

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 7720 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH

and

HONOURABLE MR.JUSTICE B.N. KARIA

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

M/S ALPHA NIPON INNOVATIVES LTD.....Petitioner(s)

Versus

DY. COMMISSIONER OF INCOME TAX, CIRCLE 1(1)(1) & 1....Respondent(s)

Appearance:

MR RK PATEL, ADVOCATE WITH DARSHAN R. PATEL, ADVOCATE for the Petitioner.

MR M R BHATT, ADVOCATE WITH MS MAUNA M BHATT, ADVOCATE for the

Respondents.

CORAM: HONOURABLE MR.JUSTICE M.R. SHAH

and

HONOURABLE MR.JUSTICE B.N. KARIA

Date : 16/11/2016

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

1. Rule. Mrs. Mauna N. Bhatt, learned advocate waives service of notice of rule on behalf of the respondents. In the facts and circumstances of the case and with the consent of the learned advocates appearing for the respective parties, the present petition is taken up for final hearing today.

2. By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed for an appropriate writ, order or direction to quash and set aside/cancel the reference made by the Assessing Officer to the Transfer Pricing Officer (for short "TPO").

3. The main grievance which is voiced in the present petition is that despite the specific instructions issued by the CBDT issued vide Instruction No.3/2016 dated 10th March, 2016, by which, before making a reference to the TPO, the Assessing Officer is required to deal with the objection raised by the petitioner - assessee and is required to pass a speaking order. In the present case, the Assessing Officer has made a reference to the TPO without passing any speaking order on the objection raised by the petitioner - assessee.

4. Mr. R. K. Patel, learned advocate appearing on behalf of the petitioner - assessee has heavily relied upon para 3.4 and para 7 of the instructions issued by the CBDT vide Instruction No.3/2016 dated 10th March, 2016. Learned advocate for the petitioner - assessee has also heavily relied upon the decision of the Delhi High Court in the case of **Indorama Synthetics (India) Ltd. v.**

Additional Commissioner of Income-Tax, [(2016) 71 Taxmann.com 349 (Delhi)].

5. Mr. M. R. Bhatt, learned advocate appearing on behalf of the revenue relying upon para 3.3 of the Instruction No.3/2016 dated 10th March, 2016, has tried to oppose the objection by submitting that, in the present case, admittedly, the assessee though entered into specified domestic transactions but did not file the accountant's report under Section 92E, the Assessing Officer has rightly made a reference to the TPO. It is also submitted that, even in the reply to the notice dated 12.1.2016, the assessee specifically admitted that it entered into the transaction amounting to Rs.3,59,80,168/- as the transaction have been entered into with the relative. However, subsequently the assessee wants to back out from the same.

6. On the other hand, it is the case on behalf of the assessee that the aforesaid was a mistake on the part of the Chartered Accountant, and, according to the assessee, the aforesaid transaction does not amount to any transaction with the relative and, therefore, Section 92E shall not be attracted.

7. Having heard the learned advocates for the respective parties and considering the material on record, it is an undisputed fact that no speaking order has been passed by the Assessing Officer while making a reference to the TPO, which is a requirement as per the Instruction No.3/2016 dated 10th March, 2016, issued by the CBDT. Before making a reference to the TPO, the assessee is required to be

given an opportunity to show-cause why the reference may not be made to the TPO and thereafter a speaking order is required to be passed by the Assessing Officer while making a reference to the TPO.

8. Under the circumstances, on the aforesaid ground alone, the impugned reference made by the Assessing Officer to the TPO deserves to be quashed and set aside and the matter is required to be remanded to the Assessing Officer to pass a speaking order while making a reference to the TPO. For that purpose, as agreed between the learned advocates for the respective parties, the communication of the reply dated 22.1.2016 be treated as objection raised by petitioner – assessee against making a reference to the TPO. At this stage, Mr. M. R. Bhatt, learned advocate appearing on behalf of the revenue has apprehended that if the matter is remanded and the Assessing Officer is required to pass a fresh speaking order by making a reference to the TPO (after considering the objection submitted by the petitioner – assessee) that a question with respect to limitation may arise.

9. To the aforesaid, Mr. R. K. Patel, learned advocate appearing on behalf of the petitioner – assessee has stated at the Bar that, if the matter is remanded to the Assessing Officer for passing a fresh order while making a reference to the TPO (after considering the objection raised by the petitioner – assessee) and thereafter the reference is made to the TPO, the petitioner – assessee shall not raise issue/question with respect to limitation.

10. In view of the above and for the reasons stated above, on the aforesaid ground alone, the impugned reference made by the Assessing Officer to the TPO is hereby quashed and set aside and the matter is remitted to the Assessing Officer to pass a speaking order while making a reference to the TPO (after considering the objection raised by the petitioner – assessee). Such exercise shall be completed within a period of four weeks from today. As agreed by learned advocate Mr. R. K. Patel appearing on behalf of the petitioner – assessee, if, on remand, after considering the objection raised by the petitioner – assessee, a speaking order is passed and the Assessing Officer forms an opinion that reference is to be made to the TPO, the petitioner – assessee shall not take a plea of limitation. Rule is made absolute to the aforesaid extent. No costs.

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(M.R. SHAH, J.)

THE HIGH COURT
OF GUJARAT

(B.N. KARIA, J.)

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