Legal Decisions[1]

DIRECT TAXES

Income-tax Act

LD/60/109

Assistant Commissioner of Income-tax, Circle I, Cuddalore
Vs.
CMS (India) Operations & Maintenance Co. P. Ltd

Section 9 read with Section 195 and Section 40(a)(i) of the Income-tax Act, 1961 - Income - Deemed to accrue or arise in India.

When salaries were paid to deputed employees by foreign service provider, taxes were duly deducted and such tax deducted were reflected in income tax return filed by said employees and no technical know-how was made available to assessee foreign service provider, reimbursement of manpower cost to foreign company had no element of income therein and hence, no tax was leviable thereon

US Company CMS RDC, was engaged in the business of providing consultation, operation and maintenance services to electrical utilities outside USA. It deputated employees to the assessee's power plant for operation and maintenance work.

The assessee-company engaged in Operation and Maintenance of Power Plant, had made remittance abroad during the impugned assessment years, which as per the Assessing Officer, was fees for technical services. According to the Assessing Officer, the amounts debited by the assessee under the head 'Reimbursement of manpower cost' were payments effected to a US-Company CMS RDC. After making a study of agreement, Assessing Officer held that assessee should have deduct the tax at source from the payments effected. The assessee submitted that the payments were salaries to the persons deputed by CMS RDC, who were given advances by CMS RDC. Therefore, it was only the reimbursement.

The assessee further submitted that the amounts were treated by CMS RDC as money recoverable from assessee. Since the income of the recipient was chargeable under the head 'salaries', it did not fall within the term 'fees for technical services' as defined in *Explanation* 2 to section 9(1)(vii) of the Act. The amounts paid were reimbursement of advances against salaries and was not a sum chargeable to tax as stipulated under section 195 of the Act. Hence, assessee was not obliged to deduct any tax at source.

However, the Assessing Officer held that the deputed persons were not salaried employees of the assessee, since the assessee was bound to make payment only to CMS RDC. He came to a conclusion that the amounts paid by the assessee to CMS RDC were fees for technical services taxable in the hands of CMS RDC and the assessee-company having failed to deduct tax at source as stipulated under section 195 of the Act, it was visited with the consequences of section 40(a)(i) of the Act. In this view of the matter, he disallowed the entire expenditure claimed by the assessee for payments effected to CMS RDC for the respective Assessment Years.

The Commissioner (Appeals) was appreciative of the assessee's submissions that the agreement between the assessee and CMS RDC was only a reimbursement agreement and not a supplementary to any agreement for technical know-how. Assessee had only reimbursed the money advanced by CMS RDC to the said persons and this would not result in any income to CMS RDC in India.

The Tribunal held that assessee could be fastened with a liability to deduct tax under section 195 and section 192.

Applying this position of law to the facts here, if the payments effected were salaries, no doubt by virtue of section 192, which does not make any differentiation between resident or non-resident recipient, assessee was bound to deduct tax. But here admittedly the persons involved were not employees of the assessee and there was no employee - employer relations between the assessee and the said persons. CMS RDC had deducted tax at source on payment of salaries effected to these persons who were on their rolls. Thus, they could only be considered as employee of CMS RDC.

To fall under section 195, the payment should be a sum chargeable under the provisions of the Act. No doubt if it was fees for technical services, it would definitely fall under section 9(1)(vii) of the Act and irrespective of the place of business or business connection of the non-resident entity in India such income has to be deemed as accruing or arising to the non-resident entity in India.

Even if the services rendered by the concerned persons are considered as fees for technical services within the meaning of the above definition, assessee could still fall back on the section 90(2) of the Act,

[1] *Readers are invited to send their comments on the selection of cases and their utility at eboard@icai.org.*

and say that Double Taxation Agreement between the two countries should be applied. Definition as per Double Taxation Agreement and that in the Act as to what is a fee for technical services differs. Double Taxation Agreement between India and U.S.A. and the Memorandum of understanding dated 15th May, 1989 between these countries, which defines the terminology used in the DTAA, specify that technical services should be made available. The assessee might have come to a bona fide belief that there were no technical services made available to it by CMS RDC. There is a clear finding by the Commissioner (Appeals) that when salaries were paid to the deputed employees by CMS RDC, taxes were duly deducted and such tax deducted were reflected in the income tax return filed by the said employees. The agreements between the assessee and CMS RDC clearly show that no technical know-how was made available to the assessee. The assessee could therefore, has formed a bona fide impression that no part of the payment the assessee had effected to CMS RDC had any element of income therein.

The circumstances here were such that the assessee could be justified in reaching a *bona fide* impression that payments effected by it to CMS RDC was not sums on which tax was chargeable in India. Therefore, the assessee was not at default of Chapter XVII-B and therefore, could not have been fastened with the consequences of the nature specified in section 40(a)(i) of the Act. Hence, disallowances were not warranted.

LD/60/110

Airport Authority of India

Vs.

CIT

December 16, 2011 (DEL-FB)

Section 28 (i) of the Income-tax Act, 1961 - Business and professional income – Chargeable as

Whether where Customs, Immigration, Meteorological Department, Post Office, BSF, CISF, Special Bureau of Govt., FRRO, Intelligence Bureau etc. had their offices to facilitate functioning of assessee airport and they did not agree to pay any licence fee of space occupied by them, income would accrue merely because proforma advices were raised, that too, at instance of CAG of India

If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a hypothetical income which does not materialised. This principle is applicable whether the accounts are maintained on cash system or under

mercantile system. If the accounts are maintained under the mercantile system, what has to be seen whether income can be said to have been really accrued to the assessee company.

The appellant Airport Authority of India took over the functions of management of certain airports and other allied activities. Certain Government Department like Customs, Immigration, Meteorological Department, Post Office, BSF, CISF, Special Bureau of Govt., FRRO, Intelligence Bureau etc. have been provided accommodation in the terminal buildings and other technical areas by the assessee-Airport authority. It is the case of the assessee that these departments have their offices to facilitate the functioning of the assessee and they do not agree to pay any licence fee of the space occupied by them on the plea that they are regulatory bodies to provide special services in terms of the Government directions. Still the assessee had raised the proforma invoices in all these years and kept in memoranda account. According to the assessee these memoranda accounts are maintained by the assessee only be-cause its auditors namely CAG of India had suggested/emphasised the assessee to maintain these accounts. The assessee also emphasised that such use by Government Department should not be treated as commercial departments since they have to be provided space for the performance of duty. Therefore, no regular revenue was being generated. The invoices were only proforma in nature. The Assessing Officer, however, did not accept the aforesaid plea and treated the amount of proform invoices as income of the assessee. The plea of the assessee that there was no 'real income' accrued to the assessee was turn down.

The High Court of Delhi held that allocations towards proforma advices were made included private parties as well as Government Departments. Insofar as private parties are concerned, there is no issue that the income has accrued and would be taxable in the year in which these invoices are made. In case money

from these private parties is not realised later on, that can always be claimed as bad debt.

In respect of government parties against the huge total proforma invoice of, the payment receipt was of a meager sum. The same is the position in respect of earlier assessment years.

Merely because a meager sum of few lakhs was received, the entire amount of running in few crores could not be treated as income. What was to be seen as to which Government Department was remitting the amount. From the details furnished, it was obvious that some of the Departments have never made any payment.

In respect of the Government Agencies, like Police, Customs who have never paid any amount to the assessee-Airport authority, on the application of 'real income' theory and taking a realistic view, it is to be held that no income has accrued merely because proforma advices were raised, that too, at the instance of the CAG of India.

The Assessing Officer should determine the taxability of proforma invoices in respect of those parties who had been remitting part payments and had accepted their liability and not in respect of those Government Agencies who have never paid any amount.

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Section 37(1) of the Income Tax Act, 1961 - Business expenditure – Allowable as

In schemes formulated by Government for removal of encroachers from airport surroundings and rehabilitate them at other places, if assessee airport authority had paid amount that amount could not be said to be for acquisition of new assets; payment was made to facilitate smooth functioning of its business i.e. in relation to carrying on business in a profitable manner; hence such an expenditure if incurred by assessee would be on revenue account and would not be capital in nature

The appellant Airport Authority of India took over the functions of management of certain airports and other allied activities. On some of these airports, illegal encroachments were found in and around the security area of the airports. With the intervention of local authorities, schemes were devised to rehabilitate the encroachers and the money required for rehabilitation. For this reason, the assessee has been making provisions for the aforesaid expenditure to be incurred in removal of encroachers and has been incurring the expenditure for the said purpose from time to time. The Assessing Officer disallowed the same and added to the income of the assessee which order has been upheld till the stage of the Tribunal.

The Delhi High Court applying the ratio of *Bikarner Gyupsum v. CIT* [1991] 187 ITR 39 (SC) to the facts of this case held that a conclusion would be that the expenditure in question by the assessee was revenue in nature. It is not in dispute that the land belongs to the assessee. Certain encroachers in all these airports had encroached upon the part of the land. In the schemes formulated by the Government for removal of these encroachers and rehabilitate them at other places, if the assessee had paid the amount that amount is not for acquisition of new assets. The payment was made to facilitate its smooth functioning of the business *i.e.* in relation to carrying on the business in a profitable manner.

Such expenditure if incurred by the assessee would be on revenue account and is not capital in nature.

The Apex Court in *Bharat Earth Movers v. CIT,* 245 ITR 428 has laid down that the liability should have been actually incurred in the year and it should be capable of reasonable ascertainment, the assessee is to prove that such a liability had actually been incurred and was capable of reasonable ascertainment. A finding of fact is arrived at by the Tribunal that no such ascertainment of liability could be proved by the assessee. Certain documents were produced by the assessee to show that amount of ₹16.01 crores in the assessment year 1998-99 was in fact paid and similar amounts were paid in other years as well. If so, these would be admissible deductions being revenue in nature. The deduction would be allowed by the Assessing Officer only after the assessee furnishes proof of having made such a payment in the different assessment year in question.

LD/60/111
CIT
Vs.
Integrated Technologies Ltd.
December 16, 2011 (DEL)
[Assessment Year 2004-05]

Section 37(1) read with section 36 of the Income-tax Act, 1961- Business expenditure – Allowable as

Where even though there was no sale or purchase or any manufacturing activity carried on in relevant previous year, business of assessee was not closed relevant expenditures were to be allowed

According to the Assessing Officer the expenses incurred by the assessee were not allowable in computing the business income of the assessee because no business activities were carried on in the relevant previous year. He therefore, proposed to

disallow the expenditure claimed by the assessee. It was contended by the assessee that even though there was no sale or purchase or any manufacturing activity carried on in the relevant previous year, the business was still a going concern and in order to keep it alive and fulfill several legal and statutory formalities, some expenditure has to be incurred.

The High Court of Delhi held that the assessee had not closed its business and had every intention to revive the same. The basis for this finding was the fact that the assessee had kept its establishment alive by paying salary and other allowances to the staff and had also acquired plant and machinery in the relevant previous year and had further incurred repair expenditure on its existing plant and machinery. These findings had not been challenged by the revenue as perverse. In fact, the allowance of the salary payments, staff welfare and repairs and maintenance expenditure by the CIT (Appeals) was not challenged by the revenue by filing any appeal on those points before the Tribunal and this aspect has been referred to by the Tribunal. Thus, the revenue had impliedly accepted the fact that the business was kept alive in the hope of revival and there was only a temporary lull in the business activities. The assessee had purchased new plant and machinery and had also incurred repair expenditure in respect of the existing machinery. Therefore, it was a fair and reasonable inference to draw that the assessee wanted to keep the business alive and revive the same at the earliest opportunity. The assessee had also stated before the BIFR that after the change in the business scenario globally, the company was expecting to receive substantial orders for its products. Thus, the finding of the Tribunal that the business of the assessee was not closed is fully supported by facts on record which have not been challenged by the revenue.

Therefore, the claims of deductions were to be allowed.

LD/60/112
Mira Kulkarni
Vs.
Assistant Commissioner of Income Tax
December 16, 2011 (DEL)
[Assessment Year 2003-04]

Section 37(1) of the Income-tax Act, 1961 - Business expenditure – Allowable as

For allowance of business expenditure, it is to be incurred wholly and exclusively for purpose of business and thus, personal expenses cannot be allowed as business expense

The appellant, an individual was a part owner of a property. A portion of the said property was used as a hotel pursuant to an agreement. The appellant declared the income earned under the agreement as "income from house property" which was accepted by the assessing Officer.

The appellant had also claimed (i) Foreign travel expenditure, (ii) Repair and maintenance expenses, (iii) Salary and local conveyance under section 37, which were disallowed by the Assessing Officer and that was upheld by the Tribunal.

On appeal, the High Court held that section 37(1) postulates that the expenditure should be laid out or expended wholly or exclusively for the purpose of business. The two conditions, wholly or exclusively are conjoint and not disjunctive. This means that the expenditure should have been incurred for the purpose of business. It should be really incidentally connected with the business. The intention behind incurring the expense is relevant and it should be connected with the trade or business activity. It should be to enable a person to carry on and earn profits in the trade. The revenue's objection, unless permitted by law, is normally confined to deciding the reality of the expenditure which means; whether the expenditure was actually incurred and secondly; whether it was incurred wholly and exclusively for the purpose of business. Personal expenses cannot be allowed as business expense.

In view of the agreement it was agreed that the hotel would maintain all related facilities and amenities and business activities. All charges or taxes with regard to the running of the business of the said hotel including the charges for the salaries, telephone, electricity, food provisions water bills license fee, advertising, marketing had to be borne and paid by the hotel.

The agreement not only referred to the constructed hotel portion on the property but stated that all related facilities, amenities and business activities would be maintained by the Hotels. This was not confined to the hotel building only but also extended to the land apparent thereto. A hotel may not be restricted or consist of a constructed building and garden, precincts and land appurtenant thereto, may have to be developed and maintained. The clauses of the agreement indicated that this development and maintenance was the responsibility and liability of the Hotel. The appellant had not lead any evidence or placed material on record in form of any communication or confirmation by the Hotel that she had incurred expenditure, which was relevant for maintenance and running of the said hotel. Even otherwise the appellant could not produce evidence and material to substantiate her claim. The Tribunal had specifically recorded that 75 per cent of the property was in personal use of the appellant. Obviously the expenditure incurred on maintenance and repair on the personal property cannot be set off and allowed as business expenditure under section 37. In case the assessee had been able to produce evidence and show that she had incurred any expenses to earn and for purpose of business, she might have succeeded. Thus the appellant had not been able to show and establish her claim for deduction under section 37(1) as regard to repairs and maintenance expenses.

As regard to foreign travel expenses, as per the agreement, marketing, advertisement and reservations etc. were to be undertaken by and was the responsibility of the Hotel. There was no evidence or material placed on record as to how the said (personal foreign visit) expense was connected with or for the purpose of business income.

As regard to salary and local conveyance the Tribunal observed that the running of the hotel, including salary to the hotel staff etc. was the responsibility of the Hotel. The Hotel had stated that the appellant had regularly visited the property and conducted activities such as quality control of food but no specific details or particulars were elucidated. Further, it was the appellant's case that she had carried out agricultural operations in the said property and grown agricultural produce. On the basis of material on record, the Tribunal recorded a finding of fact that the salary account and the local conveyance expenses claimed by the appellant did not pertain to running or operation of the hotel. The operational expenses etc. were incurred by the Hotels. Hence, the said expense was not for the purpose of business. The aforesaid findings therefore could not again be categorised as perverse and which require interference by this Court under section 260A.

LD/60/113
Nandi Steels Limited
Vs.
ACIT, Circle 12(2)
December 9, 2011 (ITAT-Bangalore-SB)
[Assessment Year 2003-04]

Section 72 of the Income Tax Act, 1961 - Losses – Carry forward and set off of business loss

Business loss and depreciation brought forward from earlier years cannot be set off against income from "capital gains" under section 72

The assessee has sold the land situated along with the building and bore well which were all used for the business. The assessee had shown the profit and sale of land etc. as long term capital gains and offered to tax at the rate of 20%. The assessee had set off the long term capital gains of ₹43,36,640 against the brought forward business loss and depreciation contrary to the provisions of section 72. The Assessing Officer held that the brought forward business loss and unabsorbed depreciation cannot be set off against the income from capital gains.

The Special Bench of Bangalore Tribunal held that the capital receipts are not taxable nor are the capital payments deductible from the income of the assessee. The capital is to be used for the purpose of carrying on the business of the assessee and it shall remain in the business of the assessee till it is either converted into stock-in-trade or is disposed off. The income earned by the assessee by carrying on the business by use of the stock in trade only is the business income of the assessee. Likewise, any expenditure incurred by the assessee for carrying on of business and for earning the income from such business or profession is only allowable as deduction. After taking into account the receipts and payments for carrying on the business of the assessee only the profit or gain or loss from the business is computed. If the profit or loss relate to the same assessment year from one source then it can be set off from another source under the same head of income under section 70, and it can

be set off against the income from any other head of income under section 71. Section 72, however, permits the carry forward business loss to subsequent assessment years and allows it to be set off against profit & gains, if any, of any business or profession carried on by the assessee and assessable for the relevant assessment year. Thus, it is clear that it is only the business loss that can be carried forward under section 72 and it can also be set off only against the business income of the assessee, be it from the same business or from any other business.

Therefore, business loss and depreciation brought forward from the earlier years cannot be set off against the income from "capital gains" under section 72.

LD/60/114

ACG Associated Capsules Pvt. Ltd.
Vs.
CIT, Central-IV, Mumbai
February 8, 2012 (SC)
[Assessment Year 2003-04]

Section 80HHC read with Section 80M of the Income Tax Act, 1961 - Deductions - Profits from export business

If any quantum of any receipt of nature mentioned in clause (1) of Explanation (baa) to section 80HHC has not been included in profits of business of an assessee as computed under head "Profits and Gains of Business or Profession", ninety per cent of such quantum of receipt cannot be deducted under Explanation (baa)

Profits of the business of an assessee will have to be first computed under the head "Profits and Gains of Business or Profession" in accordance with provisions of section 28 to 44D of the Act. In the computation of such profits of business, all receipts of income which are chargeable as profits and gains of business under section 28 of the Act will have to be included. Similarly, in computation of such profits of business, different expenses which are allowable under sections 30 to 44D have to be allowed as expenses. After including such receipts of income and deducting such expenses, the total of the net receipts are profits of the business of the assessee computed under the head "Profits and Gains of Business or Profession" from which deductions are to made under clauses (1) and (2) of *Explanation* (baa) to section 80HHC.

Under Clause (1) of *Explanation* (baa), ninety per cent of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in any such profits are to be deducted from the profits of the business as computed under the head "Profits and Gains of Business or Profession". The expression "included any such profits" in clause (1) of the *Explanation* (baa) would mean only such receipts by way of brokerage, commission, interest, rent, charges or any other receipt which are included in the profits of the business as computed under the head "Profits and Gains of Business or Profession". Therefore, if any quantum of the receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature is allowed as expenses under sections 30 to 44D of the Act and is not included in the profits of business as computed under the head "Profits and Gains of Business or Profession", ninety per cent of such quantum of receipts cannot be reduced under Clause (1) of *Explanation* (baa) from the profits of the business. In other words, only ninety per cent of the net amount of any receipt of the nature mentioned in clause (1) which is actually included in the profits of the assessee is to be deducted from the profits of the assessee for determining "profits of the business" of the assessee under *Explanation* (baa) to section 80HHC.

For this interpretation of *Explanation* (baa) to section 80HHC, on the judgment of the Constitution Bench of Supreme Court in *Distributors (Baroda) P. Ltd. v. Union of India and Others* (1985) 155 ITR 120 was relied upon. Section 80M provided for deduction in respect of certain intercorporate dividends and it provided in sub-section (1) of section 80M that "where the gross total income of an assessee being a company includes any income by way of dividends received by it from a domestic company, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such income by way of dividends an amount equal to" a certain percentage of the income mentioned in this section. The Constitution Bench held that the Court must construe section 80M on its own language and arrive at its true interpretation according to the plain natural meaning of the words used by the legislature and so construed the words "such income by way of dividends" in sub-section (1) of section 80M must be referable not only to the category of income included in the gross total income but also to the quantum of the income so included. Similarly, *Explanation* (baa) has to be construed on its own language and as per the plain natural meaning of the words used in *Explanation* (baa), the words "receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits" will not only refer to the nature of receipts but also the quantum of receipts included in the profits of the business as computed under the head "Profits and Gains of Business or Profession" referred to in the first part of the *Explanation* (baa). Accordingly, if

any quantum of any receipt of the nature mentioned in clause (1) of *Explanation* (baa) has not been included in the profits of business of an assessee as computed under the head "Profits and Gains of Business or Profession", ninety per cent of such quantum of the receipt cannot be deducted under *Explanation* (baa) to section 80HHC.

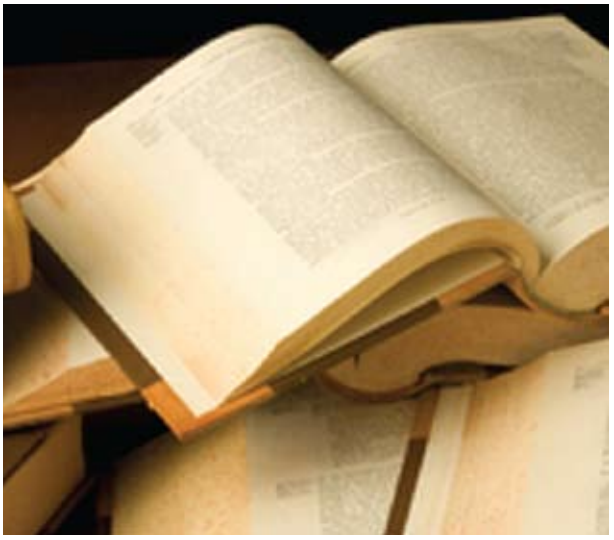
Note: Decision of Bombay High Court in ITA(L) No. 1276 of 2010 dated 6-8-2010, set aside.

LD/60/115
Veer Gems
Vs.
ACIT, Circle 7&1
October 19, 2011 (GUJ)
[Assessment Year 2008-09]

Section 92CA read with Section 144C of the Income Tax Act, 1961 - Transfer Pricing - Computation of

TPO is not authorised to judge whether there had been any international transaction or not; he has no competence to decide validity of reference itself; such issue has to be decided by Assessing Officer alone

For the Assessing Officer to make a reference of computation of the arm's length price under sub-section (1) of section 92CA to the TPO, it is necessary that the assessee should have entered into an international transaction and further that the Assessing Officer considers it necessary or expedient to make such a reference to the TPO. Since the term "international transaction" means a transaction between two or more associated enterprises, which transaction satisfies the requirement under sub-section (1) of section 92B, it is necessary that there has been a transaction between two associated enterprises before a reference under section 92C can be made by the Assessing Officer. So much is plain and clear from the statutory provisions contained in the Act. The question is at what stage it must be finally and conclusively held by the Assessing Officer that in the previous year relevant to the assessment year under consideration there had been an international transaction between the petitioner and the associated enterprise. Surely the TPO would not be a competent authority to decide this issue. From the statutory provisions we have noticed, it clear emerges that upon a reference the TPO has to serve a notice on the assessee requiring him to produce



or cause to be produced evidence on which the assessee may rely in support to the computation of the arm's length price in relation to an international transaction. Thereupon, the TPO after considering such evidence, as the assessee may produce, including the documents referred to in section 92D, has to pass an order in writing determining the arm's length price in relation to the international transaction in accordance with sub-section (3) of section 92C, send a copy of this order to the Assessing Officer and also the assessee. It is, thus, clear that once a reference is made to the TPO, his duty is to pass an order determining the arm's length price after permitting the assessee to produce relevant documents on records. At that stage, the statutory provisions do not require or even permit the TPO to deliberate on the question whether there had been any international transaction during the period under consideration. The TPO whose primary task is to determine the arm's length price of an international transaction upon a reference being made in this regard by an Assessing Officer, would have no jurisdiction to decide the validity of any such reference. His jurisdiction to act in accordance with provisions contained in section 92CA and in particular, sub-sections (2) and (3) thereof, would commence only upon a reference being made to him for computation of arm's length price of an international transaction by the Assessing Officer. He cannot judge the validity of such a reference.

There is no provision under Chapter-X, which would require the Assessing Officer to hear the assessee, consider his objections and only thereafter make a reference to the TPO to compute the arm's length price. As already observed, it is true that the question of reference to the TPO would arise only in the case where there has been an international transaction between the assessee and the associated person. Such a question in a given case may also be highly disputed question. However, under the scheme of the provision contained in Chapter-X, the Assessing Officer is not obliged to grant hearing to the assessee, invite and consider the objections with respect to the question whether during the previous year relevant to the assessment year under consideration, there had been any international transaction between the assessee and the associated enterprise before making a reference to the TPO. Such opinion the Assessing Officer would have to form on the basis of available material on record and such opinion would be having ad-hoc finality in the sense that for the purpose of reference to the TPO and till the stage that the TPO passes an order under sub-section (3) of section 92CA, such issue would be closed.

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.

While framing the assessment in terms of the report submitted by the TPO under sub-section (3) of section 92CA, 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.

By virtue of newly substituted sub-section (4) of section 92CA, the Assessing Officer is now bound by the order of the TPO on the computation of the arm's length price of an international transaction, the Assessing Officer is not and cannot be stated to be bound by the opinion of the TPO with respect to the question whether there had, in fact, been an international transaction between the assessee and the associated person during the period under

consideration. The TPO is not called upon to and, is not competent to decide this issue. This issue is within the sole jurisdiction of the Assessing Officer.

The assessee has one more opportunity to contest the question of presence or absence of an internation-al transaction. Under section 144C, 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. 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, 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 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 sub-section (6) of section 144C, such directions will have to be issued after considering various details provided in Clauses (A) to (G) thereof. Sub-section (8) of section 144C provides that the Dispute Resolution Panel may confirm, reduce or enhance the variations proposed on the draft order. Sub-section (11) of section 144C 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 provides that upon receipt of directions issued under sub-section (5) of section 144C, the Assessing Officer shall in conformity with the directions complete the assessment proceedings. Section 144C, 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 sub-section (5) of section 144C and to confirm, reduce or enhance the variations proposed under sub-section (8) of section 144C. Under sub-section (13) of section 144C, such directions are binding upon the Assessing Officer.

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 empowers the Dispute Resolution Panel to issue such directions as it thinks fit for the guidance of the Assessing Officer. When sub-section (8) of section 144C 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.

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. What has changed by virtue of substitution of sub-section (4) of section 92CA is that the opinion and the order of the TPO with respect to computation of arm's length price is now binding on the Assessing Officer. As recorded earlier, the TPO is not authorised to judge whether there had been any international transaction or not. In other words, he has no competence to decide the validity of the reference itself. Such issue has to be decided by the Assessing Officer alone. ■