* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
\+ **WRIT PETITON (CIVIL) NO. 7932/2010**

Reserved on: 24th November, 2011
% **Date of Decision:** 24th January, 2012

ALPINE ELECTRONICS ASIA PTE LTD. ...Petitioner
Through Mr. Yogesh K. Jagia, Ms. Sandhya Kohli & Mr. Akshay Singh, Advocates.

VERSUS

DIRECTOR GENERAL OF INCOME TAX & OTHERS ...Respondent
Through Mr. Abhishek Maratha, Sr. Standing Counsel & Ms. Anshul Sharma, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.:

The petitioner Alpine Electronics Asia Private Limited is a company incorporated in Singapore and was allowed to open a liaison office in India vide permission granted by the Reserve Bank of India dated 15th July, 1997. The petitioner thereafter obtained registration with the office of the Registrar of Companies vide registration order dated 21st November, 1997. The permission granted by the Reserve Bank of India on 15th July, 1997 was extended from time to time upto 14th July, 2009.

2. On 23rd October, 2008, the petitioner had filed an application with the Reserve Bank of India for closing their liaison office. The Reserve Bank of India vide letter dated 12th February, 2009 asked the petitioner to obtain ITCC or "no objection certificate" from the Income Tax Department in terms of their Master Circular No. 2/2008-09 dated 1st July, 2008.

3. On 27th February, 2009, the petitioner filed an application with the Deputy Director of International Tax for issue of no objection certificate/ITCC. The said application was transferred and assigned to Assistant Director of Income Tax, Circle 1(1), Directorate of International Taxation, the respondent No. 1 herein. In response to the said application, the respondent No. 1 issued letters/questionnaire dated 2nd March, 2009 asking for various details and information, including document and business activities overall and in India, specific financial details, i.e., receipt, income and expenses and year wise details of all purchases and details of services from India or of head office or any group company etc. Details of purchases or sales by the head office or group company to any Indian party, commission income earned by the liaison office in India or the head office or group company in relation to the purchases/sales to Indian

parties, copy of ledger account of liaison office in India a account of the head office in the books of the liaison office, details of salary, incentives, bonus etc. paid to the employees, details of distributors, dealers of head office or other group companies in India, copy of self-appraisal of the top three employees and copy of e-mails of the top three employees of the liaison office for the month of October, 2008 to December, 2008 and a sample and details of all products sold in India during the financial year 2006-07 to the current financial year along with details of customers.

4. The petitioner vide letter dated 25th March, 2009 stated that the petitioner was only maintaining a liaison office and was receiving money from abroad for meeting the administrative expenses and it was not authorised to carry on any business activity. The liaison office was doing coordination work and getting market information on behalf of its principal. It was further pointed out that the company in Singapore was a 100% subsidiary of the parent company Alpine Electronics, Japan. The company in Singapore was being liquidated in terms of restructuring plan. The existing business of the Singapore company, i.e., the petitioner had been taken over by another

company Alpine Electronics of Asia Pacific company Ltd, Bangkok, which is 100% subsidiary of Alpine Electronics, Japan. The Alpine Electronics of Asia Pacific Company Limited, Bangkok had opened a liaison office in India. Further a new company Alpine Asia Pacific India Limited had also been incorporated in India.

5. It was stated that the Alpine Electronics, Japan had an exclusive distributor agreement with Supreme Hi-Fidelity (P) Limited, who are conducting business activities, including sale etc of the products manufactured by Alpine Electronics, Japan. The sales turnover of the distributor was disclosed and it was stated that none of the sales/purchases had been from India either by head office or by any group company. The sale in India have been made to the distributors Supreme Hi-Fidelity (P) Limited, who continued to be in operation till a recent date under a separate agreement between them and Alpine Electronics, Japan. Copy of the ledger accounts was enclosed and it was stated that the petitioner had officially ceased operation as on 31st March, 2007 and all the staff had been retrenched. Copy of the e-mails of the three staff members were enclosed and it was stated that the car stereos were installed in the cars

manufactured by Honda Siel Cars India Limited. Monthly returns were also furnished vide letter dated 9th April, 2009. Further details were furnished on 30th April, 2009. Salary paid to staff members (four in number, including one who had left in late 2006) in the liaison office who were retrenched, was furnished. Various other details, which were asked for were also furnished including a copy of the agreement between Alpine Electronics Incorporated, Japan and Alpine Electronics Asia Private Limited, Singapore.

6. It is stated in the petition that during the course of hearing the respondent had warned and threatened that he shall initiate reassessment proceedings under Section 147/148 of the Income Tax Act, 1961 (Act, for short). It may be noted here that the petitioner had been filing its returns of income under Section 139(1) of the Act. It is not disputed that the returns of income for the assessment years 2003-04, 2004-05, 2005-06 and 2006-07 along with audited balance sheets were duly filed.

7. The petitioner on 12th June, 2009 wrote a letter to the Director General of International Taxation protesting against the delay in issue of no due certificate as it was delaying and holding up the winding up proceedings in Singapore. It was

stated that there was no existing demand and no proceedings were pending against the petitioner. It was further stated that the petitioner had filed a guarantee bond executed by a third person Ms. Kavita Aswal for meeting tax liability in future. Reference was made to Section 230 of the Act and it was pointed out that under Rules 42 and 43 of the Income Tax Rules, 1962, the prescribed authority is required to issue no objection certificate immediately. It was stated that in the garb of no objection/no tax due certificate, the issuing authority had initiated detailed enquiry proceedings for which he has no authority or sanction under the law. (For record, it is stated that the stand of the respondent is that Section 230 is not applicable. It applies to an individual and not to a company).

8. It is alleged in the writ petition that on 8th July, 2009 the petitioner's representative visited the office of the respondent and was asked to withdraw/modify the representation and was issued a veiled threat that action under Section 147/148 of the Act shall be initiated.

9. Aggrieved, the petitioner filed Writ Petition (Civil) No. 10267/2009 before the High Court and notice was issued vide order dated 21st July, 2009. Advance copy of this writ petition

was served on the respondent on 16th July, 2009 and was listed for hearing on 21st July, 2009. Direction was given to the respondent to file counter affidavit within two weeks. On 21st October, 2009, when Writ Petition (Civil) No. 10267/2009 came up for hearing, it was pointed out by the respondent that they had issued notices under Section 147/148 of the Act but the same had been received back undelivered as the premises from where the liaison office was operating was found to be closed. Notices were directed to be served on the Chartered Accountant, who was authorised to appear for the petitioner and was entitled to receive communications. It was directed that if notices were served on the said Chartered Accountant, it would be treated as a proper service. Thereafter, notices were served. It may be recorded that the notices for reopening were issued on 31st July, 2009 for the assessment years 2003-04 and 2004-05 and on 26th August, 2009 for the assessment years 2005-06 and 2006-07. Reference to the reasons to the reopening has been made and contents thereof have been mentioned below.

10. On 28th January, 2010, the petitioner was furnished a copy of the reasons for initiating proceedings under Section 147/148 of the Act. By order dated 28th January, 2010, the petitioner was

asked to file objections and follow the procedure in ***G.K. Driveshafts (I) Limited versus Income Tax Officer and Others***, (2003) 259 ITR 19 (SC). The respondent was asked to pass a reasoned order and proceed in accordance with law.

11. The petitioner filed objections on 13th July, 2010 and 19th July, 2010 to the reopening. In the objections, it was mentioned that they had requested for a copy of the approval granted by Additional Director of Income Tax under Section 151 of the Act but this had not been furnished.

12. On 20th August, 2010, the petitioner was furnished the order dated 19th August, 2010 passed by the Assessing Officer rejecting the objections. The said order has been referred to and examined below. The court order dated 29th August, 2010 also records that on 18th August, 2010 the petitioner had filed supplementary objections to the issue of notice under Section 147/148 of the Act. In the supplementary objection, attention was drawn to the order passed by Additional Director of Income Tax dated 17th July, 2009 under Section 151(2) of the Act for the assessment years 2003-04 and 2004-05. In this order, the Additional Director of Income Tax had stated that perusal of the reasons indicated that they were required to be re-drafted with

specific emphasis on the material on record and conclusio drawn and the statement of income. The respondent was asked to redraft the reasons in more crystalized and concise form and resubmit the same. Thereafter, approval was obtained from the Additional Director of Income Tax on 23rd July, 2009 and notices under Section 147/148 of the Act for assessment years 2003-04 and 2004-05 were issued.

13. The respondent thereafter issued notices under Section 142(1) dated 1st November, 2010.

14. It may be only noted that the Writ Petition (Civil) No. 10267/2009 has been disposed of in view of the reassessment proceedings, which have been initiated. Subsequently, the petitioner filed the present writ petition challenging the reassessment proceedings on various grounds.

15. The petitioner has filed CM No. 10573/2011 raising additional grounds. It is pointed out that the petitioner had filed a letter dated 19th November, 2009 stating that the returns of income filed under Section 139(1) should be treated as filed in response to the notice under Section 147/148 of the Act. It is stated that the Assessing Officer had issued notice under

Section 143(2) of the Act only on 23rd November, 2010 which beyond the period of six months prescribed in the proviso to Section 143(2)(ii). For the sake of convenience, the said Section 143(2) including the proviso to clause (ii) is reproduced below:

> "***Section 143. Assessment***
>
> X X X X
>
> (2) Where a return has been furnished under Section 139, or in response to a notice under sub-section (1) of Section 142, the Assessing Officer shall,—
>
> (*i*) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim:
>
> ***Provided*** *that no notice under this clause shall be served on the assessee on or after the 1st day of June*, *2003*;
>
> (*ii*) notwithstanding anything contained in clause (*i*), if he considers it necessary or expedient to ensure that the assessee has not under-stated the income or has not computed excessive loss or has not under-paid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in support of the return:
>
> Provided that no notice under clause (*ii*) shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished."

16. In response to the said application, the respondent has filed additional counter affidavit. In the additional counter affidavit, the said factual position is admitted. It is not disputed

that the petitioner had filed returns of income pursuant to tl notice under Section 147/148 vide letter dated 19th November, 2009 adopting their earlier returns under Section 139(1) of the Act and the notice under Section 143(2) issued only on 23rd November, 2010. The respondent, however, has placed reliance upon Section 292BB of the Act.

17. Before we examine the aforesaid legal submission, it may be relevant to notice the grounds for reopening the assessment and the order dated 19th August, 2010 passed by the respondent No. 1 rejecting the objections to reopening. As already recorded above, the Assessing Officer had earlier recorded detailed reasons dated 17th July, 2009 for the assessment year 2003-04 and 2004-05 for approval/satisfaction under Section 151(2) by the Additional Commissioner of Income Tax. By letter dated 17th July, 2009, the Assessing Officer/respondent No. 1 was asked to redraft the same with specific emphasis on the material on record, conclusion drawn and statement of income in a more crystallized and concise form. In the reasons to believe, which are common to all the assessment years, the Assessing Officer has observed that the liaison office in India was in fact a permanent establishment as

the petitioner was involved in activities which were beyond tl scope of ancillary activities. It was observed that the liaison office was doing core acts, responsible to its head office and earning income for Alpine Electronics, Japan and Alpine Singapore. Reasons recorded by the Assessing Officer are as under:-

> "(i) The Liaison Office is engaged in various kinds of activities in India. The assessee has on 26.03.09 inter alia stated that "the fact that the principal's located in Singapore has commenced the process of liquidation and it has been imperative to keep the presence in India intact and meet the expenses in India, another Liaison Office has been opened as a Liaison Office of company located in BANGKOK i.e. a Liaison Office in India of ALPINE ELECTRONICS OF ASIA PACIFIC CO LIMITED, BANGKOK". This shows the critical importance for the Alpine Group of having a Liaison Office in India.
>
> (ii) The Liaison Office in India does not act as a mere communication channel between the Head Office and assessee's customers in India. In fact, it has been interacting with customers of Alpine Japan and even end user customers (Honda Siel- who has purchased from India Distributor-Supreme India).
>
> (iii) Liaison Office appears to be involved in designing of demonstrations, providing publicity material, warranty liaisoning, inspection of products etc.
>
> (iv) As per the India Monthly Reports the assessee is involved into several activities of core nature like (for example: from the report for July 2008):
>
> a. Discoutinous compensation.
>
> b. Delivery Defect Reporting.

c. Dispatch of defective unit to Daesung in China. Which appear to be the manufacturing/repairing centre of the Alpine products.

d. Preparing Mid-Term Analysis.

e. Presentation of 2NS to HSCI (Honda Siel), with help of APN-TC.

f. Proposal presentation for 2NS to HSCI.

g. Presentation to Honda Access Asia Oceania, Mr. Iwai, same proposal as HSCI.

- India Liaison Office has been deciding about proposals & making proposals to potential customers and has been doing the marketing activities also.

h. < Action Plan for next Month> (7) Service setup, with the help of AOAP Service Dept.

(v) The assessee was specifically asked to submit the calculation of Bonus. Calculation of Bonus is not submitted and the assessee just submitted that bonus payment is not linked with sales. The presumption is drawn that the bonus is linked to sales, as per the general nature & meaning of bonus."

18. On the question of the quantum of tax/income, which had escaped assessment, the Assessing Officer in the reasons to believe has recorded as under:-

"5. On the basis of above I have reasons to believe that India Liaison Office should have been remunerated at Arm's Length Price by the Singapore Head Office at the rate of cost plus 5% on the same basis on which it (the Head Office) has received markup from Alpine Japan and further, the share of profit are required to be attributed to the Permanent Establishment in India for the sales made by various Alpine Group Companies and these income have not been offered to tax.

The amount of income escaping assessment as seen from the following details of the expenses incurred in India which should have been remunerated at cost plus mark up is:

F.Y.	Expenses (Rs.)	5% Markup
2004-05	46,24,440	2,31,222
2005-06	50,44,083	2,52,204
2006-07	50,54,502	2,52,725
2007-08	46,86,430	2,34,321
2008-09	37,95,114	1,89,755 (For first half of F.Y. 08-09)

The 5% markup represents the income escaping assessment, on account of mark up, which should have been received by the India Liaison Office from its Head Office for this assessment year. The Liaison Office is present in India since F.Y. 1997-98.

The amount of income escaping assessment on account of attributable profit, which should have been attributed, but has not been, is linked to the sales made in India. The details of the sales made in India by the Alpine Group Companies (Incorporated outside India), have been submitted by the assessee under the cover of its letter dated 25.03.2009. The sales have been:

F.Y.	Sales (Rs.)
2006-07	25,80,69,345
2007-08	17,78,44,737

2008-09	2,57,62,698 (Note: 1)

Note 1: Liaison Office effectively worked for a small part of the year. As the sales have gone down with the slowing/non-working of Liaison Office, further supports the fact that Liaison Office is critical for sales made in India."

19. In the objections, the petitioner had stated that there was no material and basis of which inferences had been drawn. These were assumptions which were factually incorrect and without material or evidence. The petitioner in the objections had submitted that the Assessing Officer had drawn presumption that the bonus was paid to all the employees linked to sales whereas this was not factually correct. Further, in the reasons a presumption had been drawn that the 5% loading margin paid under the agreement between Alpine Electronics, Japan and Alpine, Singapore must be attributed or treated as income of the liaison office in India, and this was merely a hunch or suspicion and not a reason to believe. The Assessing Officer rejected the said contention holding that these aspects were required to be examined and determined at the time of final assessment.

20. We have referred to the aforesaid aspect to project a complete history of the litigation and the manner in which the

proceedings were initiated. In the draft assessment order, whic has been passed under Section 144C of the Act, the Assessing Officer has substantially reproduced the reasons to believe. For the sake of convenience and completeness we are reproducing paragraph 14 of the draft assessment order for the Assessment Year 2003-04 which records as under:-

> "14. As observed in Para 8, the assessee is definitely a PE of the foreign company. The amount of income escaping assessment on account of attributable profit, which should have been attributed, but has not been, is linked to the sales made in India. The details of the sales made in India by the Alpine Group Companies (Incorporated outside India), have been submitted by the assessee under the cover of its letter dated 25.03.2009. The sales have been:
>
> | **F.Y.** | **Sales (Rs.)** |
> |---|---|
> | 2006-07 | 25,80,69,345 |
> | 2007-08 | 17,78,44,737 |
> | 2008-09 | 2,57,62,698 (Note: 1) |
>
> Note 1: Liaison Office effectively worked for a small part of the year. As the sales have gone down with the slowing/non-working of Liaison Office, further supports the fact that Liaison Office is critical for sales made in India.
>
> The assessee has argued against any such attribution. Hence, it has not submitted anything based on which correct attribution could be made. The sales figure for FY 2002-03 has also not been given. It is observed from the information submitted that the sales figure is declining over the years. There is a decline of approximately 30 percent in sales in FY 2007-08 vis a vis FY 2006-07. Assuming

> that this is the trend that was there in the earlier years also, the sales in FY 2002-03, which is also the year under review, would be 30 percent more than the sales that took place in FY 2003-04, which is taken as Rs.60,71,43,490/-. This amounts to 1.33 times the sales figure of FY 2003-04 which works out at Rs.80,75,00,842/-. Invoking Rule 10 of the Income Tax Rules, 1962, I estimate 20 percent of the sale made in India during the year under reference (Rs.80,75,00,842/-) by the assessee company as reasonable estimates of the profits made and 50 percent of such profits are attributable to the activities of the PE in India in the form of the alleged LO. Following this method, 20% of the sales during FY 2002-03 is Rs.16,15,00,168/-. 50 percent of these profits are attributable to the PE in India, that is Rs.8,07,50,084/- which is taxable as business profits @40%.
>
> 15. With these remarks, the computation is as follows:
>
> Income on account of Cost plus the actual
>
> Expenses incurred by LO (Para 13) @40% Rs.2,50,000/-
>
> Add: Business profits attributable to PE Rs. 8,07,50,084/-
>
> Assessable Income Rs.8,10,00,084/-
>
> Rounded off to Rs.8,10,00,100/-"

21. This brings us to the core issue what is the effect of the failure to issue notice under Section 143(2) within the period stipulated in the proviso to clause (ii) and effect of Section 292BB of the Act. It is now well settled that service of notice under Section 143(2) of the Act within the statutory time limit is mandatory and is not a procedural requirement, which is inconsequential. In ***Commissioner of Income Tax vs. Lunar Diamonds Ltd.*** [2006] 281 ITR 1 (Del.), the issue which arose

for consideration was whether the word "served" and "issue" are interchangeable. The Delhi High Court after referring to the decision of Supreme Court in ***Banarsi Debi v. ITO*** [1964] 53 ITR 100 (SC), held as under:

> "11. … While specifically dealing with the use of the word "issued" in section 4 of the Amending Act, the Supreme Court noted that there is no prescription in section 34 of the Indian Income-tax Act of a time-limit for sending a notice. Therefore, it was obvious that the expression "issued" used in section 4 of the Amending Act could not be used in the narrow sense of "sent". Concluding the discussion on the subject, the Supreme Court noted that the intention of the Legislature was to save the validity of a notice as well as a consequent assessment order from an attack on the ground that the notice was served beyond the prescribed period. That intention would be effectuated if a wider meaning is given to the expression "issued". Consequently, the Supreme Court held it possible that even though the notice was served beyond the prescribed time, it was saved by section 4 of the Amending Act…"

22. The said view has been followed in ***Commissioner of Income-tax v. Vardhman Estate P. Ltd.,*** [2006] 287 ITR 368 (Del).

23. The requirement to comply with Section 143(2) of the Act in the block assessment proceedings and the effect of failure to issue notice u/s 143(2), was examined by the Supreme Court in ***Assistant Commissioner of Income Tax vs. Hotel Blue Moon*** (2010) 321 ITR 362 (SC) and it was observed as under:-

> "Clause (b) of section 158BC by referring to section 143(2) and (3) would appear to imply that the provisions of section 143(1) are excluded. But section 143(2) itself becomes necessary only where it becomes necessary to check the return, so that where block return conforms to the undisclosed income inferred by the authorities, there is no reason, why the authorities should issue notice under section 143(2). However, if an assessment is to be completed under section 143(3) read with section 158BC, notice under section 143(2) should be issued within one year from the date of filing of block return. Omission on the part of the assessing authority to issue notice under section 143(2) cannot be a procedural irregularity and the same is not curable and, therefore, the requirement of notice under section 143(2) cannot be dispensed with."

24. Section 143(2) is applicable to proceedings under Sections 147/148 of the Act. Proviso to Section 148 of the Act protects and grants liberty to the Revenue to serve notice under Section 143(2) of the Act before passing of the assessment order for returns furnished on or before 1st October, 2005. In respect of returns filed pursuant to notice under Section 148 of the Act after 1st October, 2005, it is mandatory to serve notice under Section 143(2) of the Act, within the stipulated time limit.

25. Section 292BB reads:-

> "**292-BB. Notice deemed to be valid in certain circumstances**.—Where an assessee has appeared in any proceeding or co-operated in any

> inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was—
>
> (*a*) not served upon him; or
>
> (*b*) not served upon him in time; or
>
> (*c*) served upon him in an improper manner:
>
> Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment."

26. Section 292BB incorporates principle of estoppel. It stipulates that an assessee, who has appeared in any proceeding and co-operated in any enquiry relating to assessment or reassessment shall be deemed to be served with any notice which was required to be served and would be precluded from objecting that the notice was not served upon him or was served upon him in an improper manner or was not served upon him in time. However, the proviso states that the principle of estoppel incorporated in the main section would not apply, if the assessee has raised objection in reply to the notice before completion of assessment or reassessment. In the

present case, the Assessing Officer has passed an order und Section 144C, which is a draft assessment order. The assessee has to file objections to the draft assessment order within the stipulated time. After objections are filed, the Dispute Resolution Panel has to decide the objections and issue necessary directions to enable the Assessing Officer to complete the assessment. In this connection, we may reproduce Section 144C of the Act, which reads as under:

> "***Section 144-C.*** **Reference to Dispute Resolution Panel**.—(1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation in the income or loss returned which is prejudicial to the interest of such assessee.
>
> (2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,—
>
> (*a*) file his acceptance of the variations to the Assessing Officer; or
>
> (*b*) file his objections, if any, to such variation with,—
>
> (*i*) the Dispute Resolution Panel; and
>
> (*ii*) the Assessing Officer.
>
> (3) The Assessing Officer shall complete the assessment on the basis of the draft order, if—
>
> (*a*) the assessee intimates to the Assessing Officer the acceptance of the variation; or
>
> (*b*) no objections are received within the period specified in sub-section (2).

(4) The Assessing Officer shall, notwithstanding anything contained in Section 153, pass the assessment order under sub-section (3) within one month from the end of the month in which,—

(*a*) the acceptance is received; or

(*b*) the period of filing of objections under sub-section (2) expires.

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

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

(*a*) draft order;

(*b*) objections filed by the assessee;

(*c*) evidence furnished by the assessee;

(*d*) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;

(*e*) records relating to the draft order;

(*f*) evidence collected by, or caused to be collected by, it; and

(*g*) result of any enquiry made by, or caused to be made by, it.

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

(*a*) make such further enquiry, as it thinks fit; or

(*b*) cause any further enquiry to be made by any income tax authority and report the result of the same to it.

(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.

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

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

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

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

(14) The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.

(15) For the purposes of this section,—

(*a*) "Dispute Resolution Panel" means a collegium comprising of three Commissioners of Income tax constituted by the Board for this purpose;

(*b*) "eligible assessee" means,—

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

(*ii*) any foreign company."

27. It is clear from the said Section that the Assessing Officer is still to complete the assessment and pass an assessment order. Draft order is not the final assessment order and does not result in completion of assessment. Under sub-section (2) to

Section 143, the assessee has a right to accept, within 30 days, the draft assessment order or has right to file objections with the Dispute Resolution Panel and the Assessing Officer. Under Section 144C(3), the Assessing Officer shall complete assessment proceedings on the basis of the draft order only if the assessee files his acceptance to the variations or if no objections are received within 30 days. In case objections are filed, the Assessing Officer is to await directions of the Dispute Resolution Panel. Sub-section (5) states that the Dispute Resolution Panel can issue directions, as it thinks fit, for guidance of the Assessing Officer to enable him to complete the assessment. Section 144C(13) stipulates that the directions issued by the Dispute Resolution Panel under sub-Section (5) will be binding on the Assessing Officer and the Assessing Officer in conformity of the said directions shall complete the assessment.

28. In the present case, the final assessment order has not been passed and only a draft assessment order has been passed. The proviso to section 292BB is applicable. The principle of estoppel under Section 292BB will, therefore, not apply. In these circumstances, the respondent cannot rely upon the main

Section 292BB and claim that notice under Section 143(2) deemed to be served within the stipulated time.

29. In view of the aforesaid position, we do not see any reason why reassessment proceedings should continue as no notice under Section 143(2) of the Act was served on the assessee within the stipulated time.

30. Accordingly, the writ petition is allowed and a Writ of Certiorari is issued quashing the assessment proceedings pursuant to the notices under Section 148 of the Act. A Writ of Mandamus is issued to the respondents to issue 'no objection certificate' to the petitioner as per the needs and requirements of the Reserve Bank of India. The no-objection certificate will be issued within 6 weeks from today. There will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(R.V. EASWAR)
JUDGE

JANUARY 24th , 2012
VKR