

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 28.11.2011

+ **ITA 938/2011**

COMMISSIONER OF INCOME TAX

.... Appellant

versus

AMADEUS INDIA PVT LTD

.... Respondent

Advocates who appeared in this case:-

For the Appellant : Ms Suruchi Aggarwal

For the Respondent : Mr M.S. Syali, Sr. Advocate with Mr Mayank Nagi &
Ms Husnal Syali

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MS JUSTICE VEENA BIRBAL

BADAR DURREZ AHMED, J

1. The present appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the said Act) has been preferred by the Revenue against the judgment dated 18.02.2011 of the Income Tax Appellate Tribunal, Delhi Bench-A, New Delhi, delivered in ITA No. 5203/DEL/2010 pertaining to the assessment year 2006-07. The substantial question of law which arises for our consideration is as under:-

“Whether, on the facts and circumstance of the case, the Income Tax Appellate Tribunal erred in deciding that the Transfer Pricing Officer (TPO) could not take cognizance *suo moto* of any international transaction for adjustment in the Arms Length Price (ALP) under Section 92CA of the Income-tax Act, 1961?”

2. The facts of the case are that the assessee, which was incorporated on 26.07.1999 as a joint venture company between M/s Radha Bhatia and family and German Travel Services (GTS), Germany, in which the former holds 95% of its equity capital and the remaining share capital of 5% is held by the German company. The assessee is engaged in the business of providing data processing and related services to its associated enterprises. The assessee is responsible for providing software access to the subscribers of the Amadeus products and computer database within the Indian sub-continent which includes the territory of India, Bangladesh and Nepal. The prime activity of the assessee is to provide connectivity to the host system by their computer programmes online. During the previous year under consideration, the assessee entered into international transactions with associated enterprises, within the meaning of Section 92B of the said Act. The details of the said transactions were mentioned in Form 3CEB filed by the assessee in terms of Rule 10E of the Income Tax Rules, 1962 (hereinafter referred to as the said Rules) read with Section 92E of the said Act. The Assessing Officer had referred the case of the assessee to the Transfer Pricing Officer (TPO), under the provisions of Section 92CA(1) of the said Act, after taking the statutory approval from the Commissioner of Income Tax, Delhi-I, New Delhi on 23.10.2009. The Transfer Pricing Officer, by virtue of his order dated 23.10.2009, adjusted an amount of ₹ 32,92,83,589/- attributable to the difference in arm's length price of the international transactions entered into between the assessee and its associated enterprise. The said adjustment was made by the Assessing Officer by virtue of the assessment order dated 19.10.2010. Being aggrieved by the said order, the assessee preferred an appeal before the Income Tax Appellate Tribunal, after obtaining directions under Section 144C of the said Act.

3. The Transfer Pricing Officer had observed that the assessee had incurred more than the normal sales and marketing expenses to build the "Amadeus" brand in India which was owned by Amadeus Spain. According to the Transfer

Pricing Officer, the assessee should have been reimbursed with an appropriate mark-up on such additional marketing expenses. Consequently, the Transfer Pricing Officer computed the arm's length price in respect of advertisement, marketing and promotion (AMP) expenses after comparing the same with three companies, namely, Galileo India Private Ltd, Aztecsoft Limited and Geometric Limited. The Transfer Pricing Officer computed the average AMP percentage of these three companies at 12.16% and concluded that any expenditure over and above 12.16% would be considered as more than routine AMP expenses. The Transfer Pricing Officer computed the AMP percentage of the assessee at 40.87%, which was much above the AMP percentage computed for the said three companies at 12.16%. As such, an adjustment was made to the AMP expenses to the extent of ₹ 29,93,48,718/-.

4. The main point of discussion before the Income Tax Appellate Tribunal was whether the Transfer Pricing Officer could have determined the arm's length price in respect of an international transaction which had not been specifically referred to him by the Assessing Officer. In this context, it was argued on behalf the assessee that the issue of determining the arm's length price in respect of AMP expenses had not been referred by the Assessing Officer to the Transfer Pricing Officer as an international transaction. In fact, what had been referred was only that which found mention in Form 3CEB which pertained to services provided and services received, as mentioned in paragraph 3 of the Transfer Pricing Officer's order. It was contended on behalf of the assessee that the Transfer Pricing Officer had exceeded his jurisdiction when he sought to consider the question whether AMP expenditure was in the nature of an international transaction and that the Transfer Pricing Officer fell in error in doing so. The fact that the Transfer Pricing Officer had embarked upon a consideration of the question as to whether AMP expenditure was in the nature of an international transaction, is apparent from paragraph 7.2 of the Transfer Pricing Officer's order dated 23.10.2009. In fact, the submission on

behalf of the assessee was that the Transfer Pricing Officer had gone to the extent of even recommending penalty proceedings being initiated against the assessee, in view of the fact that the Transfer Pricing Officer had determined that AMP expenditure was in the nature of an international transaction which ought to have been mentioned in Form 3CEB. This is apparent from the discussion and conclusion arrived at in paragraph 12.4 of the Transfer Pricing Officer's order.

5. Before the Income Tax Appellate Tribunal, it was contended on behalf of the assessee that no reference had been made by the Assessing Officer under Section 92CA(1) with regard to AMP expenses. This contention was based upon the following submissions which are extracted from the impugned judgment:-

“1.1 Following facts substantiate that no reference was made by the AO u/s 92CA(1) as regards the AMP expenses:

* A common reference was made to the TPO in case of 12 companies by the AO vide letter dated 15th July 2008 (copy filed during the course of hearing on 05th January 2011). The reference was made only *vis a vis* transactions reported in Form No. 3CEB (Report attached with return of income).

* International transactions reported by the assessee in Form No. 3CEB (relevant at pg 125 of PB) were acknowledged by the TPO in his order at page 4, para 3 (i.e. page 61 of PB) which did not include AMP expenses.

* TPO at Pg 14, Para 7.2 of the order (i.e. pg 71 of PB) had to conclude that AMP expenditure incurred by assessee is an 'international transaction' before adjudicating thereon.

* TPO at pg 30, para 12.4 of the order (i.e. pg 87 of PB) recommended imposition of penalty as AMP expenditure "Being an international transaction it was required to be reported in Form 3CEB under section 92E of the Act".

* TPO in his order did not propose any adjustment to the income of assessee in respect of international transactions disclosed in its TP report.

1.2 The above facts have not been disputed by the department (kindly refer submissions filed by the Ld. CIT (DR) relevant at page 2, last para). However in the same paragraph it is noted by the Ld. CIT (DR) that “the Transfer Pricing Officer noticed that expenditure in respect of AMP expenses incurred by the assessee were also within the realm of international transaction and he accordingly determined the arm’s length price of these expenses in his order.”

6. The impugned judgment also records, in paragraph 8 thereof, that as far as the primary facts are concerned, there is no dispute between the parties and the only dispute before the Tribunal was whether the Transfer Pricing Officer could suggest adjustments to the Assessing Officer in respect of an international transaction which had not been referred to him by the Assessing Officer under Section 92 CA(1) of the said Act.

7. The Income Tax Appellate Tribunal thereupon considered the rival contentions of the parties and embarked upon the interpretation of the relevant provisions and came to the conclusion that the role of the Transfer Pricing Officer has been restricted to only that transaction which has been referred to him by the Assessing Officer for computation of the arm’s length price and that the Transfer Pricing Officer cannot take *suo moto* notice of any other transaction which has not been referred to him for the purposes of computing the arm’s length price. The exact words used by the Tribunal are as under:-

“10. On bare perusal of sub-section (1) of section 92CA it reveals certain conditions i.e. the assessee should have entered into an international transaction in any previous year. The Assessing Officer may consider it necessary and expedient to

verify the arm's length price of the international transactions. The Assessing Officer would take previous approval from the Commissioner for referring the computation of the arm's length price in relation to the said international transaction. The expression "said international transaction" employed at the end of the sub-section would indicate that operative force of this expression related to that international transaction which has been considered by the Assessing Officer for computation of the arm's length price and for which he took approval from the Commissioner. The role of the Transfer Pricing Officer has been restricted to that transaction which has been referred to him by the Assessing Officer for computation of the arm's length price. The plain reading of this section nowhere reveals that Ld. Transfer Pricing Officer can take any transaction suo moto for verification and then suggested necessary adjustment. On a plain reading of sub-section (1) according to its language this meaning alone is discernable. Apart from that, we find support from the CBDT instructions vide Instruction No.3/2003 wherein role of TPO has been explained. These instructions have been placed on record by the Ld. Counsel of the assessee at page no.331 of the PB. The relevant part of the instructions read as under:-

Role of the Transfer Pricing Officer:

The role of the TPO begins after a reference is received from the Assessing Officer. In terms of section 92CA this role is limited to the determination of arm's length price in relation to the international transaction(s) referred to him by the Assessing Officer. If during the course of proceedings before him it is found that there are certain other transactions which have not been referred to him by the Assessing Officer, he will have to take up the matter with the Assessing Officer so that a fresh reference is received with regard to such transactions. It may be noticed that the reference to the TPO is transaction and enterprise specific."

8. It is in this backdrop that the question framed has to be considered by us.
9. Ms Suruchi Aggarwal, the learned counsel for the Revenue contended that when a reference is made by an Assessing Officer to the Transfer Pricing

Officer, the reference includes the entire gamut of transactions between the assessee and its associated enterprise. The provisions of Section 92CA cannot be read in a restrictive manner so as to confine it only to specific international transactions or elements of said transactions for the purposes of determination of the arm's length price. According to the learned counsel for the Revenue, it is Section 92 of the said Act which provides the basis for determination of an arm's length price of any international transaction, however, when the Assessing Officer feels that it would be necessary for a specialist such as a Transfer Pricing Officer to determine the arm's length price, he can refer the matter to the Transfer Pricing Officer by invoking the provisions of Section 92CA of the said Act, after following the due procedure, which includes the prior approval of the CIT. She submitted that once this is done, the Transfer Pricing Officer can look into the entire gamut of dealings between the assessee and the associated enterprise and thereafter determine the arm's length price.

10. Mr Syali, the learned senior counsel appearing on behalf of the assessee, on the other hand, submitted that the provisions of Section 92CA have been correctly interpreted by the Income Tax Appellate Tribunal. He submitted that the Transfer Pricing Officer has a very limited and restricted role to play and he cannot take upon himself the functions and duties of an Assessing Officer. It is for the Assessing Officer to determine as to whether a transaction is an international transaction or not. The Transfer Pricing Officer is not required to determine nor does he have the jurisdiction to determine the issue as to whether any transaction falls within the meaning of an "international transaction" as defined in Section 92B of the said Act. According to Mr Syali, the Transfer Pricing Officer can only determine the arm's length price of an international transaction which has been specifically referred to him by the Assessing Officer after, of course, obtaining the necessary approval of the Commissioner of Income Tax in respect thereof. He also contended that the AMP expenditure was not the result of a transaction between the assessee and its associated

enterprise but was in the nature of a domestic transaction and, hence, was not even an 'international transaction' as defined in section 92B of the said Act. He, then, referred to the language employed in Section 92CA to submit that the arm's length price is to be determined in relation to an international transaction and, therefore, it must be that international transaction which has been referred to by the Assessing Officer and not every international transaction. He submitted that if the Transfer Pricing Officer felt that there was some other international transaction which had escaped the notice of the Assessing Officer, then the Transfer Pricing Officer could have requested the Assessing Officer to make a reference in respect thereof, after obtaining the requisite approval of the Commissioner of Income Tax, but, he of his own, could not have entered into the consideration of this aspect of the matter and could not have computed the arm's length price.

11. Mr Syali also referred to instruction no.3 of 2003, issued by the Central Board of Direct Taxes on 20.05.2003 which is to the following effect:-

“(ii) Role of Transfer Pricing Officer:

The role of the Transfer Pricing Officer begins after a reference is received from the Assessing Office. In terms of section 92CA this role is limited to the determination of arm's length price in relation to the international transaction(s) referred to him by the Assessing Officer. If during the course of proceedings before him it is found that there are certain other transactions which have not been referred to him by the Assessing Officer, he will have to take up the matter with the Assessing Officer so that a fresh reference is received with regard to such transactions. It may be noted that the reference to the Transfer Pricing Officer is transaction and enterprise specific.”

12. He also relied upon the decision of this court in **Sony India P. Ltd v. Central Board of Direct Taxes and Another: (2007) 288 ITR 52 (Delhi)** as also on the decision of the Gujarat High Court in **M/s Veer Gems v. ACIT** in Special Civil Application No.12648 of 2011 dated 19.10.2011. Mr Syali also

referred to the amendment introduced by the Finance Act, 2011. By virtue of which sub-section (2A) was inserted in Section 92CA with effect from 01.06.2011. He submitted that upon a plain construction of the newly inserted sub-section (2A), it is apparent that Parliament intended to widen the jurisdiction of the Transfer Pricing Officer and any provision whereby the jurisdiction is affected, has to be prospective in nature. For this proposition, he placed reliance on the Supreme Court decisions in *STO v. Oriental Coal Corporation: (1988) SCC Suppl. 308* and *Bharat Singh v. Management of New Delhi Tuberculosis Centre and Others: (1986) 2 SCC 614*. He also submitted that the insertion of sub-section (2A) is clear indication that there can be more than one international transaction between an assessee and an associated enterprise. Therefore, in the period prior to the insertion of sub-section (2A), it is only that international transaction which had been specifically referred to the Transfer Pricing Officer by the Assessing Officer, which could be the subject matter for determination of the arm's length price and no other.

13. The factual position is clear. The issue of AMP expenses had not been referred to the Transfer Pricing Officer by the Assessing Officer. What had been referred was the international transactions mentioned in Form 3CEB. It is only in the course of determining the arm's length price in respect of the international transactions mentioned in Form 3CEB and referred to by the Assessing Officer that the Transfer Pricing Officer took upon himself the consideration of the question as to whether the said AMP expenditure was in the nature of an international transaction. The Transfer Pricing Officer, after having concluded that it was an international transaction, went ahead and computed the arm's length price for the same. As we have noticed above, the Tribunal took the view that the Transfer Pricing Officer could not have determined the arm's length price of an international transaction which had not been referred to him by the Assessing Officer. So, on facts, it is clear that the

issue of AMP expenditure had not been referred to the Transfer Pricing Officer by the Assessing Officer in this case.

14. Let us examine the relevant provisions of the said Act. Section 92 (1) of the said Act stipulates that any income arising from an international transaction shall be computed having regard to the arm's length price. Section 92 B gives the meaning of an international transaction for the purposes of Section 92, 92C, 92D and 92E. The said provision reads as under:-

“92B. Meaning of international transaction. – (1) For the purposes of this section and sections 92, 92C, 92D and 92E, “international transaction” means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.

(2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise.”

15. The computation of the arm's length price is provided for in Section 92C of the said Act. The relevant portions of the same read as under:-

“92C. Computation of arm's length price. – (1) The arm's length price in relation to an international transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or

class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe, namely:—

- (a) comparable uncontrolled price method;
- (b) resale price method;
- (c) cost plus method;
- (d) profit split method;
- (e) transactional net margin method;
- (f) such other method as may be prescribed by the Board.

(2) The most appropriate method referred to in sub-section (1) shall be applied, for determination of arm's length price, in the manner as may be prescribed:

[Provided that

Provided further that]

(3) Where during the course of any proceeding for the assessment of income, the Assessing Officer is, on the basis of material or information or document in his possession, of the opinion that—

- (a) the price charged or paid in an international transaction has not been determined in accordance with sub-sections (1) and (2); or
- (b) any information and document relating to an international transaction have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section (1) of section 92D and the rules made in this behalf; or
- (c) the information or data used in computation of the arm's length price is not reliable or correct; or
- (d) the assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub-section (3) of section 92D,

the Assessing Officer may proceed to determine the arm's length price in relation to the said international transaction in accordance with sub-sections (1) and (2), on the basis of such material or information or document available with him:

Provided that an opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the arm's length price should not be so determined on the basis of

material or information or document in the possession of the Assessing Officer.

(4) Where an arm's length price is determined by the Assessing Officer under sub-section (3), the Assessing Officer may compute the total income of the assessee having regard to the arm's length price so determined:

Provided that

Provided further that"

16. From the above provisions, it is apparent that it is primarily the duty of the Assessing Officer to compute the arm's length price in relation to an international transaction in accordance with the most appropriate method specified in Section 92C (1). However, where the Assessing Officer requires the arm's length price to be computed by a specialist, a reference may be made to the Transfer Pricing Officer. This is provided in Section 92CA of the said Act which reads as under:-

“92CA. Reference to Transfer Pricing Officer. – (1) Where any person, being the assessee, has entered into an international 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 Commissioner, refer the computation of the arm's length price in relation to the said international 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 referred to in sub-section (1).

**(2A) Where any other international transaction [other than an international transaction referred under sub-section (1)], comes to*

* Inserted by the Finance Act, 2011, w.e.f. 1-6-2011.

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).]

(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 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.]

[(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.]

XXXX XXXX XXXX XXXX XXXX”

17. A plain reading of Section 92CA makes it clear that the Assessing Officer, if he considers it necessary or expedient so to do, may, with the previous approval of the Commissioner, refer the computation of the arm's length price in relation to an international transaction under Section 92C to the Transfer Pricing Officer. At this juncture, we may reiterate that it is primarily

the duty of the Assessing Officer to compute any income arising from an international transaction having regard to the arm's length price. He may determine the arm's length price of an international transaction himself or, if he feels that it is necessary or expedient so to do, he may seek the approval of the Commissioner and, thereafter, refer the computation of the arm's length price in respect of an international transaction to the Transfer Pricing Officer. This makes it clear that it is the Assessing Officer who has to determine, first of all, whether a transaction is an international transaction under Section 92B of the said Act. Secondly, if it is an international transaction in his view, he has to proceed to determine the arm's length price in terms of Section 92C of the said Act. However, if, for any reason, he feels that it is necessary or expedient so to do, he may seek the approval of the Commissioner and then refer the computation of the arm's length price in relation to the said international transaction to the Transfer Pricing Officer. The role of the Transfer Pricing Officer, as indicated in Section 92CA, is restricted to determining the arm's length price in relation to the international transaction which has been referred to him by the Assessing Officer and such computation of the arm's length price in relation to the said international transaction has to be done in terms of Section 92C of the said Act. On a plain reading, we are of the view that it is not within the domain of the Transfer Pricing Officer to determine whether a particular transaction, which has come to his notice, but which has not been referred to him, is or is not an international transaction and then to go on and determine the arm's length price thereof. That, we feel, is in the exclusive jurisdiction of the Assessing Officer. It ought to be pointed out that these views are on the basis of the provisions of Section 92 CA, as applicable to the assessment year 2006-07, that is, prior to the introduction of sub-section (2A) of Section 92CA by virtue of the Finance Act, 2011 with effect from 01.06.2011. Insofar as the present appeal is concerned, Section 92CA would have to be read without sub-section 2A. We agree with Mr Syali that sub-

section (2A) cannot have retrospective effect inasmuch as it deals with the jurisdiction of the Transfer Pricing Officer and, therefore, sub-section (2A) cannot be regarded as being a mere procedural provision.

18. In *STO v. Oriental Coal Corporation* (*supra*), a similar contention had been raised that an amendment was purely procedural and, therefore, ought to be construed to be retrospective. The Supreme Court took the view that the amendment in question was not purely procedural inasmuch as the amendment changed the position and imposed a substantive liability on a dealer and that it was also one which conferred jurisdiction on an officer in a particular state to levy a tax which he otherwise did not have. Consequently, the Supreme Court held that the amendment in question was a substantive provision and could not be treated as procedural and, therefore, did not have retrospective effect. The actual words used by the Supreme Court are as under:-

“9. The contention that the amendment is purely procedural is also misconceived. Assuming the correctness of the contention that a purely procedural amendment should ordinarily be construed to be retrospective, we are unable to agree that the present amendment is of such nature. The decision of this Court in *Kasturi Lal's case* [1987 (3) JT 234] had held that an unregistered dealer is not taxable under the proviso. The amendment changes this position and imposes a substantive liability on such a dealer. It is also one which confers jurisdiction on an officer in a particular State to levy a tax which he otherwise cannot. It is thus a substantive provision. That apart, even the question whether a charge to tax can be imposed in one State or another is not a mere question of venue. It may have an impact on the rate of tax in certain cases and it also regulates the rights inter se of States to levy taxes on such inter-state sales. It is, therefore, difficult to accept the contention that the amendment should be treated as purely procedural and hence necessarily retrospective.”

19. In *Bharat Singh (supra)*, a similar view was expressed. One of the issues before the Supreme Court was whether Section 11A of the Industrial Disputes Act, 1947, by virtue of which the tribunals were conferred with a new jurisdiction, would operate retrospectively. The Supreme Court came to the conclusion that Section 11A conferred a jurisdiction on the Labour Court, Tribunal or National Tribunal to act in a particular manner which jurisdiction it did not have prior to the coming into force of Section 11A. The Supreme Court observed:-

“16. ... The conferment of a new jurisdiction can take effect only prospectively except when a contrary intention appears on the face of the statute. Section 11A plainly indicates its prospective operation. ...”

20. Similarly, in the case before us, we find that there is nothing in the statute to indicate that sub-section (2A) was introduced in a manner so as to operate with retrospective effect. Sub-section (2A) expands the jurisdiction of the Transfer Pricing Officer by empowering him to determine the arm's length price of any international transaction other than an international transaction referred to him by the Assessing Officer under sub-section (1) of Section 92CA. This is clearly an expansion of the jurisdiction of the Transfer Pricing Officer and, therefore, sub-section (2A) can only have prospective effect from 01.06.2011 and would have no application to the present appeal which is in respect of the assessment year 2006-07.

21. As observed by a Division Bench of this court in the case of *Sony India Pvt. Ltd (supra)*, the CBDT Instruction dated 20.05.2003 [2003 (261) ITR (St.) 51], is based on a correct interpretation of the relevant provisions of the said Act and they can, indeed, guide the Assessing Officer while taking up the exercise of computing the arm's length price in terms of Section 92C. Clause

(a) of the said Instruction, prescribes that in order to make a reference to the Transfer Pricing Officer, the Assessing Officer has to satisfy himself that the tax payer has entered into an international transaction with an associated enterprise. One of the sources from which the factual information regarding international transactions can be gathered is Form No.3CEB filed with the return which is in the nature of an accountant's report containing the basic details of an international transaction entered into by the tax payer during the year and the associated enterprise with which such transaction is entered into, the nature of documents maintained and the method followed. It further prescribes that the primary details regarding such international transactions would normally be available in the accountant's report.

22. Clause (d) of the said Instruction itself records that if there are more than one transaction with an associated enterprise or there are transactions with more than one associated enterprise, the aggregate value of which exceeds Rs 5 crores, the transactions should be referred to the Transfer Pricing Officer. This clause of the said instruction clearly recognizes the fact that there can be more than one international transaction with an associated enterprise. Reading the instructions and the provisions together, it is apparent that it is the duty of the Assessing Officer to satisfy himself as to whether an international transaction has been entered into by the assessee with an associated enterprise. Only when the Assessing Officer is satisfied about the existence of an international transaction, can he, after obtaining approval of the Commissioner of Income-tax, refer the matter to the Transfer Pricing Officer for computing the arm's length price. The question of determining whether a particular transaction is or is not an international transaction, has to be determined by the Assessing Officer and not by the Transfer Pricing Officer. We make it clear, once again, that this view of ours is based on the fact that in respect of the assessment year 2006-07, the provisions of sub-section (2A) would not be applicable inasmuch as the same was introduced much later, that is, with effect from 01.06.2011.

23. The observations of the Gujarat High Court in the case of *M/s Veer Gems (supra)* are also apposite. They are:-

“10. It, thus, emerges that for the Assessing Officer to make a reference of computation of the arm’s length price under sub-section (1) of Section 92CA of the Act to the TPO, it is necessary that the assessee should have entered into an international transaction and further that the Assessing Officer considers it necessary or expedient to make such a reference to the TPO. Since the term “international transaction” means a transaction between two or more associated enterprises, which transaction satisfies the requirement under sub-section (1) of Section 92B of the Act, it is necessary that there has been a transaction between two associated enterprises before a reference under Section 92 C can be made by the Assessing Officer. So much is plain and clear from the statutory provisions contained in the Act. The question is at what stage it must be finally and conclusively held by the Assessing Officer that in the previous year relevant to the assessment year under consideration there had been an international transaction between the petitioner and the associated enterprise. Surely the TPO would not be a competent authority to decide this issue. From the statutory provisions we have noticed, it clearly emerges that upon a reference the TPO has to serve a notice on the assessee requiring him to produce or cause to be produced evidence on which the assessee may rely in support to the computation of the arm’s length price in relation to an international transaction. Thereupon, the TPO after considering such evidence, as the assessee may produce, including the documents referred to in Section 92D of the Act, has to pass an order in writing determining the arm/s length price after permitting the assessee to produce relevant documents on record. At that stage, the statutory provisions do not require or even permit the TPO to deliberate on the question whether there had been any international transaction during the period under consideration. In addition to the statutory provisions we have noticed, we are further of the opinion that the TPO whose primary task is to determine the arm’s length price of an international transaction upon a reference being made in this regard by an Assessing Officer, would have no jurisdiction to decide the validity of any such reference. His jurisdiction to act in accordance with provisions contained in Section 92CA of the Act and in particular, sub-section (2) and (3) thereof, would commence only upon a reference being made to him for computation of arm’s

length price of an international transaction by the Assessing Officer. He cannot judge the validity of such a reference.”

24. We do not agree with the submission made by the learned counsel for the revenue that when a reference is made by an Assessing Officer to the Transfer Pricing Officer, the reference includes the entire gamut of transactions between the assessee and its associated enterprise. The Assessing Officer is the person who has been entrusted with the duty to determine as to whether a transaction is an international transaction or not. Then, if it is an international transaction of the nature specified in Section 92B of the said Act, the Assessing Officer has to determine the income of the assessee having regard to the arm's length price by following the method prescribed in Section 92C. If, for some reason, the Assessing Officer feels that it is necessary or expedient so to do, he may refer the computation of the arm's length price of specific international transactions, after obtaining the prior approval of the Commissioner of Income-tax, to the Transfer Pricing Officer. It is quite possible that in the case of a particular assessee, there may be several international transactions and the Assessing Officer may only wish to refer some of those international transactions for the purposes of computing the arm's length price while in respect of others, he may compute the arm's length price himself. Thus, the jurisdiction of the Transfer Pricing Officer is limited and restricted to computing the arm's length price of only those international transactions which have been specifically referred to him by the Assessing Officer. We once again clarify that this is the position prior to the introduction of sub-section (2A) of the said Act which we have held to be prospective in operation.

25. In view of the foregoing discussion, the substantial question of law formulated in paragraph 1 is answered in the negative as we are of the view that the Income-tax Appellate Tribunal committed no error in deciding that the Transfer Pricing Officer could not take cognizance *suo moto* of any international transaction for adjustment in the arm's length price under Section

92C of the Income-tax Act, 1961. As a consequence, the revenue's appeal is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

VEENA BIRBAL, J

November 28, 2011

Srb/dutt