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

Judgment reserved on : 11.12.2008
% Judgment delivered on : 19.12.2008

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1. **WP(C) 6974/2008**

MOSER BAER INDIA LTD ..... APPELLANT

versus

THE ADDITIONAL COMMISSIONER OF INCOME TAX & ANR. …….RESPONDENTS

2. **WP(C) 7958/2008**

HCL TECHNOLOGIES BPO SERVICES LTD ….. APPELLANT

versus

THE ADDITIONAL COMMISSIONER OF INCOME TAX & ANR. …….RESPONDENTS

3. **WP(C) 7969/2008**

HCL TECHNOLOGIES LTD ..... APPELLANT

versus

THE ADDITIONAL COMMISSIONER OF INCOME TAX & ANR. …….RESPONDENTS

4. **WP(C) 8054/2008**

HAIER APPLIANCES (I) PVT LTD ..... APPELLANT

versus

THE ADDITIONAL COMMISSIONER OF INCOME TAX & ANR. …….RESPONDENTS

5. **WP(C) 8055/2008**

GLOBAL LOGIC (I) PVT LTD ..... APPELLANT

versus

THE ADDITIONAL COMMISSIONER OF INCOME TAX & ANR. …….RESPONDENTS

6. WP(C) 8597/2008

KAMLA DIALS AND DEVICES LTD ..... APPELLANT

versus

THE ADDITIONAL COMMISSIONER OF INCOME TAX & ANR. …….RESPONDENTS

Advocates who appeared in this case:

For the Appellant	:	Mr S. Ganesh, Sr. Advocate with Mr Ajay Vohra, Ms Kavita Jha & Mr Sriram Krishna in WP(C) No 6974/2008 Mr Ajay Vohra in WP(C) Nos 7958/2008, 7969/2008, 8054/2008, 8055/2008, 8597/2008.
For the Respondent	:	Mr. Parag P. Tripathi, ASG with Mr Sanjeev Sabharwal.

CORAM :-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ?
2. To be referred to Reporters or not ?
3. Whether the judgment should be reported in the Digest ?

RAJIV SHAKDHER, J

1. In the captioned writ petitions, a challenge has been laid to the orders passed by the Transfer Pricing Officer (hereinafter referred to as the 'TPO') whereby he has determined the Arm's Length Price (hereinafter referred to as 'ALP') in relation to 'International

Enterprises. The orders of the TPO which have been challenged in each of the writ petitions are as follows:-

(i) WP(C) No 6974/2008: Impugned order dated 22.08.2008

(ii) WP(C) No 7958/2008: Impugned order dated 23.09.2008

(iii) WP(C) No 7969/2008: Impugned order dated 30.09.2008

(iv) WP(C) No 8054/2008: Impugned order dated 24.10.2008

(v) WP(C) No 8055/2008: Impugned order dated 30.09.2008

(vi) WP(C) No 8597/2008: Impugned order dated 17.10.2008

2. The counsel for the petitioners, as well as, the Ld. ASG appearing for the respondent have addressed their submissions before us, which are, common to each of the afore-mentioned writ petitions.

2.1 The petitioners were represented by Mr S Ganesh, Sr Advocate and Mr Ajay Vohra, while the respondents were represented by Mr Parag Tripathi, Additional Solicitor General.

3. The challenge to the orders of the TPO which is mounted by the petitioners is common and it goes as follows:-

a. that the TPO has not granted an oral hearing before determining the ALP in respect of international transactions entered into by the petitioner's with their Associated Enterprises and;

b. there has been a failure on the part of the TPO to consider documents and information filed by the petitioners, as also, non-disclosure of information and documents obtained by the TPO which were used by him in the determination of the ALP.

SUBMISSIONS OF COUNSEL APPEARING FOR PARTIES:

4. In the background of the aforesaid broad ground of challenge, the contention of the counsel for parties is as under:-

4.1 The learned counsel for the petitioners submitted that the TPO in the conduct of the proceedings had been remiss, in as much as, he had failed to follow a fair procedure, while determining the ALP, in relation to, 'international transactions' undertaken by each one of the petitioners. It was their contention that the determination of the ALP was a complex process, which, not only required the TPO to take into account the information provided by the petitioner assessee by way of an audit report in the prescribed statutory Form (i.e. Form 3CEB), as also, the evidence based on which the said audit report is generated. In the event the TPO disagreed with the ALP determined by the assessee, it could proceed to determine, the same in accordance with the provisions of Chapter X of the Act. It is the contention of the learned counsel for the petitioners, that in the event the TPO proceeds to disregard the ALP determined by the assessee and makes adjustments to the ALP determined by the assessee, it would be necessary under the scheme of Chapter X and, in

accordance with the principles of natural justice, that he confront[illegible] assessee and/or his representatives with the material or information which could form the basis of the determination of ALP by the TPO.

4.2 It was contended by Mr S. Ganesh, Sr Advocate appearing in writ petition no. 6974/2008, that the provisions of section 92CA, sub-section (3) mandate grant of an oral hearing, before the TPO makes a determination of ALP in relation to 'international transaction(s)' entered into by assessee's with their Associated Enterprise. This, according to the learned counsel, is particularly so, in view of the fact that the determination of ALP involves scrutiny and analysis of data of enterprises, which is, involved and hence, tends to be invariably complex. It was his submission that prior to the amendment brought about by virtue of Finance Act, 2007, w.e.f. 1.6.2000, the assessee was afforded an opportunity of presenting its case, both before the TPO, as well as, before the Assessing Officer. However, with the amendment brought about in section 92CA(4) by virtue of the Finance Act, 2007, the Assessing Officer is required to compute the total income of the assessee in 'conformity' with the ALP determined by the TPO.

4.3 It is his submission that post the 2007 amendment in Section 92CA (4), the proceedings before the TPO have the colour and texture of a regular assessment under Section 143(3) of the Act. As a matter of fact, he contends that the language of the provisions of Section 143(3)(i) &

(ii) are pari materia with the provisions of sub-section (2) and (3) of Section 92CA.

4.4 Mr S. Ganesh further contended that the lack of fairness in the procedure adopted by the TPO was evident from the fact that between May, 2007 when the TPO first issued notice to the petitioner/assessee seeking information with respect to 'international transactions' entered into by it and March,2008, eight (8) hearings were held only to obtain information from the petitioner. The first show cause notice was issued on 20.3.2008, when the TPO required the petitioner to show cause as to why an adjustment of Rs 48.11 crore ought not to be made in the ALP, in respect of international transaction(s) entered into by the petitioner with an Associated Enterprise i.e., GDM. The petitioner submitted two replies on 8.4.2008 and 15.4.2008 justifying as to why it had taken the Associated Enterprise as a tested party for determining the ALP. These replies were followed by a second show cause notice issued on 14.5.2008, whereby the TPO again sought certain information and details from the petitioners. The said information and details were supplied by the petitioner vide reply dated 22.5.2008.

4.5 It transpires that thereafter the TPO had abandoned the second show cause notice as he proceeded to issue a third notice by virtue of which, he called upon the petitioner to show cause as to why an adjustment of Rs 239.28 crore ought not be made, in respect of,

international transactions entered into by the petitioner with its associated enterprise. The learned counsel submitted that not only was the basis in the third show cause notice different, in as much as, the TPO had taken into account irrelevant data, but also that despite, the petitioner demanding an oral hearing, which is evident upon perusal of its reply dated 5.6.2008 to the third show cause notice, the TPO paid no heed to it and proceeded to determine the ALP. It was contended thus, the procedure adopted was unfair and in complete violation of the principles of natural justice and hence, the impugned decision of TPO was a nullity in the eye of law.

4.6 It was thus submitted that it is to obviate such a situation, that an oral hearing is a must both under the scheme of Chapter X, as well as, on account of the myriad complexities which arise in determination of ALP. In this regard, the learned Senior counsel placed reliance on the judgment of the Supreme Court in ***Travancore Rayons vs UOI***: ***AIR 1971 SC 862*** at page 864 (paragraph 7), and the judgment of Kerala High Court in ***Indian Transformers Ltd Vs Assstt. Collector and Anr (1983) E.L.T. 2293*** at page 2300 (paragraph 7).

4.7 Similarly, Mr Ajay Vohra who appears for the petitioner in writ petition no. WP(C) No. 7958/2008, WP(C) No. 7969/2008, WP(C) No. 8054/2008, WP(C) No. 8055/2008 & WP(C) No. 8597/2008, contended that apart from the fact that the impugned orders of the TPO were liable

to be set aside on the ground that no oral hearing had been granted b[illegible] the final determination of the ALP by the TPO: the impugned orders of the TPO were a nullity in the eye of law as the petitioner/assessee had not been confronted by the TPO with material or information which formed the basis for the determination of ALP by the TPO. It was the submission of Mr Vohra that it was incumbent on the TPO to confront the assessee with the material collected, and give an opportunity to the petitioners/assessee to rebut the same. In the event the TPO failed to do so, he could not have relied upon the said material which was collected behind the assessee's back and used without the petitioners/assessee having any notice of it. In that sense, it was contended by Mr Vohra, that it would not help the cause of the Revenue in projecting before this Court that opportunities were given by the TPO to the petitioners/assessee, if the said opportunities by way of interaction were during a period which preceded the date on which the last show cause notice, prior to determination of ALP, was issued by the TPO, especially so, if the basis adopted in the final show cause notice was different from that contained in the earlier show cause notices issued by the TPO. In support of his contention that the TPO was required to disclose the material as also confront the petitioners/assessee documents and information which formed the basis for determination of ALP by the TPO, reliance was placed on the following judgments:-

Dhakeswari Cotton Mills Ltd v. CIT: *(1954) 26 ITR [illegible] (SC);* ***Suraj Mall Mohta and Co vs A.V. Visvanatha Sastri and Anr.:*** *(1954) 26 ITR 1 (SC);* ***CIT vs East Coast Commercial Co Ltd:*** *(1976) 63 ITR 499 (SC);* ***Sales Tax Officer vs Uttareswari Rice Mills:*** *(1967) 89 ITR 6 (SC);* ***Kishinchand Chellaram vs CIT:*** *(1980) 125 ITR 713 (SC)*

5. In reply, Mr Parag Tripathi the learned ASG assisted by Mr Sanjeev Sabharwal, Advocate made the following submissions:-

5.1 At the outset, he fairly conceded that in so far as writ petition no. 6974/2008 is concerned, since an oral hearing was specifically demanded, which was not granted, by the TPO, he had instructions to say that the Department would have no objections if the matter was remanded to the TPO, provided the re-determination of ALP was permitted to be arrived at by the TPO based on material already on record. We had put this to Mr S. Ganesh, learned Sr Counsel appearing for the petitioner in the said writ petition. Mr S. Ganesh, Sr Advocate conveyed to us that he had instructions to say that this course of action was not acceptable to the petitioner if the hearing were to proceed on remand to TPO based on material already on record as such a hearing would not only be illusory, but would result, in a futile exercise as it would only impede true and correct determination of ALP. In these circumstances we were left with no choice but to proceed to decide the matter.

5.2 On the substantial issue of the scope and width of provision of Section 92CA(3) of the Act, the Learned ASG submitted that the principles of natural justice have been complied with in each and every case. It was his submission that oral hearing was not a necessary facet of natural justice. A right to effective representation would suffice. The learned ASG in this regard relied upon the following judgments:-

> ***UOI vs Jesus Sales Corporation** (1996) 4 SCC 69, pr 5, pg 74, 75; **Carborundum Universal Ltd vs CBDT** (989) Supp (2) SCC 462, pr 6, pg 464; **Hira Nath Mishra and others vs The Principal, Rajendra Medical College** (1973) 1 SCC 805, pr 12, pg 809, 810; **SBI vs Allied Chemicals Lab.** (2006) 9 SCC 252, pr 6, pg 253*

5.3 He further submitted that the application of the principle of natural justice is always contextual, which is more so, in taxation matters. To buttress his submission reliance was placed on the following judgments of the Supreme Court:-

> ***N.K. Pasanda vs Government of India** (2004) 6 SCC 299, pr 24, pg 308; **Chairman, Board of Mining Examination vs Ramjee** (1997) 2 SCC 256, pr 13, pg 261, 262; **Ajit Kumar Nag vs General Manager, Indian Oil Corp. Ltd** (2005) 7 SCC 764, pr 44, pg 785*

5.4 In the alternate, the learned ASG submitted that even where oral hearings are mandatory, the failure to afford such an opportunity would not render the decision invalid solely on that ground, as a defect, if any, could be cured in the appellate proceedings. It was his contention that,

against the decision of the assessing officer, a remedy by way of appeal to the Commissioner of Appeals was available. In support of his alternate submission, reliance was placed on the following decisions:-

> ***Lloyd vs McMahon (1987) 1 All ER 1118, Pg 1135 (h) to 1136(h) & Pg. 1171(e) to 1172(b); State Bank of Patiala vs S.K. Sharma (1996) 3 SCC 364***

5.5 The learned ASG concluded by submitting that in view of the fact that there was a failure to demand an oral hearing (except in one case i.e. writ petition 6974/2008) the petitioners' could not complain of breach of principles of natural justice. It was his submission that this would be fatal to the case of the petitioners', as in the absence of demand for hearing, the orders passed by the TPO cannot be impugned on the ground of violation of principles of natural justice. In support of this submission reliance was placed on the following judgments:-

> ***State of Assam vs Gauhati Municipal Board: AIR 1967 SC 1398, Pr. 7, Pg 1399-1400; Dehri Rohtas Light Rly. Co ltd vs UOI and anr: AIR 1970 Patna 109, Pr 26, Pg 119-120***

6. At this juncture, we may only note two important aspects. First, except in writ petition 6974/2008, in none of the other writ petitions has the Department filed a counter affidavit. They have proceeded to argue the matter on the basis of the impugned order(s) of the TPO. The second, that in the written submissions, filed by the respondent, an

objection has been taken to the maintainability of the writ petition, though the same was not pressed in the hearings held before the Court.

6.1 As regard the objection taken by the respondent, with respect, to the maintainability of the writ petition, it is our view that, in the event, we were to hold that the impugned order(s) of the TPO were passed in breach of the principles of natural justice and hence, a nullity in the eye of law, the writ petition would be a proper remedy. See observations of the Supreme Court in the case of ***State of U.P. vs Mohd. Nooh:*** ***AIR 1958 SC 86 at pages 93 & 94(para 10 & 11)*** and ***Whirlpool Corporation vs Registrar of Trade Marks, Mumbai and Ors:*** ***(1988) 8 SCC 1 at pages 9 to 11 (para 13 to 20).***

6.2 We are also of the view that availability of an alternate remedy does not debar an aggrieved party from moving the court by way of a writ petition under Article 226 of the Constitution of India. The practice adopted by Court's, is to normally dissuade an aggrieved party to come directly to the High Court, by exercising his right to avail of extraordinary remedy, where an effective and efficacious alternate remedy is available. This, however, is a rule of convenience and not a rule of law. The court is empowered to entertain a writ petition under Article 226 of the Constitution of India, even though there is an alternate remedy available to an aggrieved party. The discretion in this regard vests entirely with the Court which is to be exercised by the Court

keeping in mind the facts and circumstances of each case. I, accordingly, reject the objection raised by the respondents as regards the maintainability of the writ petitions on the ground of alternate remedy.

6.3 Now coming to the substantive part of the matter. The case of the petitioner is pivoted on the provisions of sub-section (3) of Section 92CA of the Act. In order to appreciate the true scope, width and amplitude of the provisions of Section 92CA(3) it would be important to set out the contextual background, purpose and object with which Chapter X of the Act, which is titled, "special provisions relating to avoidance of tax" was inserted in the Act, as also, the scheme of the chapter along with extant rules framed therewith. This exercise is necessary to appreciate the nature of enquiry to be carried out by the TPO, the provision under which the TPO is required to act and the diverse aspects of the matter which the TPO is required to deal with, are not in the least limited to the provisions of the Act.

6.4 The purpose and object of introduction of the provisions contained in Chapter X is to prevent an assessee from avoiding payment of tax by transferring income yielding assets to non-residents even while retaining the power to enjoy the fruits of such transactions i.e. the income so generated. Under the Income Tax Act, 1922, a somewhat similar provision appeared in the statute book being, Section 42(2) which, broadly provided that where a non-resident carried out business with the

person resident in the taxable territory and it appeared to the Assessing Officer that on account of a 'close connection' between such persons the business was so arranged that the business conducted by the resident with the non-resident either yielded no profit or, less than ordinary profit, which may be expected to arise in that business then, the Assessing Officer was empowered to tax profits which were derived or which may reasonably be deemed to be derived from the business in the hands of a person resident in the taxable territory.

6.5 With the enactment of Income Tax Act, 1961 a somewhat similar provision was inserted by way of Section 92. By Finance Act, 2001 w.e.f. 1.4.2002 Section 92 was substituted by Sections 92 to 92F; provisions which are contained in Chapter X of the Act. The scope and effect of the new set of provisions that find mention in Chapter X [i.e. section 92 to 92F] was explained by the Central Board of Direct Taxes (in short 'the Board') by its circular no. 14/2001 dated 12.12.2001 [2001 252 ITR (st.) 65]. Broadly, the Board explained that the reasons for insertion of the said Chapter was that with the increasing participation of multi-national groups in the economic activities in the country, it gave rise to 'new' and 'complex' issues whereby two or more enterprises of the same multi-national group would manipulate their prices in a manner which led to erosion of tax revenues. The raison d'etre for substituting the existing section 92 of the Income Tax Act was best explained in the

*"**55.**2Under the existing section 92 of the Income Tax Act, which was the only section dealing specifically with cross border transactions, an adjustment could be made to the profits of a resident arising from a business carried on between the resident and a non-resident, if it appeared to the Assessing Officer that owing to the close connection between them, the course of business was so arranged so s to produce less than expected profits to the resident. Rule 11 prescribed under the section provided a method of estimation of reasonable profits in such cases.* ***However, this provision was of a general nature and limited in scope. It did not allow adjustment of income in the case of non-residents. It referred to a "close connection" which was undefined and vague. It provided for adjustment of profits rather than adjustment of prices, and the rule prescribed for estimating profits was not scientific. It also did not apply to individual transactions such as payment of royalty, etc., which are not part of a regular business carried on between a resident and a non-resident. There were also no detailed rules prescribing the documentation required to be maintained.***

55.3 ***With a view to provide a detailed statutory framework which can lead to computation of reasonable, fair and equitable profits and tax in India, in the case of such multi-national enterprises, the Act has substituted section 92 with a new section, and has introduced*** *new Sections 92A to 92F in the Income Tax Act, relating to computation of income from an international transaction having regard to the arm's length price, meaning of associated enterprise, meaning of international transaction, computation of arm's length price, maintenance of information and documents by persons entering into international transactions, furnishing of a report from an accountant by persons entering into international transactions and definitions of certain expressions occurring in the said sections."*

<u>The scheme of chapter X with reference to provisions which</u>

6.6 Chapter X opens with Section 92 which provides that the income arising from 'international transactions" shall be calculated having regard to the ALP. The explanation to Section 92 clarifies that allowance for any expense or interest arising from an international transaction shall also be determined having regard to the ALP.

6.6.1 Section 92A defines as to which the enterprises would, for the purposes of the provisions of Chapter X, come within the purview of an Associate Enterprise. Sub-section (1) of section 92A proceeds generally to define an Associated Enterprise as one, which is, directly or indirectly, managed and controlled by another. The specifics with respect to the various modes by which control may be exerted by one enterprise on the other is provided in sub-section (2) of Section 92A. In the eventuality of an enterprise fulfilling any of the attributes provided in sub-clause (a) to clause (m), the two enterprises under sub-section (2) of section 92A would be deemed to be Associated Enterprises.

6.6.2 Section 92B defines as to what would be construed as an 'international transaction'. In order to appreciate the full width, amplitude of an 'international transaction' the meaning of which is provided in section 92B one would have to in addition read the definition of 'transaction' as given in section 92F(v).

6.6.3 This bring us to the provision crucial for determination of ALP, which is, Section 92C. Sub-section (1) of section 92C provides that ALP

in relation to an 'international transaction; could be determined by any of the methods provided in the said sub-section which is 'most appropriate' having regard to the nature of transactions or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors which may be prescribed by the Board. The methods provided being (a) comparable uncontrolled price method; (b) resale price method; (c) cost plus method; (d) profit split method; (e) transactional net margin method and; (f) such other method as may be prescribed by the Board. In determining the most appropriate method, regard is to be had to rules 10A and 10B of the Income Tax Rules, 1962 (in short the 'Rules'). Sub-section (3) of section 92C makes it amply clear that the primary burden in computing the ALP is that of the assessee. The Assessing Officer would proceed to determine the ALP in relation to an 'international transaction' in accordance with sub-section (1) and (2) of section 92C only if he is of the opinion that any of the circumstances as indicated in sub-clause (a) to sub-clause (d) of sub-Section (3) of Section 92C prevail. The circumstances, broadly being, that the price charged or paid for international transaction has not been determined as prescribed under sub-section (1) and (2) of section 92C or, the assessee has not kept information and documents of its international transactions in the form prescribed under sub-section (1) of section 92D and the Rules made in that behalf or, the information or data used by the assessee in computing the ALP is not reliable or correct or, that the

assessee, has failed to furnish, within the specified time the inform... sought pursuant to a notice issued under sub-section (3) of section 92D. Importantly, the first proviso to sub-section (3) of section 92 clearly mandates that before the Assessing Officer proceeds to determine the ALP on the basis of the material or information or document available with him he shall give an opportunity by serving upon the assessee a show cause notice fixing thereby a date and time for the said purpose. Under sub-section (4) of section 92C the Assessing Officer can proceed to compute the total income of the assessee only after the ALP has been determined by the Assessing Officer as per the provision of sub-section (3) of Section 92C.

6.6.4 Section 92CA was inserted w.e.f. 1.6.2002. Under Section 92CA, the Assessing Officer is empowered to refer the computation of ALP, in relation to, an 'international transaction' under Section 92C to the TPO, if he considers it 'necessary' or 'expedient' to do so with the prior approval of the Commissioner. It is only after a reference is made under sub-section (1) of section 92CA that the TPO enters the picture and gets a mandate to approach upon the assessee by issuing him a notice calling upon 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 ALP. This brings us to the provision which is presently, in issue, before this Court i.e., sub-section (3) of

in writing, will determine the ALP in relation to an 'international transaction' in accordance with sub-section (3) of section 92C 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 TPO may require on any specified points, and after taking into account all relevant material which the TPO has gathered. The TPO is required to send a copy of the order, whereby a determination of ALP is made both to the Assessing Officer and the assessee. Sub-section (3A) of Section 92CA provides a time frame within which the TPO is required to pass an order under sub-section (3) of section 92CA. Sub-section (3) of Section 92CA reads as follows:-

> *"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."*

6.6.4.1 This brings us to the other important aspect of the matter, which is, the change in sub-section (4) of section 92CA brought about with the amendment carried out by virtue of Finance Act, 2007 w.e.f. 1.6.2007.

Prior to the Finance Act, 2007, sub-section (4) of Section 92CA read as follows:-

> ***"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 <u>having regard</u> to the arm's length price determined under sub-section (3) by the Transfer Pricing Officer"***

Sub-section 4A post amendment w.e.f. 1.6.2007

> ***"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 <u>in conformity with</u> the arm's length price as so determined by the Transfer Pricing Officer"***

6.6.4.2 The essential difference is that prior to the amendment, the Assessing Officer on receipt of an order passed by the TPO under sub-section (3) of section 92CA, would proceed to compute the total income of the assessee under the provisions of sub-section (4) of 92C 'having regard' to the ALP determined by the TPO. After the amendment, the Assessing Officer is required to compute the total income of the assessee under sub-section (4) of section 92C in conformity with the ALP determined by the TPO. Thus, prior to the amendment, the Assessing Officer while computing the total income of the assessee, having regard to the ALP so determined by the TPO, was required to give a final opportunity to the assessee before computing the assessee's total income. This is clear from the language used in sub-section (4) of section 92CA prior to its amendment by virtue of Finance Act, 2007, as the

determination by the TPO was not binding on the assessing officer. The Assessing Officer was thus empowered even at the stage of computation of total income to look into issues pertaining to determination of ALP by the TPO. In this regard, also see observations of a Division Bench of this Court in the case of ***Sony India P. Ltd vs Central Board of Direct Taxes & Anr: (2007) 288 ITR 52 (Del)*** The other sub-sections not being relevant for the purpose of these petitions, are not being discussed herein.

6.6.5 As indicated above, Section 92D provides for information and documents which the assessee is required to keep as may be prescribed, in respect of its international transactions. The documentation which the assessee is required to maintain, is provided in rule 10D of the Rules. Sub-section (3) of Section 92D empowers the Assessing Officer or the Commissioner (Appeals) to request the assessee to furnish any information or document as may be sought within 30 days of being served with such a notice. This period of 30 days on an application being made is extendable by a further period not exceeding 30 days.

6.6.6 Section 92E provides that parties, who have entered into an 'international transaction' during the previous year, shall obtain a report from an accountant and furnish such report on or before the specified date in the prescribed form duly signed and verified in the prescribed manner by an accountant setting forth, such particulars, as may be

prescribed in Rule 10E. The report is required to be prepared and submitted in the prescribed Form 3CEB.

6.6.7 Section 92F defines various terms and expressions used in Sections 92 to 92E. The definition of ALP is provided in sub-clause (ii) of Section 92F.

6.6.8 A necessary adjunct to chapter X of the Act, are certain provisions contained in Chapter XXI, which is, entitled "penalties imposable". It is pertinent to note that with the insertion of chapter X in the Act, the legislature has also inserted the following provisions in Chapter XXI. Explanation 7 to Section 271 has been inserted which provides that any assessee who has entered into an international transaction as defined in section 92B, then, in the event of any amount being allowed or disallowed in the process of computation of total income of the assessee under sub-section (4) of section 92C, the amount, allowed or disallowed, will be deemed to represent the income, in respect of, which particulars have been concealed or inaccurate particulars have been furnished unless the assessee proves to the satisfaction of the Assessing Officer or the Commissioner(Appeals) or the Commissioner that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and the manner prescribed under that Section, in good faith and with due diligence. The sum and substance of the explanation is that it deems that any adjustment made in the ALP on

account of transfer pricing provisions will be regarded as concealment of particulars of income or income or furnishing inaccurate particulars under Section 271(1)(c) unless the assessee is able to establish that the price charged or paid in respect of such an international transaction was not only in accordance with the provision of Section 92C and the manner prescribed in that Section, but also that, the assessee acted in good faith and with due diligence.

6.6.9 Apart from the above, penalties are also imposable under Section 271AA for failure to keep and maintain information and documents required under sub-section (1) or sub-section (2) of Section 92D. The penalty prescribed is a sum equal to 2% of the value of each such international transaction entered into by such person. Similarly, under Section 271BA, an Assessing Officer is entitled to impose a penalty equivalent to a sum of Rs. 1,00,000/- in the event of failure on the part of the assessee to furnish an audit report in terms of section 92E. Lastly, under Section 271G, the Assessing Officer or the Commissioner of Appeals is entitled to impose penalty if the assessee fails to furnish any information or document as required in sub-section (3) of section 92D. Under this provision, the penalty imposable is, a sum equal to 2% of the value of the international transaction for the each such failure.

7. An overall review of the provisions, if summarised, broadly is as follows:-

7.1 Under Section 92, an Assessing Officer is empowered to compute income from international transactions which involve transfer pricing provision having regard to ALP. The meaning of what would constitute an associated enterprise or an international transaction is provided in section 92A and 92B respectively. The manner of computation of ALP is set out in section 92C. The primary burden in regard to computation of ALP is that of the assessee, which the assessee is required to compute by resorting to the most appropriate method amongst those mentioned in sub-clause (a) to sub-clause(f) of sub-section (1) of section 92C, having regard to the nature of transactions or the class of transaction or even class of associated persons or functions performed by such persons or such other relevant factor as may be prescribed by the Board. In this respect, regard is required to be had to the factors prescribed in Rule 10B. In the event the Assessing Officer has doubts with regard to the ALP determined by the assessee, having regard to the circumstances mentioned in sub-clause (a) to (d) of sub-section (3) of section 92C, the Assessing Officer can proceed to determine the ALP. However, while doing so, the Assessing Officer is statutorily required under the first (1st) proviso to section 92C, to give an opportunity to the assessee by issuing him a show cause notice with respect to the same.

7.2 In the event, the Assessing Officer considers it 'necessary' or 'expedient', he is empowered under Section 92CA to make a reference to

the assessee to produce or cause to be produced on a date specified, evidence which the assessee relies upon in support of computation made by him of the ALP in relation to the international transaction. Under sub-section (3) of Section 92CA, the TPO is required to pass an order in writing, determining the ALP in relation to the international transaction in accordance with the provisions of sub-section (3) of section 92C. An important caveat in this regard is that, while determining the ALP, he is statutorily required to hear such evidence as the assessee may produce including information or documents referred to under sub-section (3) of section 92D and such evidence as the TPO may require the assessee to furnish on specified points. The provisions of sub-section (3) of section 92CA make it clear that it is only upon consideration of all such material by way of information, documents or evidence that the TPO can proceed to determine the ALP.

7.2.1 It is quite plain, upon reading of the provisions of sub-section (3) of section 92CA, that the legislature has clearly cast an obligation on the TPO to accord an oral hearing to the assessee. The submission of the Learned ASG to the contrary is not acceptable to us. It has been reiterated time and again by Courts in India and other jurisdictions all over the world that authorities which have a power to decide and whose decisions would prejudice a party, entailing civil consequences, would be required to accord oral hearing even where the statute is silent. See

courts have gone to the extent of holding that the right to oral hearing may not necessarily flow from a statute but flows from rule of law as enunciated by courts. That brings us to the issue as to what could be regarded as 'civil consequences' in a given case. The expression of 'civil consequences' has been best explained by our Supreme Court in the case of ***Mohinder Singh Gill vs The Chief Election Commission: (1978) 1 SCC 405 at 440***. The Supreme Court has observed that civil consequences involve infraction of not only property and personal rights, but also, actions which impinge on civil liberty of an individual or result in material deprivation or even result in non-pecuniary damages.

7.3 Keeping in mind the test as enunciated by the Supreme Court in the case of ***Mohinder Singh Gill*** *(supra)* and ***State of Orissa vs Dr (Miss) Bina Pani Dei*** *(supra),* we have no doubt in our minds that the provisions of sub-section (3) of section 92CA cast a duty in no uncertain terms on the TPO to afford an opportunity of an oral hearing. This is clearly so in view of the fact that as courts have carved out this important safeguard in favour of the aggrieved parties even where the statute is silent, unless there is exclusion of such a right by way of an explicit provision or by necessary implication. In the present case, however, given the words of the statute, we have no doubt that the grant of oral hearing by the TPO is mandatory. The reason for coming to such conclusion, apart from the clear wordings of sub-section (3) of section

of ALP would have on the assessee, any adjustment by the Assessing Officer to the ALP determined, by the assessee based on the determination by the TPO under sub-section (3) of section 92CA, would result in imposition of penalty under Section 271(1)(c) read with explanation 7 of the Act. The Assessing Officer, after the amendment brought about by virtue of Finance Act, 2007, has no choice but to proceed to compute total income of the assessee under sub-section (4) of section 92C in 'conformity' with the ALP determined by the TPO. In view of the consequences which result from the determination of the ALP by the TPO, which are undoubtedly severe, there can be no doubt that an oral hearing is a must.

7.4 The other submission of the Learned ASG, which is, that even if oral hearings is considered to be mandatory, the impugned orders cannot be rendered invalid as there was no demand for oral hearing, (except in writ petition no 6974/2008) in our view, is not tenable. The reason being that the Courts have time and again, exhorted that fair procedure is required to be followed not only within its own precincts, but also, by authorities exercising quasi-judicial and administrative powers, with a view to achieve, at the end of the day, a result, which is, fair and just. And this end result has to be examined by asking oneself a question as to whether a person who, if he had knowledge of the proceedings but, was otherwise unconcerned with the end result, would view the decision

aggrieved if he has not demanded, that which is his right i.e., a right to a fair procedure, in this case, an oral hearing. The answer to this question is not far to seek. Where the State is a litigating party, it is, its Constitutional obligation to adopt a procedure which is both fair and just while dealing with its citizens. The fact that a citizen is unaware of his legal right cannot be used as a plank to seek legal sustenance for its actions which are otherwise invalid. It is duty of the State, in its role as a litigating party, to inform the citizen of his right i.e., to seek an oral hearing. An enquiry of the kind which is contemplated under Chapter X by the TPO will achieve a far more fair result, if there is an opportunity for an oral hearing or personal representation. The observation of Megarry J, in ***John vs Rees, (1969) 2 All. ER 274*** best illustrates the point as to why it is important to give a personal hearing especially in such like matters. The relevant extracts reads as follows:-

> ***"It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were of unanswerable charges which, in the end, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature***

underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

7.5 Therefore, in our opinion, the failure to demand oral hearing will not necessarily lend sanctity or reinforce the validity of the impugned orders in view of the fact that while determining the ALP, the TPO is free to look at not only the material adduced by the assessee but also information and/or evidence gathered by the TPO. According to us, it would be difficult for the assessee to gauge before hand at the stage of filing a written response to the queries raised in the show cause notice by the TPO, as to whether his response has been fully appreciated by him, and if there are any queries, whether he needs to supplement them or dilate upon them in the background of information and documents which may be available with the TPO of which the assessee has no notice. It is only when the TPO examines the response of the assessee in his or his representative's presence would there be a meaningful and effective compliance with the requirement of fair procedure as contemplated in sub-section (3) of section 92CA. In the words of Meggary J., many ***'fixed and unalterable determinations'*** may suffer a change. It is, therefore, often said that a requirement of oral hearing is usually insisted as a matter of public policy to prevent not only a perverse decision but also to secure, against a decision which is vitiated by "well-meaning

ignorance or carelessness" due to absence of oral hearings. ***Commissioner of Wealth Tax vs Sir Jagdish Prasad Choudhary (1995) 211 ITR 472 (Pat.) F.B***.

7.6 It is important to note that a submission was made on behalf of the respondent, that even though there was no record of an oral hearing in the order sheets of the TPO, but the usual practice followed by the TPO is that when responses are filed by the assessees to a show cause notice, there is invariably an interaction between the assessee and/or his representatives and the TPO. This submission of the respondents will not carry their case any further. Firstly, this fact is vehemently rebutted by the counsel for the petitioner's and secondly, in any event, there is no record of the same before us which would have us accept the version given by the learned counsel for the respondent. Lastly, but more importantly, if the entire thrust is on a meaningful and effective hearing, we do not see how a brief interaction at the time of submission of the reply by the assessee or his representative who may or may not be equipped to answer the queries raised by the TPO would help the cause of the Revenue or the assessee. In any event, it would be well nigh impossible even for the TPO to appreciate the full impact of the reply unless he has read and understood the contents of the reply filed before him.

8. In support of his submission that failure to demand oral hearing would be fatal to the challenge to the impugned order on the ground of a breach of natural justice, the learned ASG relied upon the judgment of the Supreme Court in ***State of Assam vs Gauhati Municipal Board: AIR 1967 SC 1398 at page 1399-1400 (para 7)***, and the judgment of the Division Bench of the Patna High Court in ***Dehri Rohtas light Railway Co vs UOI & anr AIR 1970 (Pat.) 109 page 119-120 (para 26)***.

9. A perusal of the facts stated in Guahati Municipal Board (supra) would show that the Supreme Court was dealing with a matter which involved exercise of power, by the State of Assam, under the provision of section 298 of the Assam Municipal Corporation Act, number XB-15 of 1957 (in short the 'Municipal Act') in relation to supersession of the incumbent Municipal Board. The Supreme Court noted that in order to effectuate supersession of the Municipal Board, the only requirement prescribed under section 298 of the Municipal Act was to give a notice and seek an explanation of the Municipal Board, before the State Government could pass an order superseding the Municipal Board. On facts, the Supreme Court found that such a notice had been given to the Municipal Board and that it had also been indicated the charges on the basis of which the State Government had formed a tentative conclusion. It was also found that, pursuant to such a notice by the State Government, the Municipal Board had furnished its explanation and

passed an order superseding the Board. In the context of these facts the Supreme Court observed as follows:-

> ***"However, we are definitely of opinion that the provisions of S. 298 being fully complied with it cannot be said that there was violation of principles of natural justice in this case when the Board never demanded what is called a personal hearing and never intimated to the Government that it would like to produce material in support of its explanation at some later stage. Therefore, where a provision like S. 298 is fully complied with as in this case and the Board does not ask for an opportunity for personal hearing or for production of materials in support of its explanation, principles of natural justice do not require that the State Government should ask the Board to appear for a personal hearing and to produce materials in support of the explanation. In the absence of any demand by the Board of the nature indicated above, we cannot agree with the High Court that merely because the State Government did not call upon the Board to appear for a personal hearing and to produce material in support of its explanation it violated the principles of natural justice.***

10. As is evident, this case turned on its own facts, in particular, the provisions of Section 298 of the said Act which, as observed by the Supreme Court, did not envisage a personal hearing. It is in such circumstance, the Supreme Court observed, that where a provisions like Section 298 is fully complied with, and the Municipal Board had neither asked for an opportunity of personal hearing or production of materials in support of its explanation, the order of the State Government could not have been set aside, on the ground that it did not call upon the Municipal Board to appear in person or produce material in support of

its explanation. In the present case, there is a statutory requireme... observed, hereinabove and in fact a mandatory requirement to accord a personal hearing. Hence, it cannot be said that failure to demand personal hearing would lend efficacy to the impugned orders.

11. The other case i.e., ***Dehri Rohtas light Railway co*** *(supra)* which was relied upon by the respondents is also, not of much assistance, to the respondents. The Division Bench, in this case, followed the judgement of the Supreme Court in ***Gauhati Municipal Board*** *(supra)*. The broad facts in this case were: the Central Government was exercising a statutory power for fixing maximum and minimum freight rates for both government, as well as, private railway companies. It is in that context that the Central Government sought a response from the petitioner railway company. After considering the response of the petitioner railway company the Central Government passed its final order. The decision of the Central Government was, inter alia, impugned by the petitioner railway company, on the ground that it had not been granted a personal hearing. The Division Bench, in this case, ruled that since no express demand has been made for personal hearing, principles of natural justice were not violated. The judgment in ***Dehri Rohtas Light Railway Co*** *(supra)* is distinguishable. In the instant case as indicated above, there is a statutory requirement for grant of personal hearing.

12. The other alternate submission of Ld. ASG was that, even if [illegible] were to accept that, an oral hearing is mandatory, failure to grant such an opportunity is a defect which could be cured by providing such an opportunity before the appellate authorities. For this purpose, the learned ASG relied upon the judgment of the House of Lords in ***Lloyds vs McMahon:*** ***(1987) 1 All ER 1118, Pg 1135 (h) to 1136(h) & Pg. 1171(e) to 1172(b)*** and also the judgment of the Supreme Court in the case of the ***State Bank of Patiala vs S.K. Sharma*** ***(1996) 3 SCC 364 at page 377 (para 15)***.

13. In our view, the judgment of House of Lords in the case ***Lloyds vs. McMahon*** *(supra)* only enunciated a principle that the rules of natural justice must be flexible and must depend upon the circumstances obtaining in a case, the nature of the inquiry, the rules under which the concerned authority is acting and also the subject matter with which the said authority is dealing. A careful perusal of the facts in the case of ***Lloyds vs McMahon*** *(supra),* would show that it was dealing with a situation where members of the city council had failed to set up a meeting of the council to fix a rate for a particular year. Upon failure of the city council to perform its duty, the District Auditor in exercise of his statutory powers notified the members of the city council that he proposed to consider issuance of a certificate seeking to recover a certain sum from the delinquent members on the ground that their actions had

identified specific losses resulting from the delay in fixing the rate, ... also the members of the city council, that is, the councillors who had by their wilful misconduct caused the loss. The notice of the District Auditor also stated that the members could make written representations to the District Auditor before he reached his decision. It is in this context the House of Lords was called upon to consider as to whether the decision of the District Auditor could be faulted on the ground that he had not given the affected members an opportunity of making oral representations. It is evident that the decision of the House of Lords was based on the circumstances obtaining in the case, the nature of inquiry, and the statute under which the District Auditor was exercising his powers. The House of Lords, noted that, the District Auditor was dealing with a group of 41 councillors who had acted in concert, in wilfully failing to discharge its duty to fix rates. They had sent their representations and none of them, it seems, had asked to be given a personal hearing. In these circumstances, the House of Lords came to the conclusion that the procedure adopted by the District Auditor was both suitable and fair. The ratio of the said decision is, as is obvious, not applicable to the facts of the case before us. In the instant case, there is not only a statutory requirement of an oral hearing but also the nature of inquiry and the provisions under which the TPO exercises his powers are entirely different. One may only point out that Court of Appeal in the ***Lloyds vs. McMahon*** *(supra)* had held that the procedure adopted by the

District Auditor fell short of fairness and since charges of bad faith ..... malafides had been attributed to the councillors, oral hearing ought to have been given. As noticed, the House of Lords, however, took a different view of the matter.

14. As regards learned ASG's submission that a provision of an appeal can cure the defect, if any, which may have crept in on failure to grant an oral hearing, in our view does not flow from the observations made by the House of Lords at pages 1135 (P. H to page 1136 at P C). The crucial observations are:

> ***"Where, however, <u>the appeal does require an examination of the circumstances of the case de novo on whatever evidence may be put before the appellate court, then the major question for consideration is, I apprehend, whether, in the context of this particular case,</u> the procedure as a whole gave the appellants an opportunity for a fair hearing....."***
>
> ***As to that, the appellants' objections to the procedure of the District Auditor are that they did not have an opportunity of an oral hearing and did not have an opportunity of dealing with the District Auditor's proposed findings. But on the appeal they were able to put in, and did not put in, as much evidence as they wished to deal with those findings and to answer every point taken by the District Auditor, and they were given, though they did not take advantage of it, the opportunity of giving oral evidence...."***
>
> ***Applying the law as I take it to have been laid down in Calvin v. Carr (1980) A.C. 574 and in Twist's case, 12 A.L.R. 379 I have no doubt that in the present case, if there was any failure of fairness on the part of the***

oral hearing or not offering them an opportunity to comment on his proposed findings before he rejected the appellants' representations as untrue, that failure was fully cured by the hearing in the Divisional Court under the statutory appeal process....."

15. A close reading of the observation would show that the dictum of the House of Lords if applied would cover those cases where an aggrieved party has an unbridled right of appeal on facts and law, and a complete freedom to file evidence which was not filed before the original authority. In other words the appellate authority is required to examine the circumstances ***"de novo on whatever evidence that may be put before the appellate court".*** In the instant case it cannot be disputed that under the provisions of sub-section (4) of section 92 CA the Assessing Officer is required to compute the total income of the assessee in conformity with the ALP determined by the TPO. Against the order of the Assessing Officer, an appeal is maintainable under Section 246A of the Act. While the Commissioner of Appeals under sub-section (4) of section 250 in disposing of any appeal before it is empowered to make further inquiry either himself or by directing the Assessing Officer to do so and receive the result of the same, the assessee cannot file any fresh evidence except in accordance with the provisions of Rule 46A. The Rule 46A inter alia permits an assessee to adduce additional evidence only if he is able to establish that he falls under one of the following situations envisaged under the said rule:-

i. Where an Assessing Officer has either refused to admit evidence which he ought to have admitted; or

ii. Where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer; or

iii. Where the appellant was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal; or

iv. Where the Assessing Officer has made the order appealed against without giving sufficient opportunity to adduce evidence relevant to any ground of appeal.

16. It is evident that upon a bare reading of Rule 46A that the assessee does not have a right to file additional evidence unless his case falls within one of the situations prescribed under the Rule 46A. The discretion to permit the assessee to adduce additional evidence lies with the Commissioner of Appeals. Therefore, it cannot be said that the Commissioner of Appeals is duty bound to admit any evidence that the assessee wishes to adduce, based on which he would conduct a de novo examination of the case before him.

17. We agree with the submission of the learned counsel for the petitioners that the appellate proceedings as provided for under the Act are not a substitute for the original proceeding before the TPO. The

submission of the learned ASG that the failure to grant an oral hearing, is a defect which could be cured by providing such an opportunity in the appellate forum is far too expansive and cannot be accepted. Whether in a give case an appellate forum, will be an effective substitute will depend on the provisions of the statute, and the nature and circumstances obtaining in the case. This, according to us, is the correct and true ratio of judgment of House of Lords in ***Lloyds vs McMahon*** *(supra)*.

18. The learned authors H.W.R. Wade & C.F. Forsyth in their book on Administrative Law, eighth edition at page 493, while noting the judgment of the House of Lords in ***Lloyds vs McMohan*** *(supra)* have commented as follows:-

> "In order to preserve flexibility the courts frequently quote general statements such as the following:
>
> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth.
>
> To the same effect is a passage, much cited, in a speech of Lord Bridge in the House of Lords. (Lloyds vs McMohan)
>
> "My Lords, the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative of judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework or other framework in which it operates. In particular, it is

> ***on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."***
>
> But the flexibility of natural justices does not imply a variable standard of procedural justice. As Sedley J has observed:
>
> The well attested flexibility of natural justice does not mean that the court applies differential standards at will, but that the application of the principles (which, subject to known exceptions, are constant) is necessarily as various as the situations in which they are invoked"

18.1 It is useful to extract the comments of Sir William Wade cited with approval in ***ICAI vs L.K. Ratna (1986) 4 SCC 537*** at 552:

> *"Some of those cases as mentioned in Sir William Wade's erudite and classic work on "Administrative Law" 5th edition. But as that learned author observes (at P. 487), "in principle there ought to be an observance of natural justice equally at both stages", and*
>
> > *"If natural justice is violated at first stage, the right of appeal is not so much a true right of appeal as a corrected initial hearing: instead of fair trial followed by appeal, the procedure is reduced to unfair trial followed by fair trial."*

The aforesaid dicta of the Supreme Court is preceded by a felicitous judgment of Krishna Iyer, J. (as he then was) in ***Mohinder Singh Gill*** *(supra)* wherein at page 45 he cited with approval the observations of Lord Wilberforce in ***Mallock vs Aberdeen Corporation, (1971) 2 All E.R. 1278:***

> *"A limited right of appeal on the merits affords no argument against the existence of a right to a precedent hearing, and, if that is denied to have the decision declared void."*

19. The other case on which learned ASG relied upon was ***State Bank of Patiala vs S.K. Sharma*** *(supra).* This was a case where an employee was removed from service after a regular inquiry on the charge of tampering and misappropriation of funds by the employee of the bank. The issue which the Supreme Court was called upon to consider was in the context of Regulation 68, which, inter alia, provided that copies of the statements of witnesses, if any, recorded earlier shall be furnished to the delinquent officer "not later than three days before the commencement of the examination of witnesses by the inquiry authority."

The Supreme Court noted at page 373 (h):

> ***"The issue boils down to this: whether the failure to literally comply with sub-clause (iii) of clause (b) of Regulation 68(ii)(x) vitiates the enquiry altogether or whether it can be held in the circumstances that there has been a substantial compliance with the said sub-clause and that on that account, the enquiry and the punishment awarded cannot be said to have been vitiated."***

20. In this context, the Supreme Court, after considering the case law, came to the conclusion that the said sub-clause (iii) of clause (b) of Regulation 68, was not mandatory and that, even if it was mandatory

since it was conceived in the interest of the employee and not in public interest, it could have been waived, even if the regulation used the word 'shall'. The Supreme Court also drew distinction in the said case with regard to violation of rights under a substantive provision as against a procedural provision. The Supreme Court observed that a substantive provision has normally to be complied with and the theory of substantial compliance or the test of prejudice would not be applicable in such case. It went on to observe that procedural provisions are generally meant for affording a reasonable and adequate opportunity to a delinquent officer/employee. A violation of any and every procedural provision cannot automatically vitiate the inquiry or an order passed except those cases which fall under 'no notice, 'no opportunity' and 'no hearing' categories. The complaint of violation of procedural provision should be examined from the point of view of prejudice viz. whether such violation has prejudiced the delinquent officers/ employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the inquiry and/or the order of punishment. If no prejudice is established to have resulted, therefrom, it is obvious, no interference is called for. In this connection it may be remembered that there may be certain procedural provisions which are of a fundamental character whose violation is by itself proof of prejudice. It is also observed that in the case of procedural provision which is not of a

mandatory character, the complaint of violation has to be examined from the stand point of substantial compliance and that the order passed in violation of such a provision can be set aside only where such a violation caused prejudice to the delinquent employee. The principles which emerged in the case, were summarized by the Supreme Court at page 389 in paragraph 33, of the judgment. After perusing the facts of the case and the principles enunciated therein, we are at a loss to understand as to how the ratio of this decision can help the case of the respondents. On the contrary, the observations in the judgment are against the respondent. In the instant case, the procedure is mandatory and there is nothing to suggest otherwise. In the present case, the provision is not only substantive but also there is nothing to suggest that the petitioners had waived their right of being afforded an oral hearing in the matter. The reliance placed by the respondents on the observation made in paragraph 15 at pages 377-378 of the judgment do not carry the case of the respondents any further. The fact that the privy council decision in Calvin vs. Carr was considered in ***Lloyds vs. McMahon*** *(supra)* in our view would make no difference. Since we have already discussed the case of the House of Lords in ***Lloyds vs. McMahon*** *(supra)*. The discussion in paragraphs 15 at page 377-378 has to be read with principles enunciated by the Supreme Court in the said case in paragraph 33 at page 389-391.

21. The submission of the learned ASG that the principles of natural justice have to be applied in taking into account the context in which the issue arises is a proposition which we have no difficulty in accepting. But our agreement ends there. In the context of the provisions of sub-section (3) of section 92CA, as observed hereinabove, the requirement to grant an oral hearing is mandatory and cannot be given a short shrift by the TPO.

22. The judgment cited by learned ASG to support his submission that the principles of natural justice does not necessarily imply the oral hearing and that the right of representation would suffice were cases where there was no statutory requirement to grant an oral hearing.

23. In ***UOI vs Jesus Sales Corporation*** *(supra)* the Supreme Court was considering the impact of the third proviso to sub-section (1) of section 4-M of the Imports and Exports (Control) Act, 1947 on the decision impugned; whereby an application for waiver of pre-deposit of penalty had been dismissed without giving an opportunity of personal hearing. In the context of the said provision and the nature of the enquiry the Supreme Court noted that the said proviso, that is, the third proviso, which vested the power in the appellate authority to dispense with the deposit of the amount of the penalty unconditionally or on some conditions did not say specifically that such orders could be passed only after hearing the parties concerned. As is obvious, the Supreme Court

was dealing with the provision which was different from the one, we are concerned with in the present case.

24. Similarly, the Supreme Court in ***Carborundum Universal Ltd*** *(supra)* was dealing with the powers of the Central Board of Direct Taxes (Board) to reduce and/or waive the amount of interest payable by an assessee under Section 220(2-A) of the Income Tax Act on the recommendation of the Commissioner in case, it was satisfied that it was a case of genuine hardship or the default in payment of the amount on which interest was payable was due to circumstances beyond the control of the assessee and that the assessee had co-operated in the inquiry relating to the assessment or in proceedings for recovery of the amount due to him. In this context, the Supreme Court held that failure to grant personal hearing did not vitiate the order of the Board, in the context of the fact that firstly the section 220(2-A) of the Act did not contemplate a hearing and secondly, the nature of the power exercised by Board was construed as discretionary. The position in the present case is different. The Supreme Court, however, made a pertinent observation which as a matter of fact supports the case of the petitioners. These observations are as follows:-

> ***"the legal position is that where a statutory provision does not exclude natural justice the requirement of affording an opportunity of being heard can be issued, particularly when the proceedings are quasi-judicial. Exclusion, however, can either be by clear provision or***

> ***which is being exercised. WE have already noticed that the power of the Board which was invoked was discretionary. It was to be exercised on the basis of recommendation of the Commissioner and material provided by the assessee....”***

25. The foresaid observations of the Supreme Court make it quite clear that even where there is no provision for oral hearing it cannot be excluded specially when proceedings are quasi-judicial in nature. The exclusion of an oral hearing can only be where there is a clear provision to that effect or it can be inferred from the scheme of statute. The fact situation in the present case is quite different.

26. The third case which was relied upon by the Respondents was ***State Bank of India vs Allied Chemical Lab*** *(supra)*, we find this has no relevance to the proposition advanced before us by the learned ASG. This is a case which dealt with a situation where the High Court had set aside a final decree or order of the DRT in a writ petition in exercise of its power under Article 226 and 227 of the Constitution of India, on the ground that the DRT had rejected the application of one of the parties before it for cross examining the deponent of an affidavit by way of evidence, filed by the bank. The Supreme Court was of the view that the High Court could not have set aside the decree/final order of the DRT in exercise of its powers under Article 226 and 227 of Constitution of India for the reasons that the grievance of the aggrieved party that it had not been afforded an opportunity of cross-examining the deponent could

always be set right by way of a statutory Appeal. This case has no relevance to the facts obtaining herein.

27. The respondents also cited before us the Supreme Court judgment in the case of ***Hira Nath Mishra and ors. vs The Principal, Rajendra Medical College*** *(supra).* This was a case where the appellants before the Supreme Court were students of a medical college, who as per the complaints received from the girl students, late at night, entered the compound of the girls hostel and walked in the nude. Based on the complaint of the girl students, a Committee was constituted by the authorities concerned. The Committee, after making the necessary inquiry and considering the statements of the appellants, who did not intimate that they wished to lead any evidence, came to the unanimous conclusion that the appellants were amongst the students who had taken part in the delinquent act. It was in this context that the Supreme Court examined the submissions of the appellant/delinquents before them that they were not given copies of the committee's report; the witnesses who gave evidence against them were not examined in their presence; and they were not given an opportunity to cross-examine to test the veracity of the witnesses. In the context of the aforementioned peculiar facts, the Supreme Court observed that the rules of natural justice were flexible, which may differ in different circumstances. This case turned on its facts.

28. The case of ***N.K. Prasad vs Government of India and ors.*** *(supra)* cited before us by the respondents, was also one where the Supreme Court observed that principles of natural justice cannot be put in a straight-jacket. Their application will depend upon the facts and circumstance of each case. If a party after having proper notice chose not to appear, he at a later stage cannot be permitted to say that a fair opportunity of hearing was not afforded to him. In the present case the respondent has not taken any such stand that the petitioners' were issued any notice to appear and present their case before the TPO. The ratio of the said authority is not applicable to the instant case.

29. In view of the discussions above we conclude:-

i. The provisions of sub-section (3) of section 92 CA casts an obligation on the TPO to afford a personal hearing to the assessee before he proceeds to pass a order of determining of the ALP in terms of sub-section (3) of Section 92CA.

ii. Since such a requirement flows from a plain reading of the provisions of sub-section (3) of section 92CA, the determination of ALP by the TPO cannot be sustained by taking recourse to the fact that the assessee did not demand an oral hearing.

iii. To obviate any difficulties in future the show-cause notice issued by the TPO just prior to the determination of ALP

under Section 92CA(3) should refer to the document[illegible] material available with the Assessing Officer in relation to the international transaction in issue. The show cause notice should also give an option to the assessee:-

(a) both to, inspect the material available with Assessing Officer as also the leeway to file further material or evidence if he so desires, and

(b) to seek a personal hearing in the matter.

30. This conclusion we have arrived at keeping in mind the nature and the complexity of the inquiry and the width and amplitude of sub-section (3) of section 92CA, which empowers the TPO to gather evidence from all available sources in the event the TPO disagrees with determination of ALP by the assessee in the first instance. Therefore, the directions issued above, if followed, would obviate any charge of breach of principles of natural justice.

31. We would now proceed to examine the sustainability of the orders of the TPO in each of the writ petitions in the light of the aforesaid discussion, while touching upon only those facts (which according to us are relevant) which impinge upon the last show cause notice issued to the petitioners prior to determination of ALP by the TPO.

Moser Baer India Ltd vs The Additional Commissioner of Income Tax & Anr: WP(C) No 6974/2008;

32. In this writ petition as noted above the learned ASG has conc[illegible] that no oral hearing has been granted even though in the reply dated 5.6.2008 pursuant to the last show cause notice dated 23.5.2008, the petitioner had asked for a personal hearing. In view of this admitted position we are of the view that the impugned order dated 22.8.2008 cannot be sustained. The TPO in these circumstances will, however, commence the proceedings from the stage at which he had issued the show cause notice dated 23.5.2008. The petitioner will within a period of 3 days from today to file any document or information which they think is necessary to support their case before the TPO. The TPO shall also grant inspection of the material, document or information in its possession and also permit the petitioner to take copies of the same on payment of charges on which it proposes to rely upon in determination of the ALP. The TPO shall give, by way of a notice, an opportunity of personal hearing to the petitioner setting out the date and time for the said purpose.

HCL Technologies BPO Services Ltd vs the Additional Commissioner of Income Tax and Anr.: WP(C) No 7958/2008;

33. In this writ petition the order of the TPO dated 23.9.2008 is impugned. It is averred in the writ petition that by the said order the TPO made an adjustment of Rs 10.96 crores to the ALP of the international transactions of the petitioner of Rs 17.60 crores. It has averred, more specifically, in the grounds contained in paragraph 31-32 that even though the impugned order dated 23.9.2008 appears to be a

petitioner, amongst others, is set out in paragraph 32 of the petition. The averments are as follows:-

> "The objections raised by the petitioner for considering M/s Saffron Global and Airline Financial Support Services (I) Ltd., the two high profit making companies only for comparing the operating profit margin of the petitioner and not considering the other comparable companies satisfying the criteria laid down in the show cause notice dated 26.8.2008 by the respondent no. 1 have been discarded primarily on the ground that the petitioner did not inadvertently enclose the annexure containing the necessary details. Respondent No. 1 did not call for the relevant annexure and passed the impugned order dated 23.9.2008, while he had time till 31st October, 2008 to complete such proceedings. The action of the Respondent No. 1 disregarding the contentions of the petitioner to proceed without calling for the relevant details, it would be noted, was solely directed to create an unreasonable addition by considering a very high operating profit margin of 25.72% by taking into account two high profit making companies, viz. Saffron Global and Airline Financial Support Services, ignoring the other comparable companies which otherwise satisfied the comparability criteria to create."

34. A perusal of comments made in paragraph 6.5(vii) of the impugned order would show that even though there is a reference to the contention raised by the petitioner in paragraph 32, the TPO has not accepted the claim of the assessee on the ground that the annexure which was filed with the letter dated 8.9.2008 which was in response to a show cause notice dated 1.9.2008 was not considered as the annexure 2 to the letter dated 8.9.2008 of the petitioner was not filed. It appears that those calculations which were detailed out in the said annexure were crucial to the case set up by the petitioner. The fact that this annexure was inadvertently left out was within the

view, by calling upon the petitioner to present his case. In the view that we have taken hereinabove the impugned order cannot be sustained and the same deserves to be set aside. The TPO in these circumstances will, however, commence the proceedings from the stage at which he had issued the show cause notice dated 1.9.2008. The petitioner will within a period of 3 days from today to file any document or information which they think is necessary to support their case before the TPO. The TPO shall also grant inspection of the material, document or information in its possession and also permit the petitioner to take copies of the same on payment of charges, on which it proposes to rely upon in determination of the ALP. The TPO shall give, by way of a notice, an opportunity of personal hearing to the petitioner setting out the date and time for the said purpose.

HCL Technologies Ltd. Vs Addl. Commissioner of Income Tax: WP(C) No 7969/2008;

35. In the captioned writ the order of the TPO which is impugned is order dated 30.9.2008. The petitioner has averred in the writ petition that by the impugned order the TPO has made an adjustment of Rs 204.25 crores to the ALP of international transaction on export of computer software of Rs 663.19 cores. Amongst other averments, the petitioner has elaborated on its submission by raising a pointed objection on the issue of exclusion data relating to 43 comparable companies in paragraphs 18 of the writ petition:-

> "In response thereto, the petitioner vide replies dated 8.9.2008 and 12.9.2008 submitted arguments justifying

> the determination of the arm's length price of th.. international transactions. The petitioner vide reply dated 8.9.2008, inter alia, requested the Respondent No. 1 to explain the basis as to why none of the remaining 43 companies identified as comparable in the Transfer Pricing documentation, were not found to be comparable with the petitioner. The petitioner requested Respondent No. 1 to provide the basis for not considering the 43 companies relied upon in the Transfer Pricing documentation as the comparable companies. The petitioner specifically requested the respondent no. 1 to provide details as to what were the specific functions being performed or risks being assumed by Infosys Technologies Limited and Satyam Computers Services which were not being undertaken by these 43 companies, to seek to exclude these remaining companies for purpose of comparison / benchmarking of the international transactions entered into by the petitioner with its associated enterprises."

36. It is the grievance of the petitioner that even though in response to a show cause notice dated 1.9.2008 the petitioner had specifically requested the TPO to respond and /or give details or reasons as to why the data of comparable companies was not considered for the purposes of final determination of ALP by applying the TNMM method. The petitioner submits that the impugned order does not specifically deal with the said issue. It is submitted that the denial of a fair and adequate opportunity has resulted in an adjustment of Rs 202 crores and a resultant profits of Rs 486 crores, which is, far in excess of the aggregate disclosed group operating profit which includes the petitioner, as well as, the foreign associated enterprises of Rs 418 crores for the year ended 30.6.2005. These submissions of

the petitioner are not rebutted. Consequently, without commenting on the merits of the matter we quash the impugned order of the TPO. The TPO, in these circumstances will, however, commence the proceedings from the stage at which he had issued the show cause notice dated 1.9.2008. The petitioner will within a period of 3 days from today to file any document or information which they think is necessary to support their case before the TPO. The TPO shall also grant inspection of the material, document or information in its possession and also permit the petitioner to take copies of the same on payment of charges, on which it proposes to rely upon in determination of the ALP. The TPO shall give, by way of a notice, an opportunity of personal hearing to the petitioner setting out the date and time for the said purpose.

Haier Appliances (I) Pvt Ltd vs The Additional Commissioner of Income Tax: WP(C) No 8054/2008;

37. In this writ petition the main grievance, amongst others is set out in paragraph 30, 31 and 32 of the writ petition. In brief the petitioner has said that the impugned order dated 24.10.2008 passed by the TPO proceeds on a basis different from the show cause notice dated 4.9.2008. It is averred that the TPO while passing the impugned order dated 24.10.2008 had accepted the bench marking analysis carried out by the petitioner applying TNMM method and

did not dispute the ALP of international transactions of import of finished products, however, the TPO made an adjustment of Rs 26.27 crores on an altogether different basis, that is, with respect to subsidy grant against the brand promotion expenses received by the petitioner. The petitioner is aggrieved that the adjustment of Rs 26.27 crores was computed on a entirely different basis then that as stated in the show cause notice. The petitioner was hence deprived of an opportunity to meet the basis adopted by the TPO. There is no rebuttal on record with respect to the said averment. We find that this would be a sufficient ground to set aside the order of the TPO. The TPO in these circumstances will, however, commence the proceedings from the stage at which he had issued the show cause notice dated 4.9.2008. The petitioner will within a period of 3 days from today convey to or file any document or information which they think is necessary to support their case before the TPO. The TPO shall also grant inspection of the material, document or information in its possession and also permit the petitioner to take copies of the same on payment of charges on which it proposes to rely upon in determination of the ALP. The TPO shall give, by way of a notice, an opportunity of personal hearing to the petitioner setting out the date and time for the said purpose.

Global Logic (I) Pvt ltd vs. The Additional Commissioner of

38. In this writ petition the order dated 30.9.2008 passed by the TPO was impugned. By the said order the TPO has made an adjustment of Rs 2,22,55,571/- to the ALP of the international transaction, involving rendering of a better software development services amounting to Rs 25.62 crores. The petitioner has impugned the order of the TPO, amongst others, on the ground that in the show cause notice dated 26.3.2008 the TPO has proposed an adjustment of Rs 3.281 crores and also that in the said show cause notice the TPO had referred to 6 comparable companies. In response to the said show cause notice the petitioner had filed a reply on 10.4.2008 wherein it had been indicated that on a correct computation of operating profit margin of six companies identified in the show cause notice the average operating profit margin of such companies would work out to 9.34% as against 25.93% as shown in the show cause notice. The petitioner followed his reply with letters dated 22.4.2008 and 28.4.2008. The petitioner's grievances is that despite these replies without raising any further queries, by the impugned order dated 30.9.2008, which was passed after a gap of 5 months, the TPO had made an adjustment of nearly 2.22 crores after considering only four out of the six companies as indicated in the show cause notice. These companies were treated as comparable companies with average operating of 21.56%. The petitioner has submitted that it was not informed as to the basis which the TPO had applied for exclusion of

two out of the six companies indicated initially in the show cause notice dated 26.3.2008 issued by the TPO. There was no opportunity to contest the calculation of the average operating margin of the four comparable companies considered by the TPO. We find that these facts are once again not rebutted by the respondent. The impugned order has changed the basis as indicated in the show cause notice and hence is quashed. The TPO in these circumstances will, however, commence the proceedings from the stage at which he had issued the show cause notice dated 26.3.2008. The petitioner will within a period of 3 days from today file any document or information which they think is necessary to support their case before the TPO. The TPO shall also grant inspection of the material, document or information in its possession and also permit the petitioner to take copies of the same on payment of charges, on which it proposes to rely upon in determination of the ALP. The TPO shall give, by way of a notice, an opportunity of personal hearing to the petitioner setting out the date and time for the said purpose.

Kamla Dials and Devices ltd vs The Additional Commissioner of Income Tax and anr: WP(C) No 8579/2008;

39. Similarly, in this writ petition the order dated 17.10.2008 passed by the TPO has been impugned. The petitioner has stated that by the impugned order TPO has made an adjustment/enhancement of

his income to the extent of 2.51 crores. Amongst others, the petitioner grievance is that after the issuance of the show cause notice dated 3.10.2008 even though it furnished replies dated 10.10.2008 and 14.10.2008 wherein request was made to the TPO to provide the material and evidence relied upon by the TPO for the proposed adjustment as indicated in the show cause notice, the TPO did not respond to the same and instead in haste proceeded to pass the impugned order dated 17.10.2008. These averments are not rebutted. We find that a fair procedure required to TPO to supply the material based on which it proposed to make the adjustment indicated in his show cause notice. The failure to do so in our view has vitiated the order dated 17.10.2008 passed by the TPO. We accordingly quash the order dated 17.10.2008. The TPO in these circumstances will, however, commence the proceedings from the stage at which he had issued the show cause notice dated 3.10.2008. The petitioner will within a period of 3 days from today file any document or information which they think is necessary to support their case before the TPO. The TPO shall also grant inspection of the material, document or information in its possession and also permit the petitioner to take copies of the same on payment of charges, on which it proposes to rely in determination of the ALP. The TPO shall give, by way of a notice, an opportunity of personal hearing to the petitioner setting out the date and time for the said purpose.

39. Accordingly, the writ petitions are allowed with the direction made hereinabove. In the circumstance there shall be no order as to costs.

RAJIV SHAKDHER, J.

December 19, 2008 **BADAR DURREZ AHMED, J.**
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