

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 12648 of 2011

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

HONOURABLE MS JUSTICE SONIA GOKANI

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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, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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M/S.VEER GEMS - Petitioner(s)

Versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE-7 & 1 -
Respondent(s)

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Appearance :

MRS SWATI SOPARKAR for Petitioner(s) : 1,
MRS MAUNA M BHATT for Respondent(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS JUSTICE SONIA GOKANI

Date : 19/10/2011

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitioner has challenged the reference made by the respondent No.1-Assessing Officer to the respondent No.2-Additional Commissioner of Income-Tax (Transfer Pricing Officer-I), under Section 92CA(1), of the Income Tax Act, 1961 (for short 'the Act'). The petitioner has also challenged the communication dated 16th August 2011 made by the respondent No.2 to the petitioner.

2. Facts leading to present petition are as follows :

2.1 The petitioner is a partnership firm. The petitioner-firm is engaged in the business of purchasing rough diamonds, manufacturing of polished diamonds and sale/export of such polished diamonds. For the assessment year 2008-09, the petitioner had filed its return of income. During the assessment proceedings, the petitioner received a notice dated 20th December 2010 under Section 142 of the Act issued by the respondent No.1, the Assessing Officer. In the said notice, the Assessing Officer stated that on perusal of the assessment records for the assessment year 2007-08, it was observed that the petitioner had filed an audit report in the prescribed form as required under Section 92E of the Act as there were international transactions with associated concern viz. M/s.Blue Gems BVBA. The assessment proceedings for the assessment year 2007-08 are in progress. The audit report showed that during the previous year relevant to the assessment year 2008-09, the petitioner had international transactions with the said associated

concern viz. M/s.Blue Gems BVBA, amounting to Rs.78.63 crores. However, the record does not show that the assessee had filed the audit report under Section 92E of the Act in the prescribed form. The petitioner was, therefore, required to explain why penalty proceedings under Section 271BA of the Act should not be initiated.

- 2.2 In response to such communication, the petitioner replied under letter dated 21st December 2010 to the respondent No.1-Assessing Officer, stating inter alia that in the preceding year relationship with associated enterprise was covered under Section 92A(2)(h) of the Act. However, in the year under consideration, purchases exceeding 90% of the raw materials for manufacturing have not been made from one enterprise and thus, there is no requirement of filing report under Section 92E of the Act. It was further contended that merely because the transactions have been made between related parties as defined under Section 40A(2)(b) of the Act, it will not mean that the assessee was required to file a report under Section 92E of the Act since the concept of associated enterprise under Section 92A is very different from that of a related party under Section 40A(2)(b) of the Act. It is the case of the petitioner that thereafter without taking into consideration such objections of the petitioner, the case was referred for pricing assessment to the Transfer Pricing Officer (for short 'TPO'), who issued his first notice on 10th January 2011 under Section 92CA(2) of the Act. There were further

notices and communications from the respondent No.2-TPO calling for evidence and other details from the petitioner. It is not necessary to record every such communication. Suffice it to note that the final communication, which is impugned in present petition, was issued on 16th August 2011 by the respondent No.2-TPO, which reads as under :

“Kindly refer to above. Reference is also invited to the your letter dated 28/7/2011 on the issue, claiming that since M/s. Blue Gems BVBA is only a party covered u/s.40A(2)(b) and not a party falling within the parameters of section 92A, the transaction need not be transfer priced.

2. The accounts of Blue Gems BVBA, as available on Capitaliq database have been perused and it is seen that it is a private limited company with a share capital of 10.6 million euro. Prima facie, the company would fall within the parameters of section 40A(2)(b) if the partners of your firm have investment of more than the limit specified by section. In your reply to my notice, while a general statement has been made relating to non-applicability of transfer pricing provisions, you have not specifically stated as to why the company has been treated as related party as per the provisions of section 40A(2)(b).

3. Please note that after going through the financials of Blue Gems BVBA and Veer Gems, it is clear that the provisions of section 92A(2) (i), (j), (k), (l) and (m) are attracted and hence the party is liable to be treated as an associate enterprise under the provisions of the section 92A(1).

6. You are, therefore, directed to show cause as to the transactions with Blue Gems BVBA should not be subject to transfer pricing

proceedings and the profits of Veer Gems not appropriately modified. Your reply should reach this office on or before 19/8/2011 positively. Please note that sufficient opportunity has already been granted to you and no further opportunity will be granted to you for representing your case before this office. The matter will be decided based on the accounts of your company and the financial statements of Blue Gems BVBA available with international database firms. Hearing in your case is fixed from 19/8/2011 at 4 pm.”

3. At this stage the petitioner has approached this Court by filing present petition and challenged the reference made by the respondent No.1- Assessing Officer to the respondent No.2-TPO and also the communication dated 16th August 2010 addressed by the respondent No.2-TPO, by which the petitioner is required to supply certain details. Short case of the petitioner is that during the previous year relevant to the assessment year 2008-09, the petitioner had not entered into any international transaction with any associated person. Reference to the TPO was, therefore, wholly without jurisdiction. Subsidiary contention of the petitioner also is that its objections to making a reference to TPO were not considered by the Assessing Officer, who alone was competent to and required to do so. Instead, the TPO issued a notice calling upon the petitioner why the transaction with M/s.Blue Gems BVBA should not be subject to transfer pricing proceedings. It is the contention of the petitioner that the TPO cannot go into the question of validity of the reference.
4. In response to notice issued, respondents have

appeared and filed a reply. The stand of the respondents is that the communication dated 16th August 2011 is only a show cause notice and not an order. Writ petition at this stage, therefore, should not be entertained. It is also stated that the respondent No.2 had issued various notices. The petitioner, however, neither replied to such notices nor did it furnish documents called for. It is stated that the transaction between the petitioner and M/s.Blue Gems BVBA, was international transaction and M/s.Blue Gems BVBA was an associated enterprise in relation to the petitioner-Assessee. It is finally stated that the show cause notice has been issued on 16th August 2011 and the petitioner would have all the opportunities to present its case.

5. On behalf of the petitioner, learned Senior Counsel Shri S.N. Soparkar vehemently contended that the reference made by the Assessing Officer to the Transfer Pricing Officer was without jurisdiction. He submitted that in the previous year relevant to the assessment year **2007-08**, the petitioner had not entered into any international transaction. He submitted that M/s.Blue Gems BVBA cannot be said to be associated concern in relation to the petitioner. He submitted that the definition of term "related parties" contained in Section 40A(2)(b) of the Act has no relevance for the purpose of ascertaining whether a person is an associated person as defined under in Section 92A of the Act or not.

- 5.1 Counsel submitted that in any case such issue was required to be decided by the Assessing Officer and without examining such issue, no reference could have been made by the Assessing Officer. The objections raised by the petitioner have not been dealt with. Unilaterally, the reference has been made which is wholly impermissible. Counsel contended that without first deciding the issue whether the petitioner had entered into any international transaction, the reference to the TPO could not have been made. He submitted that upon reference to the TPO, the assessee is exposed to entirely different assessment mechanism and assessee cannot be put to such inconvenience without ascertaining the very foundational fact whether reference to the TPO was necessary or not. Our attention was drawn to various statutory provisions contained in the Act with respect to international transactions.
6. On the other hand, learned Senior Counsel Shri Manish Bhatt appearing for the respondents opposed the petition contending that at this stage when the Assessing Officer was making a reference to the TPO, the Assessing Officer only had to be of the opinion that in an international transaction such reference was necessary. At that stage, participation of the assessee and final conclusion of existence or otherwise of international transaction, was not necessary.
- 6.1 Counsel submitted that the Assessing Officer had reason to believe that the petitioner had entered into

an international transaction. After obtaining approval of the Income Tax Commissioner; he, therefore, made a reference to the TPO. There was sufficient material on record to permit the Assessing Officer to draw such a conclusion. At this stage, hearing the objections of the petitioner is not envisaged.

6.2 Counsel referred to the decision of Punjab and Haryana High Court in the case of ***Coca Cola India Inc. v. Assistant Commissioner of Income-Tax and others***, reported in ***(2009) 309 ITR 194 (P&H)***, wherein the Division Bench of the High Court observed that the decision of the Assessing Officer to make a reference under Section 92CA of the Act does not in any manner visit the assessee with any civil consequences. The decision is to be taken by the Assessing Officer having regard to the question whether it will be proper for the Assessing Officer himself to determine the arm's length price or it will be expedient to have it determined by the TPO.

6.3 To our mind, this decision would not be of any application. Firstly, as pointed out by the counsel for the petitioner, this decision has been reversed by the Apex Court in the case of ***Coca Cola India Inc. v. Additional Commissioner of Income-Tax and others, reported in (2011) 336 ITR 1 (SC)***. This reversal, of course, is not on merits. Nevertheless the Apex Court having relegated assessee to appropriate proceedings under the Act, the decision of the Punjab and Haryana High Court no longer survives. Secondly,

in the said decision, the High Court was considering a situation where the question was which authority should determine the question as to arm's length price of an international transaction. The question apparently was not whether there had, in fact, been an international transaction and, therefore, the need to ascertain arm's length price had arisen.

- 6.4 Counsel also relied on the decision of the Delhi High Court in the case of ***Sony India P. Ltd. v. Central Board of Direct Taxes and another***, reported in ***(2007) 288 ITR 52 (Delhi)***, wherein the Division Bench of the Delhi High Court was considering the nature of discretion enjoyed by the Assessing Officer while making a reference to the TPO. It is observed that the only condition which is spelt out for such reference is the opinion of the Assessing Officer that it is necessary or expedient so to do. In this respect, it was observed as under :

“20. There is nothing in section 92CA itself that requires the Assessing Officer to first form a considered opinion in the manner indicated in section 92C(3) before he can made a reference to the Transfer Pricing Officer. In our view, it is not possible to read such a requirement into section 92CA(1). However, it will suffice if the Assessing Officer forms a prima facie opinion that it is necessary and expedient to make such a reference. One possible reason for the absence of such a requirement of formation of a prior considered opinion by the Assessing Officer is that the Transfer Pricing Officer is expected to perform the same exercise as envisaged under section 92C(1) to (3) while determining the ALP under

section 92CA(3). The latter part of section 92CA(3) unambiguously states that the Assessing 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 the section 92C.” It will be pointless to have a duplication of this exercise at two stages one after the other. On the other hand, the scheme is that after the Transfer Pricing Officer determines the ALP the matter revives before the ALP at section 92C(4) stage where, in terms of section 92CA(4) the Assessing Officer will compute the total income “having regard to” the ALP determined by the Transfer Pricing Officer.

21. The two aspects require to be taken note of in this context. The Assessing Officer will necessarily have to give an opportunity to the assessee after receiving the report of the Transfer Pricing Officer and before he finalises the assessment computing the total income. Secondly, the provisions do not mandate that the Assessing Officer is bound to accept the ALP. He has, in a sense, only “outsourced” this exercise to the Transfer Pricing Officer. He can always be persuaded by the assessee at that stage to reject the Transfer Pricing Officer's report and proceed to still determine the ALP himself. It must be recalled that it is the Assessing Officer who is the authority to finalise the assessment and that power cannot be usurped, as it were, by the Transfer Pricing Officer or any other authority contrary to the scheme of the Act. If on the other hand one were to interpret the provisions to require the Assessing Officer to first form a considered opinion on the ALP before referring the matter to the Transfer Pricing Officer, then the Assessing Officer will thereafter have no option but to accept the report of the Transfer Pricing Officer and to that extent the Assessing Officer's final say on the ALP while computing the total income gets diluted. By preserving the power of the Assessing Officer to determine the ALP even after the

determination by the Transfer Pricing Officer, full effect can be given to the words “having regard to” occurring in both section 92C(4) and section 94CA(4).”

7. Having thus heard learned counsel for the parties; to be able to resolve the legal disputes, it would be necessary to peruse certain statutory provisions contained in the said Act.

- 7.1 Chapter-X of the Act pertains to special provisions relating to avoidance of tax. Section 92 which forms part of the said Chapter pertains to “Computation of income from international transaction having regard to arm's length price”. The relevant portion of Section 92 reads as under :

“92.(1) Any income arising from an international transaction shall be computed having regard to the arm's length price.

(2) Where in an international transaction, two or more associated enterprises enter into a mutual agreement or arrangement 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, the cost or expense allocated or apportioned to, or, as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be.”

- 7.2 The term “associated enterprise” is defined in Section 92A of the Act. The relevant portion of Section 92A of

the Act reads as under :

“92A.(1) For the purpose of this section and sections 92, 92B, 92C, 92D, 92E and 92F, “associated enterprise”, in relation to another enterprise, means an enterprise-

(a) which participates, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise; or

(b) in respect of which one or more persons who participate, directly or indirectly, or through one or more intermediaries, in its management or control or capital, are the same persons who participate, directly or indirectly, or through one or more intermediaries, in the management or control or capital of the other enterprise.

(2) For the purposes of sub-section (1), two enterprises shall be deemed to be associated enterprises if, any time during the previous year; -

- | | | |
|-----|-----|-----|
| (a) | xxx | xxx |
| (b) | xxx | xxx |
| (c) | xxx | xxx |
| (d) | xxx | xxx |
| (e) | xxx | xxx |
| (f) | xxx | xxx |
| (g) | xxx | xxx |
| (h) | xxx | xxx |
| (i) | xxx | xxx |

(j) where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual; or

(k) where one enterprise is controlled by a Hindu undivided family, the other enterprise is controlled by a member of such

Hindu undivided family or by a relative of a member of such Hindu undivided family or jointly by such member and his relative; or

(l) where one enterprise is a firm, association of persons or body of individuals, the other enterprise holds not less than ten per cent interest in such firm, association of persons or body of individuals; or

(m) there exists between the two enterprises, any relationship of mutual interest, as may be prescribed.”

7.3 Section 92B of the Act provides the meaning of “international transaction”. Subsection (1) of Section 92B of the Act, which is relevant for our purpose, reads as under :

“92B. (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 to any one or more of such enterprises.

7.4 Section 92C of the Act pertains to computation of arm's length price. The relevant portion of Section 92C reads as under :

“92C. (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 where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be arithmetical mean of such prices, or, at the option of the assessee, a price which may vary from the arithmetical mean by an amount not exceeding five per cent of such arithmetical mean.”

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7.5 Section 92CA of the Act pertains to reference to Transfer Pricing Officer and it reads as under :

“92CA. (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).

(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.

(5) With a view to rectifying any mistake apparent from the record, the Transfer Pricing Officer may amend any order passed by him under sub-section (3), and the provisions of section 154 shall, so far as may be, apply accordingly.

(6) Where any amendment is made by the Transfer Pricing Officer under sub-section (5), he shall send a copy of his order to the Assessing Officer who shall thereafter proceed to amend the order of assessment in conformity with such order of the Transfer Pricing Officer.

(7) The Transfer Pricing Officer may, for the purposes of determining the arm's length price under this section, exercise all or any of the specified in clauses (a) to (d) of sub-section (1) of section 131 or sub-section (6) of section 133."

7.6 Section 92F of the Act contains definition of certain terms relevant to computation of arm's length price. In particular Clause 2 of Section 92F of the Act defines the term "arm's length price" as under :

"92F. In sections 92, 92A, 92B, 92C, 92D and 92E, unless the context otherwise requires; -

(i) xxx xxx

(ii) "arm's length price" means a price which is applied or proposed to be applied in a

transaction between persons other than associated enterprises, in uncontrolled conditions;”

7.7 Section 144C of the Act provides for reference to Dispute Resolution Panel. Relevant portion of Section 144C reads as under :

“144C. (1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereinafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.

(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order;-

(a) file his acceptance of the variations to the Assessing Officer; or

(b) file his objections, if any, to such variation with,-

- (i) the Dispute Resolution Panel; and
- (ii) the Assessing Officer.

(3) The Assessing Officer shall complete the assessment on the basis of the draft order; if-

(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or

(b) no objections are received within the period specified in sub-section (2).

(4) The Assessing Officer shall, notwithstanding anything contained in section 53, pass the assessment order under sub-section (3) within one month from the end of the month in which,-

- (a) the acceptance is received; or
- (b) the period of filing of objections under sub-section (2) expires.

(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following namely;-

- (a) draft order;
- (b) objections filed by the assessee;
- (c) evidence furnished by the assessee;
- (d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;
- (e) records relating to the draft order;
- (f) evidence collected by, or caused to be collected by, it; and
- (g) result of any enquiry made by, or caused to be made by, it.

(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),-

- (a) make such further enquiry, as it thinks fit; or
- (b) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.

(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations

proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

(9) xxx xxx

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) xxx xxx

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153, the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

(14) xxx xxx

(15) For the purposes of this section, -

(a) xxx xxx

(b) "eligible assessee" means, -

(i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and

(ii) any foreign company."

8. From the above statutory provisions it emerges that the income arising from an international transaction has to be computed having regard to the arm's length price. "Arm's length price" means a price which is applied or proposed to be applied in a transaction between the persons other than associated enterprise in uncontrolled conditions. The meaning of the term "international transaction" is contained in Section 91B of the Act, it means a transaction between two or more associated enterprises either or both of whom are non-residents, which transaction is 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 bearing on the profits, income, losses or assets of such enterprise. It includes mutual agreement or arrangement between two or more associated enterprises, for allocation or appointment of or any contribution to any costs or expenses incurred or cause to be incurred in connection with the benefit, service or facility provided or to be provided to any one or more such enterprises. The term "associated enterprise" has been defined in Section 92A of the Act.
9. Under Section 92A of the Act, the arm's length price in relation to an international transaction has to be decided by any of the most appropriate method out of the methods specified in sub-section (1) thereof. Under Section 92CA of the Act, where if any person being an assessee enters into an international transaction, 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 international transaction under Section 92C of the Act to the TPO.

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 92C 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 clear 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 in relation to the international transaction in accordance with sub-section (3) of Section 92C of the Act, send a copy of this order to the Assessing Officer and also the assessee. It is, thus, clear that once a reference is made to the TPO, his duty is to pass an order determining the arm's length price after permitting the assessee to produce relevant documents on records. 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-sections (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.

11. In view of above conclusion, we are of the opinion that the TPO's notice dated 16th August 2011 to the petitioner calling upon the petitioner to show cause why transaction with M/s.Blue Gems BVBA should not be subject to transfer pricing proceedings, was wholly erroneous. The reply statement of the respondents further contending that the communication dated 16th August 2011 is only a show cause notice and the petitioner would have sufficient opportunity to convince the TPO regarding absence of any international transaction, also to our mind, is misconceived.
12. The issue, however, does not rest here. It was the Assessing Officer, in present case, who had made a reference to the TPO. Such reference was on the basis of the opinion of the Assessing Officer that there had been an international transaction between the petitioner and the associated enterprise. This opinion the Assessing Officer formed on the basis that in the preceding year i.e. assessment year 2007-08, the petitioner-assessee had filed necessary report in terms of Section 92E of the Act in connection with the international transaction entered into between the petitioner and the associated concern viz. M/s.Blue Gems BVBA. In the present year i.e. previous year relevant to the assessment year 2008-09 also, the assessee had entered into transactions with the same concern, but had not filed prescribed reports. It was on this basis that the Assessing Officer was of the opinion that the petitioner had entered into international

transaction during the previous year relevant to the assessment year 2008-09 also and that it was necessary to refer the computation of arm's length price to the TPO.

13. We do not find any provision under Chapter-X, which would require the Assessing Officer to hear the assessee, consider his objections and only thereafter make a reference to the TPO to compute the arm's length price. As already observed, it is true that the question of reference to the TPO would arise only in the case where there has been an international transaction between the assessee and the associated person. Such a question in a given case may also be highly disputed question. However, we do not find that under the scheme of the provision contained in Section-X of the Act, the Assessing Officer is obliged to grant hearing to the assessee, invite and consider the objections with respect to the question whether during the previous year relevant to the assessment year under consideration, there had been any international transaction between the assessee and the associated enterprise before making a reference to the TPO. Such opinion the Assessing Officer would have to form on the basis of available material on record and such opinion would be having ad-hoc finality in the sense that for the purpose of reference to the TPO and till the stage that the TPO passes an order under sub-section (3) of Section 92CA of the At, such issue would be closed.

14. Before making any such reference, sub-section (1) of Section 92C itself provides certain inbuilt safeguards. Firstly, the Assessing Officer has to consider it necessary or expedient to make a reference to the TPO and secondly the reference has to be made with the previous approval of the commissioner. Thus, not only the Assessing Officer before making a reference should be satisfied that with respect to an international transaction entered into by the assessee, it is necessary or expedient to refer the computation of arm's length price to the TPO, such opinion of the Assessing Officer would have to be approved by the Commissioner, before the same can be acted upon. This is one more filter provided by the statute to ensure that the reference is made only in appropriate cases with approval of the higher authority.
15. While framing the assessment in terms of the report submitted by the TPO under sub-section (3) of Section 92CA of the Act, there is nothing to prevent the Assessing Officers from considering the objections of the assessee that, in fact, there had been no international transaction between the assessee and any other person. If the assessee succeeds in establishing such fact, naturally the Assessing Officer would have to drop the entire proceedings in connection with the international transaction.
16. Counsel for the assessee, however, submitted that by virtue of newly substituted sub-section (4) of Section 92CA of the Act, the order passed by the TPO under

sub-section (3) of Section 92CA of the Act, is now binding on the Assessing Officer and the Assessing Officer has to proceed to compute the total income in conformity with the arm's length price so determined by the TPO. He pointed out that previously sub-section (4) of Section 92CA of the Act only required the Assessing Officer to compute the total income of the assessee having regard to the arm's length price determined under sub-section (3) of Section 92CA of the Act by the TPO.

17. To our mind, this statutory change has no significant effect on our interpretation recorded hereinabove. By virtue of newly substituted sub-section (4) of Section 92CA of the Act, the Assessing Officer is now bound by the order of the TPO on the computation of the arm's length price of an international transaction, the Assessing Officer is not and cannot be stated to be bound by the opinion of the TPO with respect to the question whether there had, in fact, been an international transaction between the assessee and the associated person during the period under consideration. The TPO is not called upon to and, as held by us, is not competent to decide this issue. This issue is within the sole jurisdiction of the Assessing Officer.
18. The assessee has one more opportunity to contest the question of presence or absence of an international transaction. Under Section 144C of the Act, the Assessing Officer has to forward a draft of the

proposed order of assessment to the eligible assessee. The eligible assessee, includes any person in whose case, variation arises as a consequence of the order of the TPO passed under sub-section (3) of Section 92CA of the Act. Thus, in every case of variation of income pursuant to such order of the TPO, the Assessing Officer has to, at the first instance, forward a draft of the proposed order of assessment to the assessee. Under sub-section (2) of Section 144C of the Act, on receipt of such a draft order, the assessee has an option either to file his acceptance of the variation of the assessment or file his objection to any such variation with the Dispute Resolution Panel and also the Assessing Officer. Sub-section (5) of Section 144C of the Act provides that if any objections are raised by the assessee before the Dispute Resolution Panel, the Panel is authorized to issue such direction as it thinks fit for the guidance of the Assessing Officer. Under sub-section (6) of Section 144C of the Act, such directions will have to be issued after considering various details provided in Clauses (A) to (G) thereof. Sub-section (8) of Section 144C of the Act provides that the Dispute Resolution Panel may confirm, reduce or enhance the variations proposed on the draft order. Sub-section (11) of Section 144C of the Act provides that no direction under sub-section (5) shall be issued unless an opportunity is given to the assessee and the Assessing Officer. Sub-section (13) of Section 144C of the Act provides that upon receipt of directions issued under sub-section (5) of Section 144C of the Act, the Assessing Officer shall in conformity with the directions

complete the assessment proceedings. Section 144C of the Act, thus, provides for complete dispute resolution mechanism to an eligible assessee. He has an option either to accept the variation proposed by the Assessing Officer or to raise objections before the Dispute Resolution Panel. The Dispute Resolution Panel has wide powers of issuing directions under sub-section (5) of Section 144C of the Act and to confirm, reduce or enhance the variations proposed under sub-section (8) of Section 144C of the Act. Under sub-section (13) of Section 144C of the Act, such directions are binding upon the Assessing Officer.

19. The issue whether there was an international transaction or not can also be examined by the Dispute Resolution Panel at the instance of the assessee. There is nothing to limit the powers of Dispute Resolution Panel to completely nullify the variations arising out of the order of the TPO if it is found that there had, in fact, been no international transaction and that, therefore, the reference itself was invalid. Sub-section (5) of Section 144C of the Act empowers the Dispute Resolution Panel to issue such directions as it thinks fit for the guidance of the Assessing Officer. When sub-section (8) of Section 144C of the Act authorizes the Dispute Resolution Panel to confirm, reduce or enhances the variations proposed by the TPO, it can also annul any computations proposed on the basis of the order of the TPO.
20. Counsel for the petitioner, however, submitted that if

the Assessing Officer submits to the jurisdiction of the Dispute Resolution Panel, the assessee would lose one stage of appeal. Under ordinary circumstances, against the order of the Assessing Officer, the assessee would be entitled to appeal to the CIT (Appeals) and thereafter to the Tribunal. If an assessee raises objections before the Dispute Resolution Panel under Section 144C of the Act, the order of the Assessing Officer, which may be passed thereafter would be appealable directly to the Tribunal. To our mind, this would not, in any manner, be determinative of the interpretation of the statutory provisions under consideration. Right of appeal is a creation of statute. If in a given case, looking to the special requirement of the situation, the statute limits the right of appeal to one instead of two appeals ordinarily available, that by itself would not mean that the assessee has no right to raise his grievance with respect to an international transaction. We may recall that Chapter-X of the Act pertains to special provisions relating to avoidance of tax.

21. This is not to suggest that the Assessing Officer can, without any basis or wholly arbitrarily at his whim or caprice, make a reference of any transaction to the TPO for computation of the arm's length price. He is expected to exercise his discretion on the basis of available material on record. Such decision is subject to approval by the Commissioner. At the time of framing final assessment even the assessee will have right to point out that there had been, in fact, no

international transaction between the assessee and the associated enterprise.

22. The Delhi High Court in the case of ***Sony India P. Ltd. (supra)*** also formed a similar opinion as can be seen from the recorded portion of the judgment contained in paragraphs 20 and 21. It is true that the Delhi High Court was considering a situation where sub-section (4) of Section 92CA of the Act was different from what it is presently i.e. previously, as already noted, while framing the assessment, the Assessing Officer had to do so having regard to the order of the TPO under sub-section (3) of Section 92CA of the Act. By virtue of amendment in sub-section(4) with effect from 01st June 2007, the order of the TPO under sub-section (3) of Section 92CA of the Act is binding on the Assessing Officer with respect to computation of arm's length price. However, our interpretation and opinion is based on present statutory provisions. We do not see any significant difference. What has changed by virtue of substitution of sub-section (4) of Section 92CA of the Act is that the opinion and the order of the TPO with respect to computation of arm's length price is now binding on the Assessing Officer. As recorded earlier, the TPO is not authorized to judge whether there had been any international transaction or not. In other words, he has no competence to decide the validity of the reference itself. Such issue has to be decided by the Assessing Officer alone.

23. Counsel for the petitioner submitted alternatively that

this is a case where ex-facie it can be established that there had been no international transaction between the petitioner and the associated enterprise. However, we notice that admittedly between the petitioner and M/s.Blue Gems BVBA there was an international transaction in the preceding year and the assessee had admittedly filed a report under Section 92E of the Act. It further emerges that in the current year also the assessee had entered into transaction worth Rs.78.63 crores. In the affidavit-in-reply it is further stated that Veer Gems has made substantial purchases from M/s.Blue Gems BVBA. The Partners of Veer Gems are three brothers Shri Piyush M Shah, Mukesh M Shah and their wives/son, together holding the entire partnership stake. The fourth brother Nareshkumar Shah, along with his wife Surekhaben Shah and his son Mitesh Shah control the entire share holding of M/s.Blue Gems BVBA, the fourth brother and his son being directors of the company. It is clear that both the entities are being controlled by the same family of four brothers and their close relatives. It is further contended that it is clear that M/s.Blue Gems BVBA is closely related with M/s.Veer Gems and falls within the parameters of sec.92A(2), (j), (k) and (m) of the Act.

24. We are of the opinion that in view of above facts, it is not necessary or appropriate for us to judge, in the present petition, whether there was any international transaction between the petitioner and the associated enterprise during the previous year relevant to the assessment year 2008-09 and such issue must be left

to be judged by the competent authority while framing final assessment.

25. In view of above observations, present petition stands dismissed. Notice is discharged with no order as to costs. Interim relief, if any, stands vacated.

(Akil Kureshi, J)

(Ms.Sonia Gokani, J)

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