

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 123 OF 2018

Pr. Commissioner of Income Tax – 6  
4<sup>th</sup> Floor, Aayakar Sadan, Bodhi Tower,  
Salisbury Park, Gultekdi,  
Pune – 411 037.

....Appellant

V/s.

Kimberly Clark Lever Private Limited  
Gat No. 934 to 937 Village Sanas Wadi,  
Taluka Shirur, Pune – 412 208.

...Respondent

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Mr. Suresh Kumar for Appellant.

Mr. P.J. Pardiwalla, Senior Advocate a/w Mr. Hiten Chande i/b Lumiere Law  
Partners for Respondent.

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CORAM : K.R. SHRIRAM &  
M.M. SATHAYE, JJ.  
DATED : 7<sup>th</sup> JUNE 2023

**ORAL JUDGMENT : (PER : K.R. SHRIRAM, J.)**

1. The questions of law proposed are as under :

**SUBSTANTIAL QUESTION OF LAW**

- 1. Whether on the facts and in circumstances of the case, the Hon'ble Tribunal was correct in holding that the reasons recorded by the assessing officer in the present case does not meet with the requirement of Section 147 of the Income Tax Act 1961 ?*
- 2. Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was correct in holding that the Assessing Officer has no jurisdiction to issue notice under Section 148 of the Act ?*
- 3. Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was justified in the quashing the order passed under Section 143(3) r/w Section 147 and 144C of the Act ?*
- 4. Whether on the facts and circumstances of the case, the Hon'ble Income Tax Appellate Tribunal was correct in holding that order of the Transfer Pricing Officer passed on 22/10/2010 is null & void ab*

*initio as reference to the Transfer Pricing Officer to determine Arms Length Price cannot be initiated in the case of assessee, in the absence of any proceeding pending before Assessing Officer and reference for determination of Arms Length Price cannot precede the initiation of assessment proceedings by the Assessing Officer by issuance of notice u/s 143(2) of the Act ?*

2. Respondent is engaged in the business of manufacturing diapers and sanitary napkins. Respondent also markets the consumer tissue products. Respondent had filed return of income declaring total income at Rs.30,01,43,006/- on 31<sup>st</sup> October 2007 for Assessment Year 2007-08.

3. The return of income was processed under Section 143(1) of the Income Tax Act, 1961 (the Act). The Assessing Officer made reference under Section 92CA of the Act to the Transfer Pricing Officer (TPO) on 26<sup>th</sup> October 2009. The TPO passed an order under Section 92CA(3) of the Act on 29<sup>th</sup> October 2010 making an adjustment on account of arms length price of the international transaction at Rs.12,17,43,370/-. The Assessing Officer recorded reasons for re-opening the assessment and issued notice under Section 148 of the Act on 14<sup>th</sup> January 2011. Respondent vide its letter dated 28<sup>th</sup> January 2011 objected to the notice. It was the case of respondent that the reasons to believe income had escaped assessment was based on an invalid transfer pricing order and hence there was no reason for re-opening the assessment on the basis of the said order of TPO. The reason why respondent took this stand was because respondent's return of income was processed under Section 143(1) of the Act and there was no assessment

proceeding pending under Section 143(3) of the Act during which a reference could be made to the TPO under Section 92CA of the Act and hence such a reference to TPO itself was invalid and any order passed by the TPO would be invalid and such an invalid order of the TPO cannot be the reason for re-opening the assessment. Admittedly, no notice under Section 143(2) of the Act had also been issued. The Assessing Officer has in fact admitted that the case was not selected for scrutiny and no notice under Section 143(2) of the Act was issued but in view of the findings of the TPO he has re-opened the case for the Assessment Year 2007-08.

4. Mr. Pardiwalla submitted that where against the return of income filed by respondent in time no proceedings were initiated by issuing notice under Section 143(2) of the Act. Reference made to the TPO by the Assessing Officer under Section 92CA(1) of the Act was invalid and consequently the order passed by the TPO under Section 92CA(3) of the Act could not be the basis for recording the reasons for re-opening the assessment, i.e., initiating re-assessment proceedings. Mr.Pardiwalla submitted that where the Assessing Officer had re-opened the assessment by merely making a reference to the order of the TPO which admittedly was passed without any jurisdiction, then there was no independent application of mind by the Assessing Officer to commence the re-assessment proceedings and in the absence of the same, the assessment proceedings could not be re-opened. The reasons recorded for re-opening the

assessment read as under :

*M/s. Kimberly Clark Lever Pvt. Ltd.  
A.Y. 2007-08*

*In the case reference u/s. 92CA(1) has been made to the TP office for the A.Y. 2007-08. The Jt. CIT(TP-1), Pune vide order u/s. 92CA(3), dated 29/10/2010 has worked out adjustment in relation to international transactions of Rs.12,17,43,370/-.*

*In view of the same, as per the adjustment of Rs.12,17,43,370/- to the total income, income chargeable to tax has escaped assessment within the meaning of section 147(c)(i) of the Income Tax Act, 1961.*

*I have therefore reasons to believe that income of Rs.12,17,43,370/- has escaped assessment for A.Y. 2007-08, on account of adjustment to International transactions carried out by the assessee.*

*The case satisfies conditions laid down in sections 149(1)(a) and 151(2) of the Income Tax Act, 1961.*

*Issue notice u/s. 148 for A.Y. 2007-08.*

5. Before we proceed further we should note that it is judicially well settled that the belief of the Assessing Officer that there has been escapement of income must be based on some material on record. There must be some material on record to enable the Assessing Officer to entertain a belief that certain income chargeable to tax has escaped assessment for the relevant Assessment Year. In this case, the only material relied upon is the order of the TPO.

6. The issue which arises is the validity of the assessment proceedings initiated under Section 147/148 of the Act. As noted earlier admittedly reference was made to the TPO for determining the arms length

price of the international transaction and no notice under Section 143(2) of the Act was issued before making the said reference to the TPO. When no assessment proceedings were pending in relation to the relevant assessment year, in our view the Assessing Officer was precluded from making a reference to the TPO under Section 92CA(1) of the Act for the purpose of computing arms length price in relation to the international transaction.

7. The relevant provisions relating to the transfer pricing assessment are contained in Section 92 to 92 F of the Act.

*Section 92(1) of the Act provides that any income arising from an international transaction between associated enterprises shall be computed having regard to the arm's length price. Sections 92A and 92B of the Act contain provisions relating to the meaning of the expressions "associated enterprise" and "international transaction" respectively. Section 92C of the Act contains the powers of the Assessing Officer and the manner of determination of arm's length price in relation to an international transaction. Section 92CA of the Act provides that where the Assessing Officer considers it necessary or expedient to do so, he may refer to the Transfer Pricing Officer the determination of the arm's length price. Section 92CB of the Act relates to the power of the Board to make safe harbour rules. Section 92D of the Act relates to Maintenance and keeping of information and document by persons entering into an international transaction. Section 92E of the Act prescribes that the person entering into international transaction shall furnish a report from a chartered accountant in Form No.3CEB. Section 92F of the Act contains definitions of certain terms which are relevant to compute arm's length price, etc. in terms of sections 92 to 92 F of the Act.*

8. The entire scheme and mechanism to compute any income arising from an international transaction entered between associated enterprises is contained in Sections 92 to 92 F of the Act. Section 92CA of the Act provides that where the Assessing Officer considers it necessary or

expedient so to do, he may refer the computation of arms length price in relation to an international transaction to the TPO. In such a situation, the TPO, after taking into account the material before him, pass an order in writing under Section 92CA(3) of the Act determining the arms length price in relation to an international transaction. On receipt of this order, Section 92CA(4) of the Act requires the Assessing Officer to compute the total income of the assessee in conformity with the arms length price so determined by the TPO. This means that the determination of the arms length price wherever a reference is made to him is done by the TPO under Section 92CA(3) of the Act but the computation of total income having regard to the arms length price so determined by the TPO is required to be done by the Assessing Officer under Section 92CA(4) read with Section 92C(4) of the Act.

9. It is therefore quite clear that the process of determination of arm's length price is to be carried out during the course of assessment proceedings, may it be, under Sub Section (3) of Section 92C of the Act where the Assessing Officer determines the arm's length price or under Sub Sections (1) to (3) of Section 92CA of the Act, where the Assessing Officer refers the determination of arm's length price to the TPO. We may also refer to the provisions of section 143(3) of the Act dealing with assessment of income. In terms of clause (ii) of Sub Section 3 of Section 143 of the Act, it is prescribed that the Assessing Officer shall, by an order in writing, make

an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund on any amount due to him on the basis of such assessment. It is only in the course of such assessment of total income, that the Assessing Officer is obligated to compute any income arising from an international transaction of an assessee with associated enterprises, having regard to the arm's length price.

10. The occasion which requires the Assessing Officer to compute income from an international transaction arises only during the assessment proceedings, wherein he is determining the total income of the assessee. The Central Board of Direct Taxes (CBDT) in Instructions No. 3 dated 20<sup>th</sup> May 2003 has also stated that a case is to be selected for scrutiny assessment before the Assessing Officer may refer the computation of arm's length price in relation to an international transaction to the TPO under Section 92CA of the Act. The relevant portion of the Instructions No. 3/2003 reads as under :

*The Central Board of Direct Taxes, therefore, have decided that wherever the aggregate value of international transaction exceeds Rs.5 crores, the case should be picked up for scrutiny and reference under section 92CA be made to the TPO. If there are more than one transaction with an associated enterprise or there are transactions with more than one associated enterprises the aggregate value of which exceeds Rs.5 crores, the transactions should be referred to TPO. Before making reference to the TPO, the Assessing Officer has to seek approval of the Commissioner/Director as contemplated under the Act. Under the provisions of section 92CA reference is in relation to the international transaction. Hence all transactions have to be explicitly mentioned in the letter of reference. Since the case will be selected for scrutiny before making reference to the TPO, the Assessing Officer may proceed to examine other aspects of the case during pendency of assessment proceedings but await the report of the TPO on the value of international transaction before making final assessment.*

11. Therefore, we are inclined to uphold the proposition made by Mr. Pardiwalla that an Assessing Officer can make reference to the TPO under Section 92CA of the Act only after selecting the case for scrutiny assessment. The instructions of CBDT is also a pointer to the legislative import that the reference to the TPO for determining the arm's length price in relation to an international transaction is envisaged only in the course of the assessment proceedings, which is the only process known to the Act, whereby the assessment of total income is done. Therefore, in our view the Tribunal was correct to hold that when reference was made to the TPO by the Assessing Officer for determination of arm's length price in relation to the international transaction, no assessment proceedings were pending and hence it was invalid reference. Consequently, the subsequent order passed by the TPO determining the assessment to the international transaction was a nullity in law and void ab initio. In view thereof, the Assessing Officer could not have relied upon an order of the TPO which is a nullity to form a belief that certain income chargeable to tax has escaped the assessment for the relevant Assessment Year.

12. In the circumstances, in our view no case is made out to even admit the appeal. No substantial questions of law arise.

13. Appeal dismissed.

**(M.M. SATHAYE, J.)**

**(K.R. SHRIRAM, J.)**