

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.10.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND

THE HON'BLE MR.JUSTICE M.S.RAMESH

W.A.No.1344 of 2017

M/s.Hyundai Motor India Ltd
Rep by Authorized Signatory T.Saravanan P.
No.H-1 SIPCOT Industrial Park
Irrungattukottai Sriperumbudur Taluk
Kanchipuram - 602 117 ... Appellant

Vs

- 1 The Secretary
Income Tax Department
Dispute Resolution Panel-2
7th Floor Income Tax Office BMTC Building
80 feet road Koramangala Bangalore
- 2 Joint Commissioner of Income-Tax
Transfer Pricing officer 2(I/c)
Room No.320 III Floor Main Building No.
121 M.G.Road Nungambakkam Chennai-600034
- 3 Deputy Commissioner of Income-Tax
Large Taxpayer Unit-II 1775
Jawaharlal Nehru Inner Ring Road Anna Nagar
Western Extn. Chennai-600101 ... respondents

Appeal filed under Clause 15 of the Letters Patent against the order in WP No. 2088/2017 dated 20/10/2017

For Appellant : Mr.Sathish Parasaran, Senior counsel,
for Mr.K.Magesh

For respondents : Ms.Hema Muralikrishnan,
Senior Standing Counsel

JUDGMENT

(Delivered by DR.VINEET KOTHARI, J.)

This Writ Appeal is directed against the order of the learned Single Judge dated 20.10.2017, dismissing the Writ Petition of the Appellant herein M/s.Hyundai Motors India Ltd., as premature, which was directed against the order of the Dispute Resolution Panel ("DRP", for short) dated 13 December 2016, for the Assessment Year 2012-13.

2. The DRP had made certain directions for the guidance of the Transfer Pricing Officer (TPO) under section 144C(5) of the Act, which are binding on the TPO who makes the TP adjustments in the assessment relating to international transactions under the Chapter X of the Income Tax Act, especially enacted for these purposes.

3. The learned Single Judge has dismissed the Writ Petition as premature finding that against the order of the learned TPO when passed in consequence of the directions given by the DRP, there is an appeal remedy available to the Assessee before the learned Tribunal

and therefore, the questions of facts coupled with the questions of law sought to be raised before the DRP and before this court under the Writ Jurisdiction, can be first agitated before the learned Tribunal as well. Thereafter, the Assessee has further remedy by way of appeal to this court on the substantial questions of law arising from the order of the Tribunal under section 260A of the Income Tax Act. The relevant observations of the learned Single Judge in the impugned order dated 20 October 2017 are quoted below for ready reference:-

16. It is to be noted that though the petitioner has challenged the directions issued by the DRP in its entirety Mr.N.Venkatraman, confined his submissions only with regard to the enhancement made by DRP, and the assessee will challenge the other findings once the assessment is complete. Thus, it has to be seen whether the DRP has recorded any factual findings while disagreeing with the TPO with regard to computing quantum of adjustment. The finding recorded by the DRP in this regard is contained in paragraph 18.1, which is as follows:-

"The argument of the assessee could have some force if the data in relation to profits earned by assessee in relation to

costs pertaining to international transactions were available. However, this is not so. The assessee is selling a product, for the manufacture of which, part purchases are from AEs and remaining from the non-AEs. When the product is sold only overall profit margin is recorded without any data as to what would be the profit in relation to purchases from AE. But it cannot be presumed that the profit percentage earned in relation to costs related to international transactions as well as non-international transaction was same. So it is always possible that the margin of profit on costs related to international transaction is not the same as profit margin on costs related to non-international transactions but ultimately overall profit margin is being shown."

17. After recording the above finding, the DRP has adopted a hypothesis with regard to an assessee having

international transactions and how the arms length price needs to be determined. The case of the hypothetical assessee is dismissed in paragraphs 18.2, 18.3 and 18.4 of the impugned directions. After the above discussions, on facts the DRP has recorded as hereunder:-

"18.5.....Any impact on the basis of calculation of ALP by MAM (here TNMM) has to be considered as adjustment under Section 92CA and the same cannot be proportionately reduced by considering that a part of the purchases was from non-AE also. Whatever is the reduction in the margin of the assessee vis a vis comparables **is on account of inflated purchases from AE and the same gets considered when ALP is calculated by applying TNMM.** As regards assessee's reliance on Judicial decisions, the above factual matrix was not brought to the knowledge of Hon'ble Judicial Authorities and so those decisions cannot be applied to the case of the assessee. **The**

AO/TPO is, therefore, directed to effect adjustment without restricting the same to the proportion of international transaction to the total operating cost."

18. Therefore, **it would be too far fetched plea on the part of the petitioner to state that sans facts, the decision in Mobis, and other cases, (Firestone, Il Jin Electronics etc) should be applied** and the finding with regard to the adjustment of the ALP should be set aside, is a proposition, which cannot be acceded to. The DRP while issuing directions has directed adjustment by examining the facts. This direction is required to be implemented by the Assessing Officer after which it ripens into an assessment order open to challenge in terms of the provision of the Act. **This appears to be precisely the reason for terming the impugned order as a direction under Section 144C (5) of the Act and it ripens into an order on being given effect to by the Assessing Officer.** Therefore, I am convinced that the decisions cited by Mr.N.Venkatraman, cannot be applied, at this juncture, as the factual position requires to be considered, which obviously

cannot be done in a Writ Petition and therefore, the impugned direction issued by the DRP has to be given effect to and the third respondent has to pass an order of assessment, which can be questioned by the petitioner by filing an appeal before the Tribunal.

19. For all the above reasons, **the Writ Petition is dismissed** with direction to the third respondent to give effect to the directions issued by the DRP, dated 13.12.2016, by passing an assessment order, **after which, it is open to the petitioner to challenge the same before the Tribunal.** All contentions are left open. No costs. Consequently, connected Miscellaneous Petition is closed.

4. The learned Senior Counsel Mr.Satish Parasaran was at pains to emphasize before us that the learned DRP in its impugned order dated 13.12.2016 has disregarded the judgments of the other High Courts on the question that TP adjustments can be made only with regard to international transactions which had taken place with the Associated Enterprises and not the domestic transactions and therefore, the international transactions with the Associated Enterprises cannot be allowed to bear the brunt of the profit

adjustments in the domestic transactions and thus, this question of law has wrongly been decided by the learned DRP, which order is however binding on the Assessing Officer as per the provisions of Section 144C(5) of the Act and therefore on the said question of law alone, it was argued before the learned Single Judge as well as before us, that this Court may interfere with the impugned order by exercising the power under the Writ Jurisdiction. For other questions of fact, the Assessee may be allowed to go to the fact finding bodies, including the Tribunal and therefore, to that extent, the learned Single Judge has erred in dismissing the Writ Petition as premature and the same deserves to be interfered with by this court in the present intra court appeal.

5. On the other hand, the learned Counsel for the Revenue, Ms.Hema Muralikrishnan supported the impugned order and submitted that the mixed questions of facts and law can be agitated by the Assessee even before the Tribunal even though the order to be passed by the Assessing Officer is a mere consequence, in pursuance of the binding directions of the DRP, which comprises of three higher level officers of the Department, and that mechanism has been created in the Act to cut short the process of assessment and for applying the

guidance of higher committee in the form of DRP by the TPO, lest the individual officers may take different individual views of the matter. He submitted that Writ Jurisdiction in such cases should not be allowed to be invoked by the Assessee at this premature stage and the learned Single Judge was right in dismissing the Writ Petition as premature.

6. To allay the unfounded fears of the Assessee, she has further drawn our attention to the Affidavit filed by the third Respondent viz., the Assistant Commissioner of Income Tax, Large Tax Payer Unit II, Chennai, Dr.S.R.Nedumaran. In paragraph 3 of his Affidavit, it is clearly stated that no adjustments in respect of domestic or third party transaction shall be made by the Transfer Pricing Officer or Dispute Resolution Panel. Paragraph 3 of the said Affidavit is quoted below for ready reference:-

*"3. In any event, notwithstanding the above and without prejudice it is submitted that there is no adjustment made in respect of domestic or third party transactions by the Transfer Pricing Officer or Dispute Resolution Panel. **The adjustments made relate to International transactions only.** Hence, there is no basis to raise a question of law. The chart filed by the appellant at page 32 of the*

*typed set of papers is his understanding/ interpretation of the order of the DRP. **It is submitted that no adjustments were made to domestic transaction** and hence the case laws quoted by the appellant have no relevance to the facts of the case."*

7. Accordingly, the learned Counsel for the Revenue has submitted that the apprehension of the Appellant/Assessee in the present case that there will be a mix up of domestic transactions and TP Adjustments can be made only for international transaction is unfounded, as the Department is very clear in its approach and TP Adjustments which can be made only to the international transactions covered by the definition given in Section 92B in the Chapter X, by the Revenue Authorities. Therefore she submitted that the Assessee may approach the learned Assessing Officer and if it is aggrieved by the order passed by the Assessing Officer, they have a further remedy of appeal before the learned Tribunal and then further appeal on substantial questions of law before the High Court under Section 260A of the Act.

8. Having heard the learned Counsel for the parties, we are of the opinion that the present Writ Appeal deserves to be dismissed as there is no merit. We cannot appreciate the arguments of the learned Senior Counsel for the Assessee that on the question of law, the DRP has disregarded the case laws of other High Courts. A mere discussion of such case laws but not applying to the facts cannot be said to be any disregard to the law laid down by the other High Courts in this respect. We cannot accept the submission of the learned Counsel further on the ground that merely because the order of the DRP may be binding on the Assessing Officer, against whose order, the appeal can be filed only before the learned Tribunal, a shortcut could be provided to the Assessee in such cases to invoke the Writ Jurisdiction, which itself has three tiers of remedies; before the High Court, two tiers, viz., the learned Single Judge dealing with the Writ Petition and the intra-Court Writ Appeal before Division Bench and then if the matter is taken up to the Hon'ble Supreme Court by way of Special Leave Petition under Article 136 of the Constitution of India. If the matter is dragged through in these three tiers, it would be impossible for the orders of the DRP to be executed by the Assessing Officer and the Tribunal to apply its mind to the factual aspects of the matter for a long period. It is needless to say that even the questions of law which

are coupled or mixed with the findings of fact can be raised and argued before the concerned authorities below, including the TPO and before the learned Tribunal. Such a digression from the normal channel of the remedies provided in the Act in the said Chapter, need not be cut short by allowing the Assessee to invoke the Writ Jurisdiction in such cases.

9. In our considered opinion, this digression is self defeating and defeats the very purpose of quicker assessments sought to be achieved in the special law relating to international transactions envisaged in the Chapter X of the Income Tax Act provided for assessment of international transactions, so that an image of balanced approach by IT authorities can be projected on the international horizons. Many other developed countries provide for such quicker management of tax dispute resolution.

10. In view of the undertaking given by the Respondents in paragraph 3 of the Affidavit of the Assistant Commissioner that they are going to apply for TP Adjustments only to international transactions, even the aforesaid unfounded apprehension of the Assessee is not justified.

11. The learned Counsel for the Assessee also wanted to take us through the charts of the factual scenario which will obtain, if the directions of the DRP are implemented by the Assessing Officer for which he is bound. We are not inclined to go into the exercise of facts and figures at this stage at all, lest it affects the lower authorities in any manner and prejudices the case of either the Assessee or the Revenue. A regular appeal on substantial question of law, under Section 260A of the Act is provided in the Income Tax Act, 1961 and on those questions of law, if at all they would arise from the order of the learned Tribunal, the Assessee has a remedy even before this Court, and later before the Hon'ble Supreme Court on regular appeal.

12. This stream lined procedure, provided under the Act should not normally be allowed to be breached in such cases where a deeper analysis of facts has to be done by the authorities under the Act up to the Tribunal and a factual exercise has to be undertaken by them with regard to comparables, TP Adjustments and methods for making TP adjustments as prescribed in Rule 10B and Section 92C of the Act. Prematurely pronouncing on these issues, definitely curtails the discretion of the Assessing Authorities in this regard and as we have said above, it is a self defeating exercise, which the High Court in its

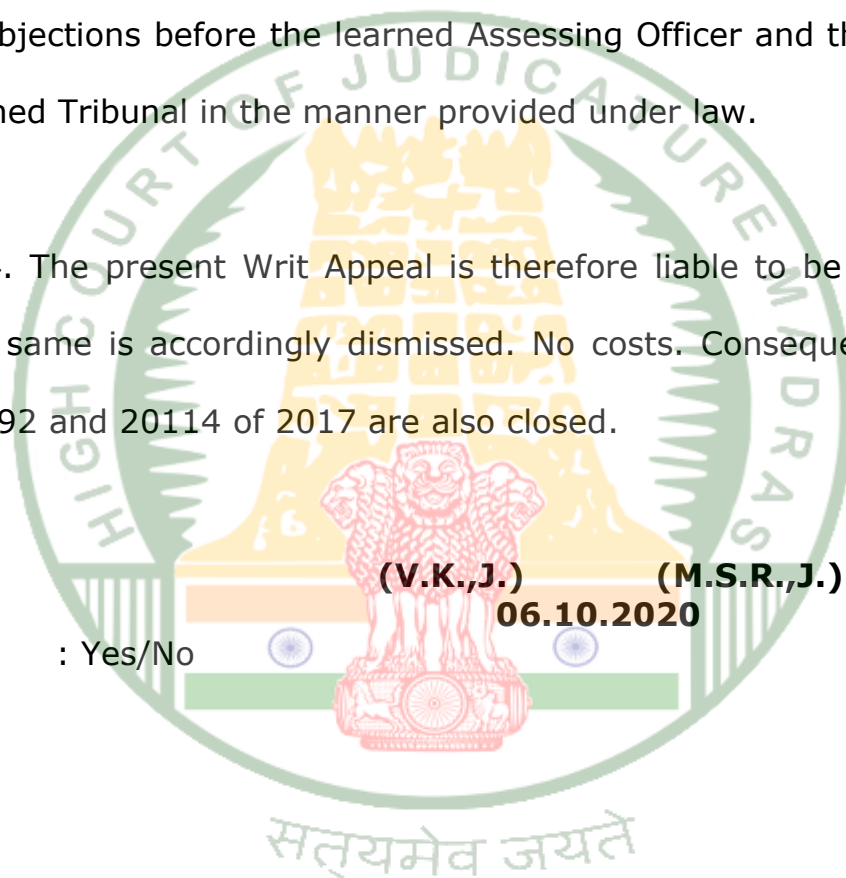
Writ Jurisdiction should be reluctant to undertake.

13. Therefore we are not inclined to interfere with the order of the learned Single Judge and leaving it free for the Assessee to raise all the objections before the learned Assessing Officer and then before the learned Tribunal in the manner provided under law.

14. The present Writ Appeal is therefore liable to be dismissed and the same is accordingly dismissed. No costs. Consequently, CMP Nos.18592 and 20114 of 2017 are also closed.

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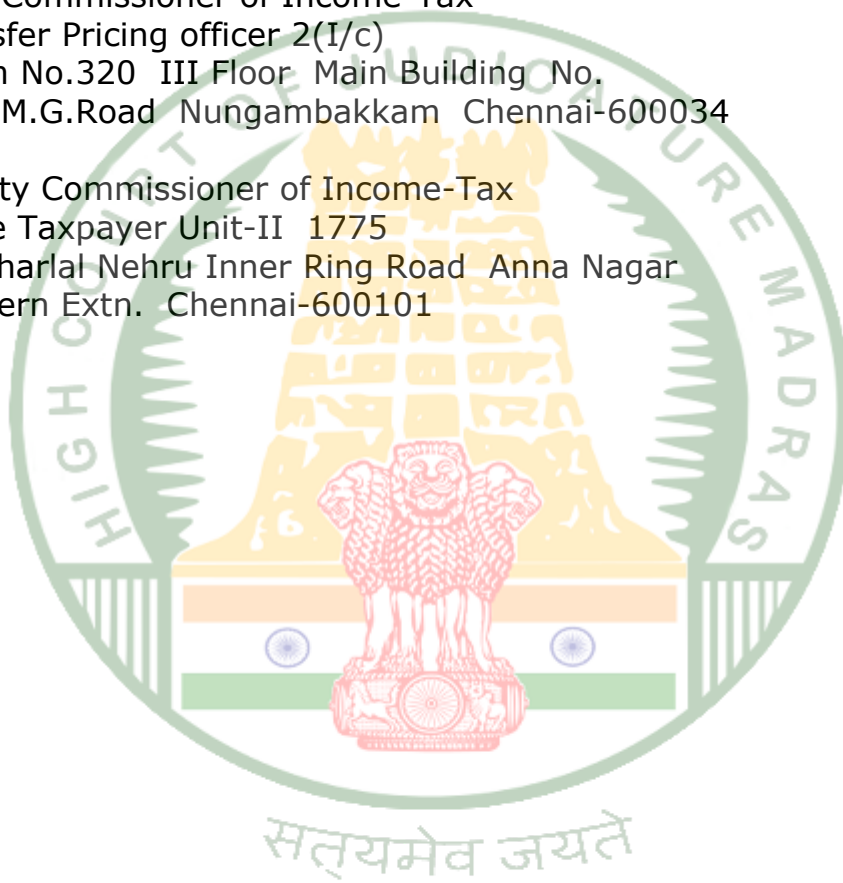
: Yes/No



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To

- 1 The Secretary Income Tax Department
Dispute Resolution Panel-2
7th Floor Income Tax Office BMTC Building
80 feet road Koramangala Bangalore
- 2 Joint Commissioner of Income-Tax
Transfer Pricing officer 2(I/c)
Room No.320 III Floor Main Building No.
121 M.G.Road Nungambakkam Chennai-600034
- 3 Deputy Commissioner of Income-Tax
Large Taxpayer Unit-II 1775
Jawaharlal Nehru Inner Ring Road Anna Nagar
Western Extn. Chennai-600101



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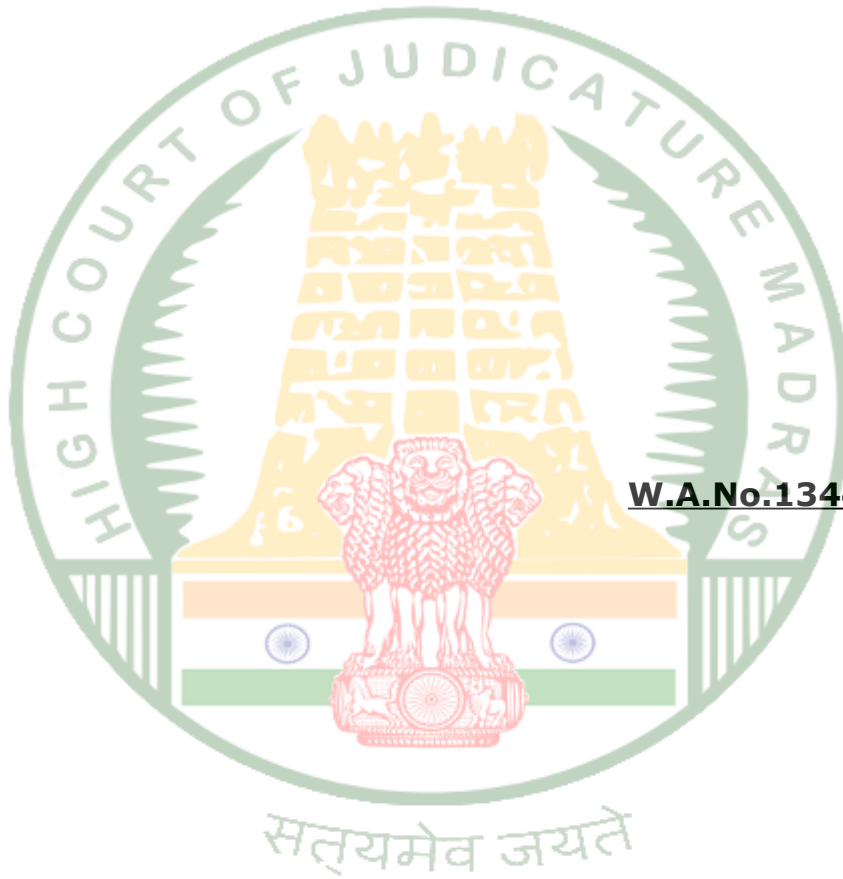
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