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

Date of Decision: 29.01.2021

\+ **W.P.(C) 965/2021**

SABIC INDIA PRIVATE LIMITED ..... Petitioner

Through: Mr. Ajay Vohra, Senior Advocate with Mr. Mahesh Agarwal, Mr. Rishi Agrawala, Mr. Karan Luthra,
Mr. Ankit Banati and Ms. Sayaree Basu Malik, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Dev P. Bhardwaj, CGSC for UOI/R-1.
Mr. Sunil Aggarwal, Senior Standing Counsel with Mr. Tushar Gupta, Advocate for R-2 to R-4.

CORAM:
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral)

CM APPL. No. 2612/2021 & 2613/2021 (for exemption)

1. Exemption allowed, subject to just exceptions.

2. The applications stand disposed of.

W.P.(C) 965/2021 & CM APPL. No. 2611/2021 (for interim relief)

3. The present petition filed under Article 226 of the Constitution of India, 1950 *inter alia* seeks to challenge the directions dated 2nd February, 2020 passed by

Respondent No. 2 on the ground that the same are arbitrary, against the principles of natural justice, *ultra vires* the provisions of the Income Tax Act, 1961 (*hereinafter referred to as* 'the Act') and in breach of Articles 14, 19(1)(g) and 265 of the Constitution of India.

4. The Petitioner, a private limited company incorporated under the Companies Act, 1956, is a wholly-owned subsidiary of SABIC Global Limited, UK (51% shareholding) and SABIC Asia Pacific Pte Limited, Singapore (49% shareholding). It is engaged in providing marketing support services in India to the Saudi Basic Industries Corporation, Saudi Arabia, and SABIC Singapore [jointly referred to as "Associated Enterprises" or "AEs"] for the sale of the products owned by SABIC, Saudi Arabia. As the Petitioner was undertaking international transactions with its AEs, the international transactions entered into by it were referred to the Transfer Pricing Officer (*hereinafter referred to as the* 'TPO') for determining the Arm's Length Price (*hereinafter referred to as* 'ALP'), as per the provisions of Section 92CA of the Act.

5. For the relevant year (A.Y. 2016-17), *vide* order dated 29th October, 2019, the TPO rejected the transfer pricing methodology adopted by the Petitioner. These findings of the TPO culminated into a draft assessment order dated 28th November, 2019, passed by the Assistant Commissioner of Income Tax, Circle 22(2). Objections were raised before the DRP-1 *vide* objection No. 17, dated 23rd December, 2019, on several grounds. The Petitioner was granted hearing on 1st December, 2020, and upon finding no merit in the objections, the impugned directions dated 2nd December, 2020 were issued, rejecting the same.

6. Aggrieved with the aforesaid negative response, the Petitioner has filed the present petition, *inter alia* contending that the DRP has failed to appropriately consider and deal with the objections of the Petitioner.

7. Mr. Ajay Vohra, learned Senior Counsel for the Petitioner contends that as the TPO exercises judicial functions and acts as a *quasi-judicial* authority, it is obligated to comply with and adhere to the principles of natural justice. He states that the TPO is required to follow the mandate of Section 144C and the impugned directions have been passed in breach thereof and are thus *ultra vires* the provisions of the Act.

8. Mr. Vohra states that he is conscious that within the scheme provided under the Act, the Petitioner has its statutory remedies against the assessment order that would be passed pursuant to the aforesaid directions. He submits that, nevertheless, considering the fact that directions given by the DRP are wholly without application of mind and are binding on the Assessing Officer, this Court should interfere in the matter, failing which the Petitioner would have to be relegated to take its remedy of filing an appeal against the assessment order. That would entail making a pre-deposit of 20 percent of the disputed amount, which will be onerous for the petitioner. Mr. Vohra acknowledges that in such matters, the Courts are reluctant to interfere with the directions given by the DRP, having regard to the statutory scheme provided under the Act, but, he submits, in exceptional circumstances, the Courts have intervened. The present case clearly falls in the said exception and fulfils the criteria laid down by this Court in ***P.D.R. Solutions FZC v. Dispute Resolution Panel-2, New Delhi and Ors.***, [2019] 418 ITR 277 (Delhi), and therefore the present petition is maintainable.

9. On merits, Mr. Vohra submits that before the DRP, the Petitioner had filed detailed written submissions setting out its objections and also furnished evidence in support thereof. In spite of that, the same have been rejected without any application of mind, in a perfunctory manner. He submits that one significant objection filed by the Petitioner pertains to the 'rule of consistency' and the persuasive effect of the directions of the DRP dated 17th July, 2019 for AY 2015-16. In the said directions, Respondent No. 2 had held that the appropriate basis for the determination of the ALP was the comparable uncontrolled price (CUP) method. The comparable(s) sought to be relied upon by the TPO were held to be irrelevant or unacceptable for detailed reasons set out in the said directions. On a consideration of the facts and evidence, the DRP held that an independent arm's length transaction, entered into by the Petitioner's parent company with an independent entity in Algeria, was the acceptable comparable. Applying this acceptable comparable, the commission payable fell in the acceptable range of 0.5% to 1%, and was found proper and legal and did not require any adjustment.

10. Mr. Vohra submits that the agreement which was found acceptable by the DRP as the appropriate comparable for A.Y. 2015-16 was also in effect for A.Y. 2016-17. There has been no change in facts in relation to the said agreement. Following the rule of consistency, the DRP ought to have followed the same basis that it had adopted for the year 2015-16. Since the DRP had held the CUP method adopted by the TPO for A.Y. 2015-16 to be appropriate, for A.Y. 2016-17 too, the TPO was obliged in law to follow the same, and has erred in law by adopting "other methods" for which there is no justification.

11. Mr. Vohra further contended that the proceedings before the DRP are not an empty formality and it is required to comply and adhere with the statutory

provisions and also take into consideration the materials furnished by the assessee. In support of the aforesaid contentions, Mr. Vohra relied upon the decisions of this Court in ***LI and Fung India Pvt. Ltd v. Commissioner of Income Tax,*** 2013 SCC OnLine Del 5052; ***Magneti Marelli Power Train India Pvt. Ltd. v. Deputy Commissioner of Income Tax,*** 2016 SCC OnLine Del 5758, and the judgment of the Karnataka High Court in ***GE Technology Centre (P.) Ltd. v. Dispute Resolution Panel, Bangalore***, 2011 SCC OnLine Kar 4018.

12. We have heard Mr. Vohra at length. There cannot be any doubt that directions impugned in the present petition are binding on the Assessing Officer under the scheme of the Act. However, that in itself is not a sufficient ground for us to exercise our jurisdiction under the Article 226 of the Constitution of India. We have to be mindful of the statutory remedies provided under the Act against the orders passed under Section 144C of the Act. Under sub-section (5) to section 144C, DRP directions, on being given effect to, by the Assessing Officer, ripen into an assessment order. Against the assessment order, the Petitioner has a remedy of filing an appeal before the Income Tax Appellate Tribunal. Therefore, there is an effective alternate remedy available with the Petitioner. In such circumstances, since effective remedy is available, the settled position in law is that a writ petition is ordinarily not maintainable [Ref: ***CIT v. Chhabil Dass Aggarwal***, (2014) 1 SCC 603].

13. Having said that, we are cognizant that the restrictions for not entertaining a writ petition under Article 226 of the Constitution of India are largely self-imposed and courts have carved out certain exceptions to the rule of alternative remedy. There have been instances where the Courts have entertained a writ petition, even at the stage where the directions of the DRP have yet not culminated into an

assessment order. Indeed, the judgment relied upon by the petitioner in the case of ***P.D.R. Solutions FZC*** (supra) is one such case. As also noted in the said decision, it is only in exceptional circumstances, that a writ petition should be entertained. Therefore, we only have to see if the present case fits into the category of exceptions, recognized by the courts. The present petition is predominately premised on the ground of violation of principles of natural justice, which is contended to be apparent from non-consideration of the detailed written submission set out in the objections filed before the DRP. We have given our anxious consideration to this plea and to fully comprehend this contention, we have perused the impugned directions. We note that Petitioner's primary objection was founded on the rule of consistency i.e. DRP should follow its own directions issued for A.Y. 2015-16. On this issue, the DRP observes as under:

> *"3.2.* ***Grounds no 1.1 and 1.3*** *relate to non-following of this Panel's directions during AY 2015-16 even though the facts are identical for AY 2015-16 and application of the other method as MAM. It is submitted that this Panel, while giving the directions for AY 2015-16 disapproved the approach followed by the TPO and also all the 3 comparables used by him. It is also stated that even though the facts of AY 2016-17 are identical to that of AY 2015-16, the TPO completely disregarded the directions given by this Panel for AY 2015-16 and selected same/similar comparables to determine the ALP and changed the MAM from CUP to Other Method (stating that Other Method does not require strict comparability). It is also stated that this Panel considered an internal agreement provided by the assessee as a comparable uncontrolled price ('CUP') to determine the ALP of the international transactions entered with the AEs and that the said agreement is valid for current year also and hence, the matter stands directly covered in our favour by earlier order. It is further submitted that the assessee has undertaken the above international transactions during various previous years i.e. from AY 2009-10 to AY 2012-13 also, whereby, it has followed the same methodology i.e. TNMM and conducted similar transfer pricing analysis to justify the arm' length nature of the transaction which was duly accepted to be at arm's length by the TPO/AO. There has not been any change in the facts and circumstances in AY 2016-17 and accordingly, in*

the absence of availability of CUP, TNMM may be accepted as the MAM and benchmarking analysis as submitted in TP documentation should be accepted.

3.2.1 The Panel has considered the submission. It is noticed that this Panel during AY 2015-16 rejected the assessee's objection to the 'CUP' method adopted by the TPO/AO and its request to accept TNMM as MAM. Following the same, we uphold the TPO's action of using the 'CUP' approach and employing the other method and selecting the comparables after considering the functional profile. No argument has been advanced regarding the defects in the other method employed by the TPO and it is merely stated that the TPO has not followed the direction of the Panel on the principle of res judicata. The Panel, however, does not find the argument acceptable as every assessment year is an independent assessment year and the decisions may vary in view of the facts obtaining in that case. The TPO in para 9 of his order has given sufficient reasons justifying the application of other method using the database having comparables. The objection, therefore, is not acceptable and is rejected accordingly."

14. The aforesaid extract from the impugned directions discern that the DRP has taken into account the fact that the panel, during A.Y. 2015-16, rejected Assessee's objection to the CUP method adopted by the TPO/AO as well as its request to accept Transactional Net Margin Method (TNMM) as the Most Appropriate Method (MAM). Following the same, the DRP had upheld the TPO's action of using the CUP approach and employing the "other method" and selecting the comparable(s) after considering the functional profile. It was further observed that no arguments were advanced regarding other methods employed by the TPO. In these circumstances, the DRP observed that each assessment year is an independent assessment year, and the decisions may vary in view of the facts of the case. We also notice that the DRP has also perused the reasons given by the TPO and found the same to be sufficient to justify the application of "other method" using the database having comparables.

15. At this stage, we are not to scrutinize the direction of the DRP as an Appellate Court. There are reasons given by the DRP for upholding the action of the TPO and we cannot analyse the same, while exercising writ jurisdiction. The aforesaid reasoning would have to be tested before the appropriate forum. The factual background would have to be necessarily evaluated by the AO while framing the assessment order. Therefore, in the instant case, we cannot say that directions are 'non-speaking' and there is a breach of principles of natural justice. The objections and the material placed by the Petitioner have been examined, but for the reasons noted above, the DRP has taken a different view. Even if we were to assume for the sake arguments that this view is erroneous, we cannot hold it be an error of jurisdiction. Every error of an authority is not open to judicial review merely by terming it to be a 'jurisdictional error', although the same may, at a later stage, be set aside for being erroneous. Accepting the contention raised by Mr. Vohra would mean that we will have to venture into the factual matrix of the case and come to a conclusion on whether the findings of the DRP are proper, and comment on the methodology behind the determination of the ALP. There cannot be any denying the fact that each assessment year is an independent proceeding and therefore the factual finding given by the DRP while agreeing with the TPO with regard to the method to be applied for determining the ALP will have to be examined by the appropriate forum. Further, on the aspect of the Petitioner not being afforded an opportunity of hearing, we may only observe that it is not the case of the Petitioner that a hearing was not held. In fact, the Petitioners have averred that on 1st December, 2020, the final hearing in the matter was conducted by Respondent No. 2. The Petitioner had also filed its written submissions before Respondent No. 2 on the subject matter, raising the plea of consistency. Besides, detailed submissions on merit, along with the relevant materials have also been

filed in support thereof. Thus, we cannot attribute any violation of breach of natural justice to the DRP on the ground of not affording an opportunity of hearing.

16. With respect to the reliance placed on judgment of this Court in ***P.D.R. Solutions FZC*** (*supra*), we find that the factual position in the instant case is different. Here the objections of the Petitioner have been considered, however the same have not found favour with the DRP and the reasons have been given. Regarding the contention that the impugned directions are in breach of the rule of consistency which is required to be followed by tax authorities, we can only say that these aspects are not required to be examined at this stage. The contentions of the Petitioner relating to the factual aspect are certainly required to be considered, but obviously not by a writ court. The decision of ***LI and Fung*** (*supra*) and ***Magneti Marelli*** (*supra*) relied upon by Mr. Vohra, are judgments rendered by this Court while deciding appeals under Section 260A of the Act. The principles laid down therein are well recognised, however, we are afraid that the said principles or yardsticks cannot be applied by us while exercising judicial review under Article 226 of the Constitution of India over the directions issued by the DRP. The reliance by the Petitioner on Karnataka High Court's decision in ***GE Technology Centre*** (*supra*) is also misplaced, as the said case turned on its specific facts. Therein, the directions issued by the DRP to the AO were struck down in writ appeal on account of being in excess of the proposal made in the proposed draft order. The same, being a question of excess of jurisdiction, was amenable to judicial review under Article 226, however it offers no assistance to the case sought to be advanced by the Petitioner herein.

17. We hasten to add that we have not examined the merits of the grounds urged by the Petitioner and the views expressed hereinabove are only for the purpose of

deciding the present petition. It shall be open to the Petitioner to raise all pleas relating to the merits of the case, including those raised herein, while exercising its statutory remedy, as and when the directions under Section 144C(5) of the Act ripen into an order or are given effect to, by the AO.

18. In view of the above, we find no merit in the present petition and accordingly the same is dismissed. No costs.

SANJEEV NARULA, J

RAJIV SAHAI ENDLAW, J

JANUARY 29, 2021
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(***corrected and released on 10th March, 2021***)