In the High Court of Judicature at Madras

Dated : 31.3.2016

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN

and

The Honourable Mr.Justice N.KIRUBAKARAN

WMP.No.9140 of 2016 in WP.No.10335 of 2016

M/s.Sutherland Global Services
Pvt. Ltd. Rep. by its Authorized
Signatory Mr.V.N.Achutarama Gupta
Chennai-42. ...Petitioner

Vs

1.Union of India, Ministry of Finance
Department of Revenue, Rep. by its
Secretary, Room No.46, North Block,
New Delhi-110 001.

2.The Joint Commissioner of Income Tax,
Transfer Pricing Officer-3, Room No.320,
III Floor, Main Building, No.121,
M.G.Road, Nungambakkam, Chennai-34.

3.The Deputy Commissioner of Income-Tax,
Corporate Circle 6(2), Room No.705,
7th Floor, No.121, M.G.Road,
Nungambakkam, Chennai-34.

4.The Central Board of Direct Taxes,
Rep. by its Chairman, North Block,
New Delhi-110 001. ...Respondents

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorari to call for the records comprised in the impugned order bearing F.No.S-304/TPO-3/A.Y.2012-13 dated 27.1.2016 made under Section 92CA of the Act on the file of the second respondent and quash the same.

WMP.No.9140 of 2016 seeking to grant stay of all further proceedings pursuant to the issuance of the impugned order bearing F.No.S-304/TPO-3/ A.Y.2012-13 dated 27th January 2016 made under Section 92CA of the Act passed by the second respondent for the assessment year 2012-13 pending disposal of the writ petition.

For Petitioner : Mr.N.Venkataraman, SC for
Mr.K.Magesh

For Respondents : Mr.J.Narayanaswamy

Order of the Court was made by V.RAMASUBRAMANIAN,J

This is a petition for interim stay of further proceedings pursuant to an order passed under Section 92CA of the Income Tax Act, 1961, by the Transfer Pricing Officer-3 at Chennai pending disposal of the main writ petition challenging the said order.

2. Heard Mr.N.Venkataraman, learned Senior Counsel appearing for the petitioner and Mr.J.Narayanaswamy, learned Standing Counsel appearing for the Department.

3. The above writ petition came up for orders as to admission on 21.3.2016 along with another writ petition in W.P.No.10411 of 2016 wherein the very same petitioner made a challenge to the Constitutional validity of Section 92B(2). That writ petition was admitted and posted in the usual

course.

4. In the writ petition challenging the order of the Transfer Pricing Officer, the learned Standing Counsel took notice on 21.3.2016 and sought time to get instructions from the Department.

5. On the basis of the instructions that he had obtained, the learned Standing Counsel made submissions on the petition for stay. The impugned order of the Transfer Pricing Officer is challenged primarily on the ground of

(i) violation of principles of natural justice and

(ii) non consideration of the issues raised in response to the two show cause notices issued by the Officer.

6. The violation of principles of natural justice is alleged not on the ground that no opportunity was given, but on the ground that no meaningful opportunity was given. Such a contention is raised on the basis of the fact that in response to the first show cause notice issued on 26.10.2015, the petitioner submitted a detailed reply on 11.11.2015 pointing out

(a) that they had adopted "FAR" analysis

(b) that after conducting two different searches on words and expressions that would lead to the desired results, the assessee mined a data base of about 10,000 companies and ultimately zeroed in on 2767 companies and

(c) that eventually a list of 11 comparables were calibrated from out of those 2767 companies, which formed the basis for them to arrive at a weighted average.

7. But unfortunately, the Transfer Pricing Officer, in his first show cause notice, committed two mistakes namely

(a) that the percentage of average margin on cost was left blank in paragraph 6 and

(b) that though it was claimed in paragraph 6 of the first show cause notice that a fresh search was conducted for the selection of comparables and the details of the same are furnished in the annexure, no such annexure was enclosed to the show cause notice.

8. In the reply to the first show cause notice dated 11.11.2015, the assessee raised a specific objection to the effect that the annexure was not enclosed and that the percentage was left blank.

9. Though in the second show cause notice, the Transfer Pricing Officer corrected the first mistake and indicated the percentage of average margin on cost to be 21.35%, the annexure provided by him contained only a list of six comparables. The data base, from out of which, those six comparables were arrived at, was not even indicated in the second show cause notice.

10. Therefore, the primary contention of the learned Senior Counsel for the assessee is that when the assessee took pains to mine information from a data base of 10,000 companies and shortlisted 2767 companies leading to a calibration of 11 comparables, the Transfer Pricing Officer short-circuited the whole matter and gave a list of six comparables without putting the assessee on notice of the nature of the search made and the spectrum of cases, from out of which, such a search was conducted. This, according to

the assessee, handicapped the assessee from meeting the proposal effectively.

11. In response to the first contention, it is submitted by Mr.J. Narayanaswamy, learned Standing Counsel for the Department that the six comparables indicated in the annexure to the second show cause notice have been chosen out of the experience that the Transfer Pricing Officer has gained after assessments of various companies. Therefore, it is his contention that when the Transfer Pricing Officer questioned the very validity of the data base chosen by the assessee and when the Transfer Pricing Officer had chosen the comparables on the basis of his experience, the same cannot be taken to be a violation of the principles of natural justice.

12. But, we do not think that the submission of the learned Standing Counsel could be accepted without a counter to the said effect from the Department. We are not able to decipher from the second show cause notice, whether the Transfer Pricing Officer arrived at a list of six comparables after mining information from a huge data base or on the basis of the information already available in his office.

13. As a matter of fact, the Transfer Pricing Officer has also said that he did not have time to go through the entire data base furnished by the assessee as seen from internal page 4 of the second show cause notice dated 5.1.2016. This is also repeated in paragraph 4.5 at internal page 15 of the impugned order. Interestingly, the impugned order was passed after a period of two full months, after the issue of the show cause notice. Therefore, the

plea of non availability of time and the plea of non availability of resources to search data base is not correct.

14. The total lack of opportunity is only one facet of the principle of natural justice. Whenever the provision of an opportunity is actually turned into an empty formality by the Officer withholding necessary information or by the officer refusing to consider certain things on the specious plea that there was lack of time or resources, the opportunity provided by the show cause notices become meaningless opportunities. Therefore, we are of the considered view that the petitioner has made out a prima facie case for the grant of stay.

15. Hence, without going into greater details and reserving the liberty to the Department to come up with a positive stand in the form of a counter, we grant interim stay of further proceedings.

16. Post after two weeks for filing counter. We make it clear that whatever recorded here are only prima facie findings.

31.3.2016

RS

V.RAMASUBRAMANIAN,J
AND
N.KIRUBAKARAN,J

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