2024:DHC:2561-DB

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 07 March 2024**
Judgment pronounced on:01 April 2024

\+ W.P.(C) 5429/2021 & CM APPL. 16909/2021 (Stay)

M/S. GIESECKE AND DEVRIENT INDIA PVT. LTD. ..... Petitioner

Through: Mr. Deepak Chopra, Mr. Harpreet Singh Ajmani & Mr. Rohan Khare, Advs.

Versus

DEPUTY COMMISSIONER OF INCOME TAX 2.1 & ORS. ..... Respondents

Through: Mr. Shlok Chandra, SSC with Ms. Priya Sarkar, JSC, Ms. Madhavi Shukla & Mr. Ujjawal Jain, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

J U D G M E N T

PURUSHAINDRA KUMAR KAURAV, J.

1. The present writ petition, at the instance of the assessee, seeks to assail the impugned order dated 24 April 2021 passed under Section 144C read with Sections 143(3) and 144B of the Income Tax Act, 1961 ["**Act**"], whereby, the Assessing Officer ["**AO**"] made an adjustment of INR 25,58,68,79,196/-, to the total income of the assessee.

2. The brief facts, which are relevant to the present controversy reveal that the assessee is engaged in providing software and information technology enabled services. On 01 April 2016, the assessee's mobile security division got demerged into the Giesecke & Devrient MS India on a going concern basis. Both the assessee and Giesecke & Devrient MS India are the wholly owned subsidiaries of Giesecke & Devrient MS GmbH, a company incorporated in Germany. The assessee filed its Income Tax Return ["**ITR**"] for assessment year ["**AY**"] 2017-18 on 30 November 2017 declaring an income to the tune of INR 18,15,98,120/-. Thereafter, the assessee's case was picked up for scrutiny and notices under Sections 143(2) and 142(1) of the Act were issued to the assessee.

3. It may be noted that since the assessee had entered into international transactions during the relevant AY, which is also duly reflected in Form 3CEB filled by the assessee in accordance with Section 92E of the Act, therefore, a reference was made by the AO to the Transfer Pricing Officer ["**TPO**"] for determination of Arm's Length Price ["**ALP**"] of the said international transactions.

4. Thereafter, upon considering the reply of the assessee, the TPO passed an order under Section 92CA(3) of the Act on 31 January 2021 and *vide* this order, the TPO determined a transfer pricing adjustment of INR 25,58,68,79,196/-. However, on an even date, the TPO passed a rectified order and adjusted the ALP to the tune of INR 16,84,51,531/-. In the said rectified order, while determining the ALP, the TPO also suggested the AO to examine the taxability of the value of the

'demerged business' of the assessee to the tune of INR 25,41,84,27,665/-.

5. Pursuant to the TPO order, on 24 April 2021, the AO passed the draft assessment order under Section 144C of the Act and computed the total adjustment of INR 25,58,68,79,196/-, which included the ALP of INR 16,84,51,531/- and INR 25,41,84,27,665/-. Aggrieved by the said order, the assessee approached this Court by way of the present writ petition, assailing the impugned order *inter alia* on the ground that the AO proceeded to make transfer pricing adjustment without considering the TPO order and donned the cap of the TPO itself while determining the ALP of the international transactions.

6. Learned counsel appearing on behalf of the assessee, submitted that the impugned order was liable to be set aside in light of the mandate of Section 92CA of the Act. He pointed out, while referring to the rectified order of the TPO, that the TPO has never determined the ALP of the international transactions by incorporating the demerger of the mobile security division of the assessee. Despite the order of the TPO, the AO, while passing the impugned order under Section 144C(1) read with Sections 143(3) and 144B of the Act, proceeded to make transfer pricing adjustment by computing the ALP of the value of the demerged business to the tune of INR 25,41,84,27,665/-. He argued that the impugned order suffers from a jurisdictional error as, in the instant case, AO determined the ALP of the international transactions without bearing in mind the TPO order. He placed reliance on a decision of this Court in **Louis Dreyfus Company India Pvt. Ltd. v. DCIT** [W.P.(C) 15381/2022] and the Central Board of Direct Taxes ["**CBDT**"]

instruction no. 3/2016 dated 10 March 2016 to substantiate his arguments.

7. Learned counsel appearing on behalf of the Revenue, vehemently opposed the submissions advanced by the assessee and submitted that the impugned order does not suffer from any infirmity on the basis of the assumption of wrong jurisdiction. He submitted that as per the mandate of Section 92CA of the Act, the AO referred the matter to the TPO for determination of the ALP and the TPO examined the international transaction related to the demerger. He further argued that the TPO computed the ALP of the said international transactions and the AO computed the total income of the assessee in conformity with the ALP ascertained by the TPO. Alternatively, he argued that this Court may consider sending the matter back to the file of AO to consider the case afresh.

8. We have heard the learned counsels appearing on behalf of the parties and perused the record.

9. In light of the aforenoted facts and submissions advanced, the short question before us is whether the AO can proceed to make transfer pricing adjustment beyond the ALP determination by the TPO in light of the mandate of Section 92CA of the Act.

10. Before adverting to the merits of the case, it is pertinent to refer to Section 92CA of the Act. The relevant extracts of Section 92CA of the Act are reproduced herein for reference:-

> "[**92-CA. Reference to Transfer Pricing Officer.—(1) Where any person, being the assessee, has entered into an [international transaction or specified domestic 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 [Principal Commissioner or Commissioner], refer the computation of the arm's length price in relation to the said [international transaction or specified domestic transaction] under Section 92-C 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 or specified domestic transaction] referred to in sub-section (1).

[(2-A) Where any other international transaction [other than an international transaction referred under sub-section (1)], comes to 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 92-D 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 or specified domestic transaction] in accordance with sub-section (3) of Section 92-C and send a copy of his order to the Assessing Officer and to the assessee.

[(2-B) Where in respect of an international transaction, the assessee has not furnished the report under Section 92-E and such transaction comes to the notice of the Transfer Pricing Officer during the course of the proceeding before him, the provisions of this chapter shall apply as if such transaction is an international transaction referred to him under sub-section (1).]

[(2-C) Nothing contained in sub-section (2-B) shall empower the Assessing Officer either to assess or reassess under Section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under Section 154, for any assessment year, proceedings for which have been completed before the 1st day of July, 2012.]

[(3-A) 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 153-B for making the order of assessment or reassessment or recomputation or fresh assessment, as the case may be, expires:]

[Provided that in the circumstances referred to in clause (*ii*) or clause (*x*) of Explanation (1) to Section 153, if the period of limitation available to the Transfer Pricing Officer for making an order is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to have been extended accordingly.]

[(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 92-C 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."

[Emphasis added]

11. A bare perusal of the aforenoted Section would reveal that in order to compute the ALP of the international transactions, the AO 'may' refer the matter to the office of the TPO, with prior permission of the Principal Commissioner of Income Tax ["**PCIT**"] or Commissioner of Income Tax ["**CIT**"]. Furthermore, the mandate of Section 92CA(4) of the Act would reflect that the AO shall calculate the total income of the assessee in conformity with the ALP determined by the TPO.

12. At this juncture, we may usefully refer to the dictum laid down by the Hon'ble Supreme Court in the case of **CIT v. S.G. Asia Holdings (India) (P) Ltd.,** [(2019) 13 SCC 353], wherein, the Court settled the controversy around the word 'may' used in Section 92CA(1) and is no longer *res integra*. The Hon'ble Supreme Court also referred to CBDT instruction no. 3/2003 and ruled that it is mandatory for the AO to refer the matter to the TPO in order to determine the ALP of the international transactions if selected for scrutiny on the basis of transfer pricing risk parameters. The relevant extracts of the said case are reproduced herein for reference:-

> "**5.** It was submitted by Mr Mahabir Singh, learned Senior Advocate that the expression "… 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 or specified domestic transaction under Section 92-C to the Transfer Pricing Officer" occurring in Section 92-CA of the Act signified that discretion was vested in the assessing officer and it would not be mandatory in every single case that he must refer the issue of computation of the arm's length price to the TPO [Transfer Pricing Officer].
>
> **6.** However, the following expressions employed in Instruction No. 3/2003 put the matter in a different perspective:
>
> "… The assessing officer can arrive at prima facie belief on the basis of these details whether a reference is considered necessary. No detailed enquiries are needed at this stage and the assessing officer should not embark upon scrutinising the correctness or otherwise of the price of the international transaction at this stage…. 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 TPO…. Since the case will be selected for scrutiny before making reference to 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.

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(*vi*) *Role of the assessing officer after receipt of "arm's length price"*: Under sub-section (4) of Section 92-C, the assessing officer has to compute total income of the assessee having regard to the arm's length price so determined by the TPO."

7. <u>In view of the guidelines issued by CBDT in Instruction No. 3/2003 the Tribunal was right in observing that by not making reference to TPO, the assessing officer had breached the mandatory instructions issued by CBDT. We do not find the conclusion so arrived at by the Tribunal to be incorrect.</u>

8. However, the Tribunal ought to have accepted the submission made by the departmental representative as quoted in para 16.2 of its order and the matter ought to have been restored to the file of the assessing officer so that appropriate reference could be made to TPO. It would therefore be up to the authorities and the Commissioner concerned to consider the matter in terms of sub-section (1) of Section 92-CA of the Act."

[Emphasis added]

13. The CBDT instruction no.3/2003 referred in *CIT v. S.G. Asia Holdings* has been replaced by CBDT instruction no.3/2016 dated 10 March 2016, which has also been relied upon by the assessee. The said instruction also reflects the cardinal responsibility imposed upon the AO to refer the matter to the TPO, if the case is selected for scrutiny on the basis of the transfer pricing risk parameters. Furthermore, it also mandates the AO to not deflect from the ALP determined by the TPO with respect to international transactions. The relevant extracts of the aforenoted instruction are reproduced herein for reference:-

"**<u>3.2 All cases selected for scrutiny, either under the Computer Assisted Scrutiny Selection (CASS) system or under the compulsory manual selection system (in accordance with the CBDT's annual instructions in this regard - for example, Instruction No. 6/2014 for selection in F.Y 2014-15 and</u>**

Instruction No. 8/2015 for selection in F.Y 2015-16), on the basis of transfer pricing risk parameters [in respect of international transactions or specified domestic transactions or both] have to be referred to the TPO by the AO, after obtaining the approval of the jurisdictional Principal Commissioner of Income-tax (PCIT) or Commissioner of Income-tax (CIT). The fact that a case has been selected for scrutiny on a TP risk parameter becomes clear from a perusal of the reasons for which a particular case has been selected and the same are invariably available with the jurisdictional AO. Thus, if the reason or one of the reasons for selection of a case for scrutiny is a TP risk parameter, then the case has to be mandatorily referred to the TPO by the AO, after obtaining the approval of the jurisdictional PCIT or CIT.

3.4 For cases to be referred by the AO to the TPO in accordance with paragraphs 3.2 and 3.3 above, in respect of transactions having the following situations, the AO must, as a jurisdictional requirement, record his satisfaction that there is an income or a potential of an income arising and/or being affected on determination of the ALP of an international transaction or specified domestic transaction before seeking approval of the PCIT or CIT to refer the matter to the TPO for determination of the ALP:

- where the taxpayer has not filed the Accountant's report under Section 92E of the Act but the international transactions or specified domestic transactions undertaken by it come to the notice of the AO;

- where the taxpayer has not declared one or more international transaction or specified domestic transaction in the Accountant's report filed under Section 92E of the Act and the said transaction or transactions come to the notice of the AO; and

- where the taxpayer has declared the international transactions or specified domestic transactions in the Accountant's report filed under Section 92E of the Act but has made certain qualifying remarks to the effect that the said transactions are not international transactions or specified

domestic transactions or they do not impact the income of the taxpayer.

In the above three situations, the AO must provide an opportunity of being heard to the taxpayer before recording his satisfaction or otherwise. In case no objection is raised by the taxpayer to the applicability of Chapter X [Sections 92 to 92F] of the Act to these three situations, then AO should refer the international transaction or specified domestic transaction to the TPO for determining the ALP after obtaining the approval of the PCIT or CIT. However, where the applicability of Chapter X [Sections 92 to 92F] to these three situations is objected to by the taxpayer, the AO must consider the taxpayer's objections and pass a speaking order so as to comply with the principles of natural justice. If the AO decides in the said order that the transaction in question needs to be referred to the TPO, he should make a reference after obtaining the approval of the PCIT or CIT.

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3.7 For administering the transfer pricing regime in an efficient manner, it is clarified that though AO has the power under Section 92C to determine the ALP of international transactions or specified domestic transactions, determination of ALP should not be carried out at all by the AO in a case where reference is not made to the TPO. However, in such cases, the AO must record in the body of the assessment order that due to the Board's Instruction on this matter, the transfer pricing issue has not been examined at all.

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5. **Role of the AO after Determination of ALP by the TPO**

Under sub-section (4) of Section 92C (read with sub-section (4) of Section 92CA), the AO has to compute the total income of the assessee in conformity with the ALP determined by the TPO under sub-section (3) of Section 92CA."

[Emphasis added]

14. It is also pertinent to refer to the order dated 30 January 2024 passed by this Court in W.P.(C) 15381/2022 titled **Louis Dreyfus Company India Pvt. Ltd. v. DCIT**, wherein, after examining the underlying scheme of Section 92CA of the Act, this Court has also observed that the AO is obliged to compute the total income of the assessee in conformity with the determination made by the TPO. Paragraphs No. 13 and 14 of the said order read as under:-

> "13. As we construe the scheme underlying Section 92CA read along with Section 144C of the Act, the following position emerges. Section 92CA pertains to a situation where a person being an assessee has entered into an international or specified domestic transaction to submit a return. On receipt thereof and where the AO considers it necessary or expedient so to do, it may refer the same for the purposes of computation of the Arm's Length Price to the TPO. The TPO thereafter upon affording an opportunity of hearing to all concerned proceeds to determine the ALP in relation to the international or specified domestic transaction and transmits that order to the concerned AO in terms of Section 92CA(3) of the Act. **Further, in terms of sub-section (4) to Section 92 CA of the Act, the AO is obliged to compute the total income of the assessee in conformity with the determination made by the TPO.**
>
> **14. The determination which the AO makes in the first instance is recognized to be a draft of the proposed order of assessment by virtue of section 144C(1) of the Act. If the assessee be aggrieved by the proposed order of assessment, it is entitled to file objections before the DRP in accordance with Section 144C(2) of the Act. The power of the AO to complete the assessment on the basis of the draft order stands interdicted in case objections have come to be preferred within the 30 day period as contemplated in Section 144C(2) of the Act. It is the DRP which thereafter proceeds to decide the objections and frame directions to enable the AO to complete the assessment in accordance with Section 144C(5) of the Act."**
>
> [Emphasis added]

15. Therefore, it is abundantly clear that in cases, where certain international transactions may have a bearing on the computation of

total income, the AO ought to refer the matter to the TPO in order to determine the ALP of the international transactions and the AO, while computing the total income of the assessee, shall proceed in conformity with the ALP determined by the TPO. It is trite position of law that if the legislative scheme prescribes an act to be done in a certain manner, it ought to be done in that manner, and that manner alone.

16. In light of the aforenoted discussion, we may now proceed to examine the challenge which stands raised against the impugned order. The relevant extracts of the impugned assessment order dated 24 April 2021 are reproduced herein below:-

> "**5. Further the TPO in his Order has determined the value of Assessee's demerged business after making elaborate discussion and providing the assessee opportunity of being heard. The TPO in the Order u/s 92CA(3) of the Act, dated 31.01.2021 has determined that amount of Rs. 2541,84,27,665/- is being treated as compensation not received by the Assessee from its AE, subsequent to demerger of assessee's profitable mobile segment business, which now rest with the AE and for which no compensation was provided by the AE to the assessee. In view of the facts and details the value of assessee's demerged business amounting to Rs. 2541,84,27,665/- is treated as assessee's business income of the year under consideration.**
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> 5. Considering the detailed reason cited by the TPO in his order under section 92CA (3) of the Income tax Act dated 29.01.2021 and as per provisions of Section 92CA(4) of the Act, the amount of Rs. 2558,68,79,196/- (Rs. 16,84,51,531/- + Rs. 2541,84,27,665/-) is proposed to be added to the total income of the assessee.
>
> **[Proposed Addition Rs. 2558,68,79,196/-]**
>
> Penalty proceedings u/s. 270A of the Act is initiated separately for under reporting of income.
>
> Subject to above remarks the total income of the assessee is computed as under:
>
> **Total income as per Return Rs. 18, 15,98,120/-**

Add: (as discussed above)	
On account of TPO adjustments and Demerged business income.	**Rs. 2558 ,68,79,196/-**
Total Income	**Rs. 2576,84,77 ,316/-**
Rounded off Total Income	**Rs. 2576,84,77,320/-**

6. Proposed to assessed at income of **Rs. 2576,84,77,320/-**. The assessment of income is completed under section 144C(1) r.w. section 143(3) r.w. section 144B of the income tax Act and computation sheet and demand notice are annexed to this Order. Penalty under section 270A of the income tax Act is issued."

[Emphasis added]

17. The AO while passing the impugned order, under Section 144C read with Sections 143(3) and 144B of the Act, proposed to add an amount of INR 25,58,68,79,196/-. The AO noted the TPO order dated 31 January 2021 and computed the total income of the assessee by adding the amount of INR 16,84,51,531/- which is the total adjustment determined by the TPO and also the amount of INR 25,41,84,27,665/- which according to him is the value of the demerged business determined by the TPO. Interestingly, the order noted that it has been passed considering the mandate of Section 92CA(3) read with Section 92CA(4) of the Act.

18. A bare perusal of the TPO order dated 31 January 2021 would suggest that the TPO never determined the ALP of the international transaction relating to the demerger of business and rather only determined an adjustment to the tune of INR 16,84,51,531/-. Though the TPO order *inter alia* reflects some discussion regarding the value of the demerger of the business, it nowhere held that the amount of INR 25,41,84,27,665/- depicted the ALP of such an international transaction.

For the sake of clarity, the relevant extracts of the TPO order dated 31 January 2021 are culled out herein below:-

> **"33.** The cumulative adjustments made in this case are tabulated below.
>
> | S.N | Nature of international transaction | Adjustment u/s 92CA (Rs) |
> |---|---|---|
> | **1.** | **Provision of Software Development and design support Services** | **2,31,91,680** |
> | **2.** | **Provision of ITeS Support Services** | **60,90,984** |
> | **3.** | **Intra-Group Services** | **13,81,14,197** |
> | **4.** | **Trade Receivables** | **10,54,670** |
> | | **Total** | **16,84,51,531** |
>
> **33. The assessing officer shall enhance the income of the assessee by Rs. 16,84,51,531/-. Further, assessing officer may examine the taxability of the value of 'Demerged Business' of Rs. 2541,84,27,665/- determined by this office. The Assessing Officer may also examine the feasibility of initiating penalty proceedings as mentioned above and also u/s 271(1)(c) of the Act in accordance with Explanation 7 of the same. The assessee has been given adequate opportunity including oral hearing."**
>
> [Emphasis added]

19. It is abundantly clear that as per the legislative mandate behind Section 92CA of the Act, the ALP determination of any international transactions falls in the domain of the TPO. Moreover, the dictum laid down in *CIT v. S.G. Asia Holdings* noticeably elucidates that the AO is not clothed with the powers to ascertain the ALP of any international transaction that is selected on the transfer pricing risk parameters. Furthermore, Section 92CA(4) of the Act evidently mandates that the

AO cannot deviate itself from the TPO order while computing the total income of the assessee.

20. In the present case, the TPO order solely reflects the transfer pricing adjustment to the tune of INR 16,84,51,531/-. However, the AO, without affording an opportunity of hearing to the assessee, proceeded to add an amount of INR 25,41,84,27,665/- to the total income of the assessee, which addition was neither determined nor directed by the TPO, as the ALP of the international transaction related to the demerger of the business. The said course of action was not available to the AO and it is a clear case of excess.

21. Therefore, in light of the above discussion and analysis, we find ourselves unable to sustain the impugned order as it clearly breaches the legislative mandate of Section 92CA of the Act.

22. Thus, we accordingly set aside the impugned order dated 24 April 2021 and in the interest of justice, remand the matter back to the file of AO with a direction to proceed in accordance with law and extant regulations.

23. In view of the aforesaid, the writ petition is allowed and disposed of, along with pending applications, if any.

PURUSHAINDRA KUMAR KAURAV, J.

YASHWANT VARMA, J.

APRIL 01, 2024/p