Bombay HC lays down Transfer Pricing law; explains Sec. 92CA scope, DRP powers

Bombay HC dismisses Vodafone writ on Transfer Pricing issues; Sub-section (2A) of 92CA(2A) undoubtedly confers fresh jurisdiction upon & extends the jurisdiction of the TPO; TPO has power to examine transactions u/s 92CA(2A); Sec 92CA(2A) amendment prospective qua proceedings and not qua assessment year; Vodafone TP assessments pending before TPO on June 1st, 2011; Rejects Vodafone's reliance on Delhi HC ruling in Amedeus, rules crucial difference in facts of both cases; AO bound by determination of TPO, both as regards whether a transaction is an international transaction as also ALP computation; TPO also has power to examine transaction as per amendment to Sec 92(2B); TPO's order must prevail over AO's order, TPO's task not merely a clerical one; HC rejects Salve's arguments on limited powers of DRP, rules DRP would also be entitled to consider whether or not TPO was entitled to exercise jurisdiction; Once entire draft order is before DRP, it would have power to examine unreported transactions; TPO had inherent jurisdiction u/s 92CA(2A) and (2B); Even if a TPO lacks inherent jurisdiction, a Writ Petition ought not to be entertained once TPO makes his order or proceedings before him are substantially concluded; However HC leaves window open for writ where assumption of jurisdiction is "patently absurd and unsustainable" such as where there is no transaction at all and where, therefore, no amount can be brought to tax; TPO's decision with respect to jurisdictional facts not "patently and loudly obtrusive" so as to merit invocation of extra-ordinary jurisdiction by HC; But HC rejects Revenue's suggestion that Supreme Court observations as regards Framework Agreements are "casual"; SC analyzed and held that call options are contractual rights; "Very heavy burden" rests upon Revenue before ITAT regarding the petitioner's assessment in view of SC judgment in Vodafone's case; However effect of retrospective amendment to Sec. 2(47) relating to transfer, raises various issues, would have to be considered & cannot be "brushed aside" ; Revenue in this case not bound by the stand taken in original Vodafone case of not raising defense of an alternative remedy : Bombay HC

The 239 page judgment has been authored by a division bench of Justice S.J. Vazifdar & Justice R.Y. Ganoo.

Advocate General Darius Khambatta, assisted by Senior Counsel Beni Chatterjee argued successfully on behalf of the Revenue. Senior Advocate Harish Salve, assisted by Advocates Anuradha Dutt and Fereshte Sethna argued for Vodafone.

Detailed Summary

The assessee, Vodafone India Services P Ltd was incorporated in the name of 3 Global Services P Ltd (3GSPL). It was a wholly owned subsidiary of Hutchison Tele-services (India) Holdings Limited which in turn was a wholly owned subsidiary of CGP Investments (Holdings) Limited, a company incorporated in the Caymen Islands (CGP). The shares of CGP were held by HTI (BVI) Holdings Limited, a company incorporated in British Virgin Islands which, in turn, was ultimately controlled by Hutchison Telecommunications International Limited (HTIL), a company incorporated in Cayman Islands. The assessee provided call centre services to Hutchison Group.

In March 2006, the assessee entered into framework agreement with Mr. Ashim Ghosh and his three companies and also with Mr. Analjit Singh and his group companies, who had acquired shares in Telecom Investments India P Ltd (TII) with credit support from HTIL. TII in turn held shares in Hutchison Essar Ltd (subsequently named as Vodafone Essar Ltd). In consideration of the credit support, the framework agreement was entered into under which a call option was given to the assessee, a subsidiary of HTIL, to buy from the respective group companies, their entire holding in TII. The assessee also was granted right to subscribe to the shares in respect of the group companies.

In February 2007 a share purchase agreement (SPA) was entered into between HTIL and Vodafone International Holding BV (VIH BV) under which HTIL agreed to procure the sale of the entire share capital of CGP. Under the agreement, HTIL also agreed to procure the assignment of loans owed by CGP and another of its group companies – Array Holdings Limited. HTIL further undertook that each of its wider group companies would not terminate or modify any rights under any of its framework agreements or exercise any of their options under such agreements.

In May 2007, the assessee entered into a business transfer agreement (BTA) with Hutchison Whampoa Properties (India) Private Limited [HWP India], whereby it agreed to sell its call centre business to HWP India on going concern basis for a consideration of Rs. 64 cr. Further, new framework agreements were entered into in July 2007 between the parties to the original Framework agreement entered into in March 2006. VIH BV was also party to these agreements and recital of the agreements stated that VIH BV would become indirect parent company of the assessee w.e.f. the completion date and was entering into the agreements as confirming party.

Click here to view the detailed chart of holding structure.

During assessment proceedings for AY 2008-09 in case of the assessee, a reference was made to the TPO for determination of ALP of 2 international transactions reported by the assessee in Accountant's report submitted in Form 3CEB. During transfer pricing proceedings, the TPO held that the assessee had not reported 2 international transactions in its Form 3CEB, namely, transaction related to sale of call centre business and assignment of the call option under framework agreement entered into in

May 2007, to its AE. The TPO suo moto determined ALP of these transaction in exercise of powers u/s 92CA(2A) and (2B) and proposed an addition of Rs. 8,434.39 Cr. The assessee challenged these adjustments in a writ petition filed before Bombay HC. The assessee contended that the TPO did not have jurisdiction to determine ALP of these transactions and that these transactions were not international transactions u/s 92B. The assessee did not however challenge in its writ petition, the TP addition proposed by TPO in respect of international transactions reported in Form 3CEB. The TPO had passed an order determining ALP of transactions on October 31, 2011 to which a corrigendum was issued on November 1, 2011 to correct typographical errors. Subsequently, the AO passed a draft assessment order on December 29, 2011 making addition as proposed in TPO's order. The assessee challenged the draft assessment order before DRP in February 2012. The DRP passed an order disposing of the assessee's objections on October 8, 2012 and the AO passed the final assessment order on October 31, 2012. However, these orders were not served on the assessee as per the directions given by Bombay HC. The assessee had sought an interim stay of proceedings before DRP on various grounds, including that the DRP does not have jurisdiction to consider various issues raised in writ petition. HC did not grant the assessee's request for interim stay of DRP proceedings. HC held that the assessee was free to appear before the DRP without prejudice to its rights and contentions including those raised in writ petition.

Before HC, the assessee raised following 3 broad issues:

- TPO cannot take suo moto cognizance of transactions without being expressly referred by the AO.

- TPO did not have jurisdiction to get into valuation of the sale of call centre business as the same is domestic transaction and not international transaction.

- Rewriting of call option in July 2007 did not constitute an assignment of options and thus, it was not an international transaction. Reliance was placed on SC ruling in Vodafone International Holding BV [TS-23-SC-2012].

The Revenue had argued that since the assessee had alternate remedy under Income tax Act, the writ petition was not maintainable. The Revenue also argued that the petitioner filed objections and had appeared before DRP and hence, it was not entitled to maintain parallel writ proceedings. Further, the TPO's order and draft assessment order had merged into DRP's order and final assessment order of the AO and therefore, the assessee's writ against the TPO's order and draft assessment order was not maintainable.

TPO's power to take suo moto cognizance of transactions not referred to him for AY 2008-09:

As per Sec. 92CA(2A) inserted by Finance Act, 2011 w.e.f. June 1, 2011, when an international transaction comes to the notice of TPO during the course of proceedings

before him, then the relevant TP provisions would apply as if the said transaction was referred to him by the AO. Further, Finance Act, 2012 inserted sub-section (2B) to Sec. 92CA w.r.e.f. April 1, 2002, which granted power to TPO in respect of international transaction in respect of which the assessee had not furnished report in Form 3CEB and such transaction comes to the notice of TPO in the course of proceedings before him.

TPO's powers u/s 92CA(2A)

HC held that subsection 2A conferred fresh jurisdiction upon and extended the jurisdiction of TPO. Earlier the TPO was not entitled to consider international transaction which came to his notice during proceedings without they being referred by AO to him. Referring to Memorandum to Finance Bill, 2011, HC observed that intention of the Parliament was to extend the jurisdiction of the TPO. In absence of such power, the TPO was not entitled to consider the international transaction referred to him, nor determine ALP of such transaction. **Therefore, HC held that amendment inserting Sub-sec (2A) was a substantive provision.** HC also observed that the AO was bound by the TPO's determination and therefore, the provision could not be treated as mere procedural one as contended by the Revenue.

HC also highlighted the difference between the two situations under Income Tax Act leading to passing of assessment order by AO where the assessee had entered into international transactions. Under the first situation, the AO himself ought to determine the ALP of international transaction u/s 92C without making a reference to the TPO u/s 92CA and thereafter, he computes the total income of the assessee having regards to the ALP so determined. In that case, the assessee aggrieved by such order is required to file appeal before CIT(A). Under the second situation, the AO makes a reference to the TPO for determination of ALP when he considers it necessary and expedient to do so. In this case, the TPO determines ALP of the international transactions and AO is required to compute total income of the assessee in conformity with ALP so determined by the TPO. In such case, provisions of Sec. 144C dealing with filing of objections before DRP are applicable. Further, AO is bound to complete the assessment in conformity with the directions given by DRP without providing any further opportunity to the assessee.

HC therefore held that rights of the assessee and the Revenue are entirely different depending upon the course adopted for determination of ALP. HC held that who benefitted from the insertion of Sub-sec (2A), either assessee or revenue, was not relevant for determining if the provision was procedural or substantive. The fact that order of TPO itself was not executable was irrelevant consideration and the provisions of sub-sec (2A) are substantive as they conferred extended jurisdiction to TPO which he did not possess prior to its insertion.

HC however rejected the assessee's contention that provisions of Sub-sec (2A) would apply to AY after June 1, 2011 and therefore, it was not applicable to AY 2008-09. HC held that the sub-section was applicable to the proceedings which were pending before

the TPO as on June 1, 2011. HC referred to the wordings used in sub-sec (2A) viz. "during the course of proceedings before him". HC held that there was nothing in these words to indicate that it would apply to proceedings pending before TPO with reference to AY post April 1, 2012. HC noted the amendment to Sec. 92C by Finance Bill, 2011 in respect of which it was stated that amendment would take effect from April 1, 2012 and would apply to AY 2012-13 and subsequent years. Noting the difference between language used in case of amendment to Sec. 92C and insertion of sub-sec (2A) to Sec. 92CA, HC observed that it supports the Revenue's argument that the provision of Sec. 92CA(2A) was applicable to proceedings pending before TPO as on June 1, 2011. Since in case of the assessee, proceedings for AY 2008-09 were pending before TPO as on June 1, 2011, HC held that TPO had jurisdiction to determine ALP of transactions not referred to him or not reported in Form 3CEB. HC also highlighted the word used in sub-sec (2A) is 'during' and not 'from'. HC also distinguished SC rulings in *Bharat Singh v. Management of New Delhi Tuberculosis Centre, New Delhi & Ors. (1986) 2 SCC 614 and the Workmen of M/s Firestone Tyre & Rubber Company of India (Pvt.) Ltd. v. the Management & Ors. (1973) 1 SCC 813.*

TPO's power u/s 92CA(2B)

HC rejected the assessee's argument that sub-sec (2B) was not applicable to it as the assessee had furnished report u/s 92E in Form 3CEB. HC observed that sib-sec (2B) was applicable 'Where in respect of an international transaction the assessee has furnished the report under section 92E …." HC observed, "The requirement is not the failure of the assessee to furnish the report under section 92E, but to furnish the report under section 92E in respect of 'an' international transaction. In other words, the section also includes cases where the assessee has filed Form 3CEB pursuant to section 92E but does not include therein 'an international transaction' or international transactions and such transaction or transactions come to the notice of the TPO."

HC observed that clause 38 of Finance Bill, 2012 supported its conclusion which states that "if the assessee does not report 'such a transaction' in the report furnished under section 92E the Assessing Officer normally would not be aware of 'such an international transaction' so as to make a reference thereof to the TPO."

HC held that "the jurisdiction is conferred upon the TPO when proceedings are pending before him, *inter alia*, of international transactions which are not reported by the assessee in the report filed under section 92E."

HC noted that there is material difference between the provisions of sub-sec (2A) and (2B). Sub-sec (2A) would apply where an assessee has reported more than one international transaction and the AO chooses to refer to the TPO under section 92CA(1) only some of and not all the international transactions. Sub-sec (2B) would apply where the assessee has not reported the transaction or transactions in Form 3CEB and the same comes to TPO's notice during the course of proceedings before him. In either case, the TPO is entitled suo moto to consider transactions other than those reported to him. HC observed that the scope of sub-section (2A) is wider than the scope of

subsection (2B). Sub-sec (2A) is applicable irrespective of whether the transaction is reported by the assessee in Form 3CEB. It applies to all transactions other than the transactions referred by AO to TPO u/s 92CA(1). However, sub-sec (2B) applies to only unreported international transactions. Further, Sub-sec (2B) applies retrospectively from June 1, 2002.

*Delhi HC ruling in Amadeus India [*TS-693-HC-2011(DEL)*]*

HC observed that in the case before Delhi HC, the proceedings before TPO were concluded prior to June 1, 2011 and even the ITAT order had been passed. However, in Vodafone's case, the proceedings for AY 2008-09 were pending the TPO as on June 1, 2011. Further, the order of Delhi HC was pronounced on November 28, 2011 i.e. before insertion of Sec. 92CA(2B). Therefore, the provisions of Sub-sec (2B) did not fall for consideration of Delhi HC.

HC noted that the assessee relied on observation made in Delhi HC ruling to the effect that *"sub-section (2A) can only have prospective effect from June 1, 2011, and would have no application to the present appeal which is in respect of the assessment year 2006-07"*. It was contended that this observation implied that provisions of sub-sec(2A) would not apply in respect of AY prior to June 1, 2011. HC did not accept this contention. and observed that judgment must be read for what it holds and not for what logically follows therefrom. Hence, HC held that Delhi HC ruling was of no assistance to the assessee.

Thus, HC concluded that the TPO had jurisdiction in assessee's case to suo moto consider the two unreported and unreferred transactions under sub-sec (2A) as well as Sub-sec (2B) of Sec. 92CA.

Maintainability of writ and availability of alternate remedy

Powers of TPO and AO

Revenue had submitted that the petition should not to be entertained for four reasons. Firstly, the petitioner had equally efficacious alternate remedies. Secondly, the petitioner filed objections and appeared before the DRP. Thirdly, the petitioner was not entitled to maintain parallel proceedings viz. this Writ Petition as well as those before the authorities under the Act. Lastly, the orders impugned in this petition of the TPO and the draft orders have merged in the order of the DRP and the final assessment order.

HC observed that assessee was not entitled to challenge the order of the TPO before the AO, but it was entitled to the other alternate remedies. Even if there was an erroneous exercise of jurisdiction, it could not affect the further proceedings and it could

be set right by the DRP or the CIT as the case may be and also by the ITAT. HC observed that objection to the maintainability of a Writ Petition on the ground of availability of an alternate remedy is not merely a formal one, but one of considerable importance and substance, especially in transfer pricing matters. Justice Vazifdar observed that ***"….Even if a TPO lacks inherent jurisdiction, normally and absent any other circumstances, a Writ Petition under Article 226 of the Constitution of India ought not to be entertained once the TPO makes his order or the proceedings before him are substantially concluded. The caveat "normally and absent any other circumstances" is entered consciously and advisedly for we cannot rule out the possibility of there being cases where the assumption of jurisdiction is patently absurd and unsustainable such as where there is no transaction at all and where, therefore, no amount can be brought to tax. Although even in such cases an assessee may be relegated to the remedies under the Act, the Court may exercise its extra-ordinary writ jurisdiction depending on the facts of the case."***

HC observed that AO is not entitled to question or revisit ALP determination by the TPO including the question as to whether the transaction is an international transaction or not. When AO makes a reference u/s 92CA(1) with approval from CIT, then in such case, the TPO is bound to determine the ALP and is not entitled to reconsider the question as to whether the transaction is an international transaction or not. The remedy of the assessee to question the TPO's decision would be before the CIT or DRP. HC expressed its agreement with Gujarat HC ruling in Veer Gems [TS-670-HC-2011(GUJ)]

HC observed that u/s 92CA(4) the AO is not allowed to deviate from the decision of TPO. HC stated that TPO's job is not merely a clerical one of computation of ALP. Even if there is any conflict on account of the AO and the TPO having determined the arm's length price in respect of a transaction which was not referred to the TPO, the same can be taken care of by the AO in the final assessment order by making the draft assessment order in conformity with the TPO's order and not in accordance with what the AO himself determined in respect of such an international transaction.

Further, HC noted that a situation can arise in which the CIT has not granted permission to refer a particular transaction to TPO u/s 92CA(1), but such transaction is picked up by TPO suo moto in terms of Sec. 92CA(2A) or 92CA(2B). HC observed that in such cases also, the TPO's order must prevail in view of the clear, mandatory terms of section 92CA(4) requiring the AO to make the assessment in conformity with the TPO's order. Therefore, HC rejected Revenue's contention to the effect that alternate remedy was available before AO against TPO's power. However, HC held that the alternate remedy was however before DRP or CIT(A) as well as before ITAT.

HC also recorded the Revenue's statement that in case of variation to income on account of TPO's power, two options are available with the assessee. The assessee can either file objections before DRP or wait till final assessment order and file an appeal before CIT(A). The Revenue had stated that where the assessee does not file objections before DRP, it would not contend that the assessee has accepted the draft

assessment order and therefore, be deprived of the right to appeal before CIT(A) and later to ITAT. HC also observed that this was based on correct interpretation of law.

DRP's powers

HC rejected the view of assessee that DRP is not entitled to consider whether the transaction is international or not. The assessee had argued that the DRP u/s 144C has powers only to "confirm reduce or enhance" the variation proposed by the TPO. Therefore, it related only to quantification of the ALP.

HC observed that the computation of income by AO not only includes the computation of international transactions but also other transactions, and thus is a computation of income as a whole. Under section 144C(1), the AO is required to forward a draft of the proposed order of assessment (draft order) to the eligible assessee if he proposes to make "any variation in the income or loss return" which is prejudicial to assessee's interest. The variation is in respect of "the income or loss return". There is nothing to indicate that the computation of the total income under section 92C(4) and 92CA(4) is only with respect to international transactions, nor is there anything to indicate that the variation in the income or loss return referred to in section 144C(1) is qua the international transactions alone.

The expression 'variations proposed in Draft order' used in 144C(8) refer to variation referred in 144C(1). U/s 144C(6)(a) and (b), DRP is entitled to consider whether TPO was entitled to exercise jurisdiction. HC observed that words 'enhance' or 'reduce' indeed related to valuation or quantification. But, the expression '**confirm**…..variations proposed in draft order' includes the power of not to confirm and power to annul the variations. DRP has power to decide whether the unreported transactions are international transactions or not or even whether what the TPO considered was a transaction at all.

HC observed that if the DRP finds that the transaction itself was not an international transaction, the proceedings before it would not be terminated because the DRP's jurisdiction arises not on account of the transaction being an international transaction but on account of the intervention of the TPO. If DRP concludes that the TPO had no jurisdiction, the proceedings do not end since DRP is bound to consider the entire assessment which comprise of domestic transactions as well.

Availability of alternate remedy and time to invoke writ jurisdiction

HC concluded that the assessee possessed an alternate remedy before the DRP or ITAT to contend that the transaction was not an international transaction and therefore, directed the assessee to avail the alternate remedies. In support of availing of alternate remedy, reliance was placed on various rulings. HC observed that in Hindalco Industries Limited vs. Addl. CIT [TS-807-HC-2011(BOM)], the facts were similar with regard to admission of jurisdiction. In that case there were several hearings before the

TPO and thereafter a writ was filed challenging the validity of approval granted by CIT to AO to make reference to TPO.

Further, the HC stated that "*this court will be justified in exercising its discretion in entertaining a writ petition on the question as to whether the TPO lacked inherent jurisdiction to exercise powers under subsections (2A) and (2B) of section 92CA only if it is invoked at the appropriate time viz. at the outset or soon thereafter. In any event, in such matters there would be no question of exercising jurisdiction after the TPO has made the order or has proceeded to a considerable extent …*"

Referring to Mr. Salve's heavy reliance on SC ruling in Calcutta Discount Company vs. ITO [1961 (2) SCR 241], the Revenue had submitted that the SC therein had observed that Petitioner had come before the Court at the earliest opportunity unlike in the instant case where the assessee participated before the TPO without raising any objection to his jurisdiction and order was also passed by the TPO.

HC stated that "*even if we had come to the conclusion that the TPO lacked inherent jurisdiction on this ground, we would not have entertained this Writ Petition for the further proceedings before the DRP or the CIT (Appeals), as the case may be, and thereafter before the ITAT, would remain unaffected by the same. These authorities would be entitled to set right the defect and conclude the assessment proceedings accordingly.*" HC thus stated that TPO's lack of jurisdiction would not render the further assessment proceedings void. HC further stated that if TPO wrongly assumes jurisdiction, the court may exercise its Writ jurisdiction if the assessee approaches the court at the earliest before the TPO passes order. HC stated that once the TPO makes his order, there was no warrant for terminating the proceedings that follow.

HC also placed reliance on Calcutta High Court ruling in Sri Sri Radheshyam Jew & Anr. v. Valuation Officer & Ors. [(1999) 238 ITR 343]

Effect on maintainability of the Writ Petition on account of the petitioner having filed objections and having appeared before the DRP

HC did not allow the Revenue to rely upon the Draft assessment order of DRP or the final assessment order of the AO , while arriving at its judgment in the instant Writ Petition. HC stated that "*It is difficult for a litigant to say with any degree of certainty whether a Writ Petition though maintainable would be entertained or not. It would be unfair to compel a litigant to speculate, to take a chance by not availing of the alternate remedy and only filing a Writ Petition. If the Court refuses to exercise the discretion that it has in entertaining a Writ Petition, the litigant would fall between two stools….Where a litigant avails of an alternate remedy only to avoid such a situation, the doors of the Writ court cannot be closed to him.*" A co-ordinate bench ruling in Orkay Mills Ltd. v. M.S. Bindra [1998 (33) ELT 48 (Bom.)] was referred to wherein it was observed that the appeal had been preferred by the petitioner out of abundant caution and, therefore, the mere fact that the petitioner had filed the appeal would not oust the jurisdiction of the Court especially where there was gross miscarriage of justice.

HC rejected Revenue's argument of dismissing the Writ on the ground that the assessee had appeared before the DRP. It was observed that the petitioner had appeared before the DRP not voluntarily, but without prejudice to its rights and contentions in this Writ Petition. HC therefore stated that "*When a litigant appears in such proceedings without prejudice to its rights and contentions and the Court expressly permits him to do so, it would be a travesty of justice for the Court to thereafter refuse to entertain the Writ Petition merely on that ground*".

Parallel proceedings

The Revenue relied on rulings in K.S. Rashid & Son v. Income-tax Investigation Commission & Ors., [AIR 1954 SC 207], Jai Singh v. Union of India [(1977) 1 SCC 1], Lionbridge Technologies Pvt. Ltd. vs. DCIT [WP (Lodg.) 2309 of 2011] and argued that the assessee was not permitted to pursue two parallel remedies in respect of the same matter. HC distinguished these rulings stating that the court, in instant case had permitted the petitioner to avail alternate remedy without prejudice to its rights and contentions.

Effect on maintainability of the Writ on account of the merger of the impugned orders of the DRP and the final assessment order of the AO

The Revenue argued that the order of TPO, which was the subject matter of challenge, has merged in the DRP order and further the DRP's order has merged in the final assessment order of the AO. Relying on SC ruling in Somnath Sahu vs. State of Orissa and Ors. [(1969) 3 SCC 384], it was argued that by challenging the TPO's order, the petitioner was in effect challenging the DRP's order and the final assessment order, which was impermissible and the petitioner's remedy is only to challenge the final assessment order.

HC rejected this argument of the Revenue. HC stated that "*Normally when an order stands merged in another order, the remedy of a party is to challenge the final order and it cannot do so by challenging the order which stands merged in the final order. This, however, is not an absolute rule. A court exercising jurisdiction under article 226 would be justified in entertaining a challenge to such an order even if it has merged in another order where the proceedings were pursued without prejudice to the petitioner's rights and/or pursuant to the orders of the Court granting the petitioner liberty to do so.*"

HC held that the TPO had jurisdiction to determine the arm's length price of the said two unreported and un-referred transactions. HC stated that the assessee's interference to challenge the jurisdiction of TPO must be limited in point of time. HC stated that "*From the initial assumption of jurisdiction, the inclination to interfere diminishes as the proceedings before the TPO progress and vanishes once the hearing before the TPO concludes and in any event, once the report of the TPO is made.*" HC thus observed that once the proceedings before TPO are concluded, a Writ petition challenging his

jurisdiction cannot entertained and the assessee must be relegated to other remedies provided.

Referring to SC rulings in State of Uttar Pradesh vs. Mohd. Nooh Raza Textiles Ltd vs. Income Tax Officer, [(1973) 87 ITR 539], HC stated that in the instant case the TPO had not "clutched at jurisdiction" or that his decision with respect to the jurisdictional facts was not "so patently and loudly obtrusive" that it has left on it "an indelible stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision" and, therefore, warrants interference in a writ petition. HC clarified that "*This (instant) judgment ought not to be construed as a final decision on the merits of the rival cases. For instance, the judgment does not decide whether the transactions are international transactions or not. Nor does it decide who the contracting parties actually are. As far as the alleged assignment of options is concerned, we have not even decided whether there was an assignment or a transfer of the options. The judgment only identifies and indicates the issues between the parties on merits to establish that the resolution thereof ought to be left to the authorities under the Act - the ITAT*".

HC thereafter proceeded to consider the arguments regarding 2 transactions. However, HC clarified that it does not rule upon whether the transactions are international transactions or the relationship between the contracting parties. It only identified and indicated issues to establish whether they deserve to be adjudicated in a writ petition under Article 226. HC observed that these observations should not be construed as if the Court has expressed a view in favour of the Revenue and there was a lot be considered in assessee's case especially in view of SC ruling in Vodafone.

TPO's jurisdiction regarding transaction of transfer of call centre business

Under BTA, call centre business was transferred by the assessee to HWP India. The assessee contended that since the transaction was between 2 Indian entities, it was a domestic transaction not subject to TP regulations. However, the TPO held that sale of call centre business was pursuant to SPA between HTIL and VIH BV. BTA was entered into to give effect to SPA and both the Indian parties acted as dummies to go through the motion to give effect to SPA. The Revenue applied doctrine of lifting of corporate veil and substance over form. The Revenue contended that the BTA was solely dependent on SPA and the real parties to the BTA were VIH BV and HTIL. The Revenue contended that under SPA, the total consideration was payable to HTIL by VIH BV and VIH BV did not want the call centre. VIH BV, however, did not wish to lose control over the assessee as it had valuable options to subscribe to 15% of Hutch Essar Ltd. shares.

The assessee contended that the sale of call center business was negotiated by MOU dated October 25, 2011 which the Revenue argued was ante-dated. Relying on SC ruling in Chloro Controls Pvt. Ltd. vs. Severn Trent Water Purification Inc. [Appeal no. 7135/7136 of 2012], Revenue invoked the doctrine of Group companies and argued that HWP India was bound by SPA between VIHBV and HTIL.

The Revenue argued that transaction of call center business came within the ambit of deemed international transaction u/s 92B(2). As per Sec. 92B(2), a transaction between an enterprise and a person other than AE shall be deemed to be international transaction, if there exists a prior agreement **in relation to** the relevant transaction between such other person and the AE, or the term of the relevant transaction are determined in substance between such other person and the AE.

Revenue argued that the assessee, an Indian company, is the "enterprise" for Sec. 92B(2). The "person other than an associated enterprise" is the Hutchison group, which includes not merely the signatory to the BTA viz. HWP (India) – an Indian company, but also HTIL, which is a non resident. The "associated enterprise" is VIH BV, also a non-resident and the SPA dated February 11, 2007 was the prior agreement in relation to the relevant transaction viz. the BTA dated 8th May, 2007. The TPO had noted that the assessee had acquired a similar call centre business subsequently with only 260 employees for Rs. 160 Cr. The call centre business which was transferred consisted of 7000 employees. Hence, the TPO held that the consideration for transfer (Rs. 64 Cr) was not at ALP. The TPO determined ALP and proposed addition of Rs. 2,350 Cr.

The assessee submitted that the transaction was between two domestic entities (assessee and HWP India) and there was no prior agreement between HWP India and VIHBV. Further it was argued the assessee and HWP India were associated enterprises when the BTA was entered and call centre business was sold. Relying on SC ruling in Vodafone International Holding BV, it was argued that doctrine of substance over form and doctrine of corporate veil was negatived by the SC.

HC referred to various clauses of the SPA (Share purchase agreement) dated February 11, 2007, MOU dated April 25, 2007 and BTA (business transfer agreement for call centre business) dated May 8, 2007. HC also analyzed the provisions of Sec. 92A and 92B(2). Sec. 92B(2) stipulates that the prior agreement must be **in relation to** relevant transaction. HC observed that the expression 'in relation to' has a very wide meaning and therefore it was sufficient even if some of the terms of relevant transaction were present in prior agreement. So long as the terms of the relevant transaction are determined "in substance" between such other person and the associated enterprise it is sufficient and that such existence of 'substance' would vary according to facts of each case.

HC stated that it was difficult to comprehend the TPO's observation that amount payable under the SPA stood reduced to the extent of the value of the call centre business. HC stated that this however did not indicate an inherent lack of jurisdiction on the part of the TPO in determining whether the transaction is an international transaction or not. Even if it was to be assumed that the TPO's reasoning was an error, it can be remedied by DRP/ITAT.

HC stated that "*provisions of the SPA prima-facie foreshadowed the sale of the call centre business by the petitioner to an affiliate of the vendor i.e. HTIL. The SPA has*

several provisions relating to and in connection with the sale of the call centre business." HC further stated that "it is difficult in a writ petition to reject outright the respondents' contention that the SPA constitutes an agreement between the Hutchison group including HWP (India) at least so far as the sale of the call centre is concerned and the Vodafone group". HC also observed that under SPA, term 'affiliate' would include HWP India. Further, the term 'vendor group' under SPA included vendor i.e HTIL and its affiliates which include HWP India. Further, it was not the assessee's case that HWP India never considered itself to be bound by SPA provisions relating to sale of call centre business.

Referring to various clauses of BTA and SPA, HC observed that it was not possible to come to a conclusion in this writ petition that the BTA/sale of the call centre business was not in relation to the SPA insofar as it concerned the sale of the call centre business.

With regard to the issue on whether SPA was prior in point of time to the BTA / the sale of the call centre business, the assessee submitted that it was only after the BTA was entered into that the assessee became an associated enterprise of VIH BV. Sec. 92B(2) applies only when transaction is entered into by an enterprise with a person other than an associated enterprise. HC observed that the question of whether the BTA preceded the SPA or not, is arguable and requires consideration not merely as a question of law but also as a question of fact. The Revenue argued that the MOU was ante-dated, and if the assessee and HWP India were part of same group, there was no need for an MOU to be signed.

HC stated *"assuming that the MOU was not ante dated and was executed prior to the SPA, the petitioner does not have an open and shut case. The matter wound not end there. The terms and conditions of the MOU require serious consideration. The most important question is whether the MOU constituted an agreement at all or whether it was only an agreement to enter into an agreement, which is not enforceable in law*." HC concluded that it was difficult to express any view conclusively in respect of these issues while exercising writ jurisdiction, and these should be decided by the fact finding authorities.

With regard to the assessee's argument that the BTA was an independent transaction and the SPA was not a prior agreement for it since final BTA negotiated and increased the transaction price from draft BTA, HC stated that Sec. 92B(2) would apply even if there was a modification of prior agreement. HC stated that if such view of assessee is accepted, it would render provisions of Sec. 92B nugatory by simple expedient of altering the provisions of relevant agreement.

With regard to Revenue's argument that the assessee cannot argue contrary to what was contended in the writ petition preferred by him and that the averments in petition constituted an admission that assessee and HWP India were not associated enterprises, HC observed that it was not necessary to conclusively decide whether these arguments constituted admission or not. HC stated that these issues were not

purely jurisdictional issues and there was no need for the court to decide such issues by invoking extra-ordinary jurisdiction of Writ.

With respect to assessee's argument that it makes no difference whether the SPA was signed first or BTA was first and the entire purpose of the SPA was not to sell the call centre business but to retain it, HC stated that "*it is not for this Court to ascertain or even speculate for the parties having nevertheless structured their transaction in the manner in which they actually did*". HC stated the impugned issue requires application of principles of Sec. 92A to particular fact situation. HC stated that the issue was not purely a question of law and was a mixed question of law and fact.

HC further stated that if during a particular previous year, the enterprise is an AE of more than one company, it would make no difference for the purpose of Sec. 92B(2). Sec 92B(2) does not exclude from its ambit a case where the enterprise was an associated enterprise of more than one entity during the previous year.

HC clarified that it was not for it to consider the merits of the case, and that it was only the issue of whether there was inherent and patent lack of jurisdiction on part of TPO which was to be considered. There are various issues of facts and law which the lower authorities are required to consider, and it was not necessary for the court to invoke its extra-ordinary writ jurisdiction to decide the same.

TPO's jurisdiction regarding alleged assignment of call options under framework agreements

The TPO had held that under the Framework agreement, there was assignment of call options by the assessee to its AE, viz. VIH BV for no consideration. The TPO determined ALP at Rs. 6178.88 Cr. Further the AO, taking the cost of acquisition at Rs. 73.44 Cr, had computed capital gains on such assignment.

Before HC, the assessee, relying on favourable SC ruling in Vodafone, had argued that rewriting of framework agreement in 2007 was only due to regulatory requirements and they were not transactions at all, much less international transactions. Further, SC in that case had rejected the Revenue's contention regarding lifting of corporate veil and invoking of doctrine of substance over form. There was no assignment or transaction and hence, the TPO's order was without jurisdiction.

HC observed that SC delivered ruling in January 2012 and at the time of TPO's order and AO's order, the judgment of Bombay HC held the field. HC held, "It would undoubtedly now be necessary for any Court or Tribunal to construe the Framework agreements in the light of the judgment of the Supreme Court as it over-ruled the judgment of this Court."

HC observed that SC had not only considered the provisions of framework agreement, but also construed the same. SC had held that the call options are contractual rights and they vested and continued to vest in the assessee and had not been transferred or

assigned by the assessee. Therefore, HC observed, "We proceed, as indeed we must, that before the ITAT, a very heavy burden would rest upon the Revenue even regarding the petitioner's assessment in view of the judgment in Vodafone's case. Every Court, Tribunal, authority or person is bound to give the observations of the Supreme Court, including in respect of the Framework Agreements, their full effect. The suggestion that they are casual observations is rejected. A view to the contrary would tantamount to judicial indiscipline."

Since AO & TPO's order was prior to SC ruling, HC observed that they did not have occasion to consider it. But, HC observed that there was no need to short circuit the proceedings and ITAT should consider the impact of that ruling. However, HC also observed that the Revenue would not be precluded from relying on other facts, circumstances or documents in support of its contention, despite SC ruling in Vodafone.

Referring to retrospective amendment to Sec. 2(47) (definition of term 'transfer") by Finance Act, 2012 w.r.e.f. April 1, 1962, HC observed, "*Section 2(47), as amended, even on a cursory glance raises various issues. It is necessary to note four preliminary aspects of Explanation 2 to section 2(47). Firstly, as the opening words, "For the removal of doubts it is hereby clarified that ….." , indicate it is a clarificatory amendment. Secondly, it is an inclusive definition as is evident from the words " "transfer" includes.....". Thirdly, the amendment is with retrospective effect from 1st April, 1962. Fourthly, the Finance Act 2012 which introduced, inter-alia, the amendment to section 2(47) and section 92CA(2B) is a validating act in view of section 119 thereof*."

HC highlighted that as per the amendment, two aspects of the transfer are clarified – asset itself and manner in which it is dealt with. HC observed, "The asset is no longer restricted to the asset *per se* or a right therein, but also extends to "*any interest therein*". Prior to the amendment, the words "*any interest therein*" were absent. Further, the nature of the disposal is also expanded. It now includes the creation of any interest in any asset. Moreover, the disposal of or creation of any interest in the asset may be direct or indirect, absolute or conditional, voluntary or involuntary. It may be by way of an agreement or otherwise. Further, the concluding words constitute a non-obstante provision. It provides that the transfer contemplated therein would be notwithstanding that it has been characterized as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India."

HC observed that SC ruling in Vodafone considered the term 'transfer' prior to retrospective amendment therein. However, the amended definition would be relevant in the present case, observed HC. HC observed that the consideration of impact of the amendment and whether the SC ruling would remain unaffected on the ground that the amendment is only clarificatory nature, were important issues. These issues need not be considered in proceedings under Article 226 bypassing the regular channel provided under IT Act, ruled the HC.

HC also noted an important difference from the original Vodafone case decided by the apex court. In that case, the Revenue had not raised the defense of an alternate

remedy available to VIH BV, which was raised in this case. HC noted that in that case nothing prevented Revenue from raising that contention before the Supreme Court. However, HC observed that failure to do so in that case would not prevent Revenue from taking 'alternate remedy' contention in this case.

Dismissing the writ petition for the aforementioned reasons, HC directed the Revenue not to serve the order of DRP as well as the final assessment order, on the assessee till November 30, 2013.