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% 22.12.2009

Present: Mr.Piyush Kaushik, Adv. for the petitioner.  
Mr.N.P.Sahni, Ms.Suruchi Aggarwal and Mr.P.C.Yadav,  
Advs. for Respondent no.2.

+ **W.P.(C) 14079/2009**

\* The Petitioner by means of this Writ petition has challenged the order dated 23<sup>rd</sup> October, 2009, passed by Transfer Pricing Officer (TPO) under Section 92CA(3) of the Income Tax Act determining the Arm's Length Price (ALP) in respect of international transaction for 'representation services. On the basis of this order, the Assessing Officer has prepared Draft Assessment Order under Section 144 C of the Act proposing to incorporate in the Assessment Order the addition made by TPO in the computation of ALP of 'representation services' transaction.

The grievance of the petitioner is that no proper opportunity was given to the petitioner and the petitioner was not confronted with the formula which is ultimately adopted by the TPO while fixing the ALP. In this behalf the submission of the petitioner is that though the petitioner was asked to furnish information and details with regard to the computation of arm's length price which the petitioner furnished from time to time and in its letter dated



13.10.2009 has stated that before disallowance with respect to the ongoing proceedings the petitioner be confronted/clarified etc., no such opportunity was given to the petitioner.

Further submission in this behalf is that the TPO in a unilateral manner and without confronting the petitioner on the necessity of adopting the basis which is followed in the order dated 23.10.2009, has made an addition of Rs.41,95, 484/- (rupees forty one lakh ninety five thousand four hundred and eighty four), which according to the petitioner is not correct and in this manner the TPO has increased the price by almost 90 %.

Learned counsel for the petitioner has also relied upon the judgment of this Court in the case of *Moser Bear India Ltd. vs. Additional Commissioner of Income Tax & Another (2009) 316 ITR 1(Del.)*, wherein it has been held that Section 92CA (3) casts an obligation on the Transfer Pricing Officer (TPO) to afford a personal hearing to the Petitioner before he proceeds to pass an order of determining the arm's length price, in terms of the special provision. He further submits that in that very judgment this Court has held that if such an opportunity is not afforded to the concerned assessee before determining the arm's length price, such an order can be challenged by filing a Writ Petition under Article 226 of the Constitution.



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Mr. Sahni, has appeared on advance notice and has produced a photocopy of the order/entries. These entries demonstrate that the petitioner was called by the TPO from time to time; he was asked to furnish certain information and make submission in that behalf. The impugned order has been passed, thereafter. Therefore, it cannot be treated to be a case where opportunity of hearing was not afforded to the petitioner before passing an order. However, as noted above the submission of the petitioner is that the petitioner was not confronted with the basis which the TPO adopted ultimately. We are of the opinion that such a plea can be taken by the petitioner by filing objections to the order of the TPO as well as Draft Order prepared by the Assessing Officer. After the Draft Order is framed by the Assessing Officer the assessee has remedy to approach the Dispute Resolution Panel provided under Section 144 C of the Act. The said Dispute Resolution Panel, before considering the matter has to be guided by Sub-Section 6 of Section 144C of the Act which reads as under:

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

- (a) draft order;
- (b) objections filed by the assessee;
- (c) evidence furnished by the assessee;
- (d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority.
- (e) records relating to the draft order;

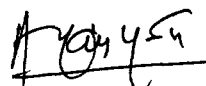


- (f) evidence collected by, or caused to be caused to be made by it; and
- (g) result of any enquiry made by, or caused to be made by, it."

Thus not only the petitioner would have opportunity to file objections, the evidence which is furnished by the assessee has also to be considered by the Dispute Resolution Panel before passing final orders.

The petitioner thus shall be entitled to raise all possible objections and along with that furnish necessary evidence as well to rebut the Report of the TPO as Draft Assessment Order. Since such a remedy is available to the petitioner, it is not necessary to go into this aspect in the present Writ Petition filed by the petitioner. We expect and hope that the Dispute Resolution Panel shall, positively, deal with the objections filed by the petitioner along with support evidence furnished by him to rebut the basis adopted by the Transfer Pricing Officer (TPO) to arrive at arm's length price (ALP) and thereafter only it shall pass speaking orders.

With these observations this Writ Petition is dismissed.

  
A.K. SIKRI, J.

  
J.R. MIDHA, J.

DECEMBER, 22, 2009

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