Bombay High Court rendered on **Hindalco Industries Ltd. Vs. Additional Commissioner of Income Tax**, reported in **TAXMAN – 2012 (211) – 315**. Relying on the said judgment, he submits that it would inappropriate for this Court to exercise its writ jurisdiction under Article 226 of the Constitution of India to entertain a petition challenging the validity of the notice dated 24th March, 2015, as well as the reference made by the respondent no.3 to the Transfer Pricing Officer on 12th February, 2015.

The judgment of the Bombay High Court, which is sought to be relied upon by the learned advocate representing the Income Tax authorities, has no manner of application at all in the facts and circumstances of the instant case. In that matter, the Transfer Pricing Officer issued a notice to the assessee upon receipt

of the reference. The petitioner, in that matter, participated in the proceedings before the Transfer Pricing Officer. Eight hearings took place before the Transfer Pricing Officer, in the course of which the petitioner submitted its representations. The Transfer Pricing Officer rendered a determination on 31st October, 2011 and it was in those facts and circumstances that the Bombay High Court made such an observation, as stated above.

Undoubtedly, in the facts and circumstances of the instant case, for reasons stated earlier, a prima facie case has been made out for an ad interim order in terms of prayer (g) of the petition. Such ad interim order shall continue until final disposal of the writ petition.

Let affidavit-in-opposition be filed within eight weeks from date. Reply, if any, four weeks thereafter.

Let this matter appear for further consideration under the heading "For Final Disposal" in the combined monthly list to be published for the month of November, 2015.

Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties.

(Biswanath Somadder, J.)