

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 5035 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE A.J. SHASTRI

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

M/S D.B. CORP LIMITED....Petitioner(s)

Versus

DY. COMMISSIONER OF INCOME TAX CIRCLE 1(1)(2) & 2....Respondent(s)

Appearance:

MR S N SOPARKAR WITH MR B S SOPARKAR, ADVOCATE for the
Petitioner(s) No. 1

MR MANISH BHATT WITH MRS MAUNA M BHATT, ADVOCATE for the
Respondent(s) No. 1 - 3

CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**

and

HONOURABLE MR.JUSTICE A.J. SHASTRI

Date : 10/08/2016

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitioner has challenged reference made by respondent No.1, the Assessing Officer, to respondent No.2 under Section 92CA of the Income Tax Act, 1961 ['the Act' for short] and also a notice dated 05.02.2016 issued by respondent No.2, the Transfer Pricing Officer ['TPO' for short] calling upon the petitioner to produce necessary documents and evidence for computation of arm's length price in relation to specified domestic transactions. The petitioner has also challenged orders dated 10.03.2016 and 28.03.2016, under which, the petitioner's objection for reference to the TPO came to be rejected.

2. Briefly stated, the facts are that:

The petitioner is a company registered under the Companies Act. For the assessment year 2013-14, the petitioner filed a return of income on 27.09.2013 disclosing total income of Rs. 330.00 crores (rounded off). A revised return was filed for the said year on 31.03.2015, however, the declaration of income did not change. Such return was taken in scrutiny by the Assessing Officer. During the course of scrutiny assessment, the Assessing Officer referred the case of the petitioner for computation of arm's length price to the TPO under Section 92CA(1) of the Act. The petitioner, under communication dated 07.03.2016, raised objections before the respondents to the reference made to the TPO and the subsequent notice issued by the TPO in this regard. The Assessing Officer made a report dated 08.03.2016 as to why such objections are not valid.

Respondent No.3, Principal Commissioner of Income Tax, rejected the petitioner's objections by an order dated 10.03.2016. The petitioner raised further objections under letter dated 18.03.2016 which were also rejected by an order dated 22.03.2016. At which point, the petitioner has approached this Court.

3. Case of the petitioner is that the provisions of transfer pricing did not apply to the petitioner. There were no international transactions nor were there any specified domestic transaction within the meaning of Section 92BA of the Act during the period under consideration. The Assessing Officer, therefore, committed a grave error in making a reference. The Commissioner committed a further error in rejecting the petitioner's objections.
4. Both sides have made detailed submissions on the issue of validity of the reference by the Assessing Officer. At the center of much debate has been a detailed report made by the Assessing Officer on 08.03.2016 to the Principal Commissioner suggesting reasons why the petitioner's objections should be rejected. Relevant portion of this report reads as under:

“The assessee mainly based its objection contending that the related party transactions reported in the audited account is in accordance with AS-18 and such transaction is not a transaction as provided in Section 40A(2)(b) of the Act. The assessee further contended that the specified transaction has been defined in Section 92BA of the Act and the assessee is covered only by clause (I) and (vi) of Section 92BA of the Act. The assessee

goes on to say that clause (vi) of Section 92BA of the Act provides any other transaction as may be prescribed. The assessee further submitted that the clause (vi) being any other transactions has not been prescribed, the assessee is required to obtain audited report u/s. 92E of the Act only if the transaction covered clause (i) of Section 92BA of the Act exceeded the limit of Rs. 5 crore prescribed.

The submission of the assessee in this respect is found to be incorrect. The assessee ought to have obtained the report as required u/s. 92E of the Act if any other transaction including the transactions defined in as defined in clause (v) of section 92F of the Act, exceeding the limit of Rs. 5 crore. The assessee admitted that the following are th covered persons u/s. 40A(2) (b) of the Act.

No.	Name of the Person A/E	Nature	Amount
1	R C Printers	Rent	12275136
2	I Media Corp Ltd.	Advertisement & Publicity	4303048
3	Sudir Agrawal	Salary	6000000
4	Ramesh Chandra Agrawal	Sitting Fees	42474
5	Girish Agarwal	Sitting Fees	84944
6	Pawan Agarwal	Sitting Fees	42472
7	Kailash Chowdhary	Sitting Fees	186124
8	Piyush Pandey	Sitting Fees	50562
9	Hairsh Bijoor	Sitting Fees	62472
10	Ashwani SInghal	Sitting Fees	186124
			23233356

From the submission of the assessee it can be seen that the assessee has only considered the expenditure defined in clause (i) of Section 92BA of the Act obviously for the reason that clause (vi) of Section 92BA of the Act has not be prescribed. The averment of the assessee in this respect is found to be incorrect. As stated above, clause (v) of Section 92F of the Act defined the transaction as transaction includes an

arrangement, understanding or action in correct. In view of the above, the assessee clearly misinterpreted the provisions of Section 92BA of the Act. As any other transaction has been clearly defined in Section 92F(V) of the Act the assessee ought to have taken the transactions of the kind enumerated in clause (v) of Section 92F of the Act in arriving at the quantum of specified domestic transaction. The assessee has entered into with various specified persons/AEs the details of which are as under:

No.	Name of the Person/AE	Nature	Amount	Remarks
1	R C Printers	Rent	12275136	40A(2)(b) as per assessee's submission
2	I Media Corp Ltd.	Advertisement & Publicity	4303048	"Do"
		Interest income from loan to subsidiary	68278000	
		Loans & Advances given/repaid	137198720	
3	Sudir Agrawal	Salary	6000000	"Do"
4	Ramesh Chandra Agrawal	Sitting Fees	42474	"Do"
5	Girish Agarwal	Sitting Fees	84944	"Do"
6	Pawan Agarwal	Sitting Fees	42472	"Do"
7	Kailash Chowdhary	Sitting Fees	186124	"Do"
8	Piyush Pandey	Sitting Fees	50562	"Do"
9	Hairsh Bijoor	Sitting Fees	62472	"Do"
10	Ashwani Singhal	Sitting Fees	186124	"Do"
11	Writers & Publishers Pvt. Ltd	Advertisement	3541444	AEs within the meaning of Section 92A as common shareholder held more than 30% share of companies
		Rent	65339658	
		Interest income from intercorporate deposit	5264361	

		Purchase of investment in subsidiaries made from minority shareholders	355954108	
	Bhaskar Infrastructure Ltd.	Purchase of investment in subsidiaries made from minority shareholders	23621405	AEs within the of meaning of Section 92A as common shareholder held more than 30% share of companies.
		Rent	3951312	

A combined reading of the provision of section 92A, 92BA, 92E and 92F of the Act, the following points emerged.

1. The assessee has to consider the amount of expenditure in respect of which payment has been made or is to be made to a person referred in Section 40(A)(2)(b) of the Act in view of clause (I) of Section 92AB of the Act.
2. The assessee has to consider any other transactions including the transactions as defined in clause(v) of Section 92F of the Act, including loans and advances (given/paid) to AE/related persons in view of clause (vi) of Section 92BA.

From the table given above, it can be seen that the assessee has entered into transactions which has exceed the limit of Rs. 5 crore and as such the assessee was required to obtain a report from an accountant as required u/s. 92E of the Act which the assessee failed to do. In view of the above and keeping in view the CBDT instruction No. 15/2015 dated 16/10/2015, the assessment referred to the TPO, Ahmedabd is inconformity with the provisions of Section 92BA of the Act and 92E of the Act and the objection raised by the assessee has no locus standi and the same is required to be rejected.”

5. Taking us minutely through the details of the report of the Assessing Officer with a special focus on the above noted portion thereof, learned counsel Mr. Soparkar for the petitioner submitted that the petitioner had not entered into any international transaction with associated enterprise. Attempt on part of the Assessing Officer, therefore, to bring the petitioner's case within the transfer pricing wholly erroneous. He submitted that the reasons cited by the Assessing Officer in the said report dated 08.03.2016 only referred to the associated enterprise, particularly, with respect to item No. 11 i.e. the transactions of the petitioner-company with Writers and Publishers Pvt. Ltd and Bhaskar Infrastructure Ltd. Drawing our attention to the affidavits filed in this petition in which, the Assessing Officer has sought to rely on these transactions to bring them within the fold of specified domestic transactions, the counsel submitted that after having recorded elaborate reasons, the Assessing Officer cannot switch stand and take a diametrically opposite position.
6. Alternatively, counsel submitted that even these transactions referred to in para 11 of the report would not fall within the scope of Section 40A(2)(b) of the Act. He submitted that Clause (vi) of the said provision on which reliance is placed would not include the transaction since admittedly none of the directors of the petitioner-company held more than 20% of the shares of Writers and Publishers Pvt. Ltd or Bhaskar Infrastructure Ltd. In his submission, the aggregate share holding of the directors

of the petitioner-company cannot be taken into account for ascertaining whether the case would fall under Section 40A(2) (b) of the Act or not? He drew our attention to various provisions of the Act including Section 64, Section 10A, sub section (9A), (now repealed) of Section 10A of the Act to highlight that whenever the legislature intended that the share holding in the aggregate should be reckoned for the purpose of certain provision, it has been so provided specifically. In the present case, the reference of holding of a director would therefore must be understood in its normal grammatical meaning viz. holding of an individual director, without resorting to aggregation of the holding of the directors. In this respect, counsel relied on the decision of Division Bench of Punjab & Haryana High Court in case of **Commissioner of Income Tax-1, Ludhiana vs. Octave Apparels** reported in [2014] 45 **Taxmann.com** 370, in which, it was held that where shareholding of each partner of the firm was less than 10% though their cumulative shareholding was more than 10%, Section 2(22)(e) of the Act would not apply.

7. Countering the reliance of the revenue on the judgement of this Court in case of **Veer Gems vs. Assistant Commissioner of Income Tax and anr** reported in 351 ITR 35, counsel submitted that the said decision was rendered in vastly different fact situation. In the said case, in the earlier assessment years, the petitioner had filed necessary declarations for transfer pricing. In the present case, there was no such need, and the

petitioner had, therefore, correctly not made any such declaration.

8. Counsel lastly submitted that when the basic facts necessary to bring the case of the petitioner within Section 92CA of the Act are missing, any reference by the Assessing Officer to the TPO would be wholly erroneous and without jurisdiction. He, therefore, submitted that the reference to the TPO be quashed.
9. Learned counsel Mr. Bhatt for the department opposed the petition contending that the petitioner had entered into international transaction with associated enterprise. In addition, it had also to having made payments referred to in Section 40A(2)(b) of the Act which aggregated more than Rs. 5 crores and therefore, the case of the petitioner would fall within the meaning of specified domestic transaction, as referred to in Section 92A(2)(b) of the Act. The Assessing Officer had the power to make a reference in terms of the sub section (1) of Section 92C of the Act. In this context, the counsel relied heavily on Clause (vi) of Section 40A(2)(b) of the Act and submitted that the provision nowhere prohibits aggregation of the holding of the directors of the company. Counsel relied on the decision of Veer Gems vs. Assistant Commissioner of Income Tax and anr (supra) to contend that at this stage, the minute scrutiny urged by the petitioner should not be undertaken.

10. Having thus heard learned counsel for the parties and having perused the documents on record, we may briefly refer to some of the statutory provisions. Chapter X of the Act pertains to special provisions relating to avoidance of tax. Section 92 contained therein pertains to computation of income from international transaction having regard to arm's length price. Sub section (2) of Section 92 by virtue of Finance Act of 2012 w.e.f. 01.04.2013 includes the reference to the specified domestic transaction. Essentially by virtue of the said provision in case of specified domestic transaction also, given other requirements being satisfied; transactions would be computed having regard to arms length price. As per the sub section (2A) which was also added by virtue of the same amendment any allowance or interest or allocation of any cost or expense or any income in relation to the specified domestic transaction would be computed having regard to the arm's length price.

11. Section 92BA provides the meaning of specified domestic transaction and reads as under:

“92BA. For the purposes of this section and sections 92, 92C, 92D and 92E, “specified domestic transaction” in case of an assessee means any of the following transactions, not being an international transaction, namely,-

- (i) any expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of sub section (2) of section 40A;
- (ii) any transaction referred to in section 80A;

- (iii) any transfer of goods or services referred to in sub section (8) of section 80-IA;
- (iv) any business transacted between the assessee and other person as referred to in sub section (10) of section 80-IA;
- (v) any transaction, referred to in any other section under Chapter VI-A or section 10AA, to which provisions of sub section (8) or sub section (10) of section 80-IA are applicable; or
- (vi) any other transaction as may be prescribed,

and where the aggregate of such transactions entered into by the assessee in the previous year exceeds a sum of five crore rupees.]”

12. In terms of clause (i) of Section 92BA thus, in case of any expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of sub section (2) of Section 40A and where the aggregate of such transactions entered into by the assessee in the previous year exceeds a sum of Rs. than 5 crores would be a specified domestic transaction. It is in this context we may refer to Section 40A(2)(b). Section 40A(2)(a) refers to a case where assessee incurs any expenditure in respect of which payment has been made or is to be made to any person referred to in clause (b). In such a situation, if the Assessing Officer is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made, it is open for the Assessing Officer to

make deduction. Relevant portion of the clause (b) of Section 40A(2) reads as under:

(b) The persons referred to in clause (a) are the following, namely:-

(vi) any person who carries on a business or profession,-

(A) where the assessee being an individual, or any relative of such assessee, has a substantial interest in the business or profession of that person; or

(B) where the assessee being a company, firm, association of person or Hindu undivided family, or any director of such company, partner of such firm or member of the association or family, or any relative of such director, partner or member, has a substantial interest in the business or profession of that person.

Explanation.- For the purposes of this sub section, a person shall be deemed to have a substantial interest in a business or profession, if-

(a) in a case where the business or profession is carried on by a company, such person is, at any time during the previous year, the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) carrying not less than twenty per cent of the voting power; and

(b) in any other case, such person is, at any time during the previous year beneficially entitled to not less than twenty per cent of the profits of such business or profession.”

13. In terms of Clause (vi)(B) thus, where the assessee is a company and such company or any director of company or any relative of such director of the company has a substantial

interest in the business or profession of that person would be covered under the said provision.

14. We have noticed that the petitioner had made expenditure in the nature of advertisement, rent and purchase of investment in subsidy to Writers & Publishers Pvt. Ltd., aggregate of which admittedly exceeds Rs. 5 crores. The respondents have, in affidavit dated 08.08.2016, pointed out following details:

“1. I am filing the present further affidavit to bring on record the substantial shareholding of directors and relatives of such directors of the Petitioner D.B.Corp. Ltd in Writers and Publishers Pvt. Ltd. I submit that the following directors and their relatives of D.B.Corp Ltd. hold the following percentage of shares in Writers and Publishers Pvt. Ltd.:

A] Directors/Relatives of D.B.Corp. Ltd shareholding in Writers and Publishers Ltd:

Directors	Shareholding (in %)
Pawan Agarwal	4.8
Sudhir Agarwal	4.96
Girish Agarwal	4.95

Relatives u/s. 2(41) of the above Directors	
Ramesh chandra Agarwal	4.52
Namita Agarwal	1.83
Jyoti Agarwal	3.95
Nikita Agarwal	0.97
Total	25.98

2. I humbly submit that as can be seen from the above, the directors of D.B.Corp. Ltd. and relatives of such directors hold more than 20% of the voting power in Writers and Publishers

Pvt. Ltd. “

15. To these factual aspects, the petitioner has raised no objection. In that view of the matter, the question would be, would the exceeding of 20% of share holding by the directors and relatives of the petitioner-company in the aggregate in Writers & Publishers Pvt. Ltd satisfy the requirement of clause (vi) of Section 40A(2)(b)?
16. In case of Veer Gems vs. Assistant Commissioner of Income Tax and anr (supra) this Court had examined the provisions of transfer pricing with the focus on the reference by the Assessing Officer. It was held that when a reference is made by the Assessing Officer to the TPO, the TPO would not be competent to decide the issue of correctness of the reference. His duty would be to determine the arm's length price in accordance with Section 92C of the Act. It was further held that Chapter X does not contained any provision under which, the Assessing Officer would require to hear assessee and consider the objections before making a reference to the TPO. However, it requires certain safeguards. The Assessing Officer to consider it necessary or expedient to make a reference and the reference has to be made with the prior approval of the Commissioner. It was further held that while framing the assessment in terms of the report submitted by the TPO under sub section (3) of Section 92C of the Act, there is nothing to prevent the Assessing Officer from considering the objections of the

assessee that, in fact, there had no international transaction between the assessee and any other person. It was further noted that the assessee would have one more opportunity to contest the question of international transaction under Section 144C of the Act before the dispute resolution panel. The dispute resolution panel would also have the power to completely nullify the variations arising out of the order of TPO if it is found that there had, in fact, been no international transaction and that therefore, the reference itself was invalid. Relevant portion of the judgement reads as under:

“14. Before making any such reference, sub-section (1) of Section 92C itself provides certain inbuilt safeguards. Firstly, the Assessing Officer has to consider it necessary or expedient to make a reference to the TPO and secondly the reference has to be made with the previous approval of the commissioner. Thus, not only the Assessing Officer before making a reference should be satisfied that with respect to an international transaction entered into by the assessee, it is necessary or expedient to refer the computation of arm's length price to the TPO, such opinion of the Assessing Officer would have to be approved by the Commissioner, before the same can be acted upon. This is one more filter provided by the statute to ensure that the reference is made only in appropriate cases with approval of the higher authority.

15. While framing the assessment in terms of the report submitted by the TPO under sub-section (3) of Section 92CA of the Act, there is nothing to prevent the Assessing Officers from considering the objections of the assessee that, in fact, there had been no international transaction between the assessee and any other person. If the assessee succeeds in establishing such fact, naturally the Assessing Officer would have to drop the entire

proceedings in connection with the international transaction.

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

Act. Under subsection (13) of Section 144C of the Act, such directions are binding upon the Assessing Officer.

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

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

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

17. As noted, in the present case, there is prima facie material suggesting that the directors of the petitioner company, in the aggregate, held more than 20% of the shares in voting power in Writers & Publishers Pvt. Ltd. The aggregate of expenditure incurred by the petitioner to such company exceeded Rs. 5 crores. Under the circumstances, we would allow the transfer pricing procedure to carry on further without interjecting at this intermediary stage. The legal contention of the petitioner that in the report of the Assessing Officer dated 08.03.2016, the basis of Section 40A(2)(b) was not taken and therefore, now cannot be raised versus the Revenue's contention, that if on admitted facts on the strength of correct statutory provisions the exercise of powers can be saved the order should not be quashed, are kept open. Likewise, the question whether Section 40A(2)(b) Clause (vi) would cover only the international holding of the director or the relative of the director of the assessee company or the aggregate of the holdings is also not concluded in this petition.

18. The petition is dismissed.

(AKIL KURESHI, J.)

(A.J. SHASTRI, J.)

Jyoti

