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IT/ILT: Under provisions of section 92CA, a reference to TPO for computation of arm's length price in relation to international transactions is permissible only in course of assessment proceedings

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[2015] 54 taxmann.com 234 (Pune - Trib.)

IN THE ITAT PUNE BENCH 'A'

Maximize Learning (P.) Ltd.

v.

Assistant Commissioner of Income-tax, Circle -11(2), Pune*

G.S. PANNU, ACCOUNTANT MEMBER
AND R.S. PADVEKAR, JUDICIAL MEMBER
IT APPEAL NO. 2234 (PUNE) OF 2012
[ASSESSMENT YEAR 2007-08]
FEBRUARY 2, 2015

Section 92CA, read with sections 143 and 147, of the Income-tax Act, 1961 - Transfer pricing - Reference to TPO (Reassessment) - Assessment year 2007-08 - Whether under provisions of section 92CA, a reference to TPO for computation of arm's length price in relation to international transactions is permissible only in course of assessment proceedings - Held, yes - Whether in case where a return is filed and is processed and no notice under sub-section (2) of section 143 thereafter is served on assessee within stipulated period, assessment proceedings under section 143 come to an end and matter becomes final - Held, yes - Whether where on date of making reference to TPO, assessment proceedings under section 143 had come to an end and proceedings for assessment stood terminated, there was no occasion for Assessing Officer to have made a reference to TPO for determination of arm's length price of international transactions in terms of section 92CA - Held, yes - Whether, consequently, subsequent order passed by TPO determining adjustment to international transaction was a nullity in law and void ab initio - Held, yes - Whether in these circumstances order of TPO could not be a valid material for Assessing Officer to entertain a belief that certain income chargeable to tax had escaped assessment within meaning of section 147 - Held, yes [Paras 25 to 28] [In favour of assessee]

Circulars and Notifications: Circular No. 549, dated 31-10-1989 & Instruction No. 3, dated 20-5-2003

FACTS

- The assessee was engaged in the business of providing Information Technology enabled services. The assessee filed its return for relevant assessment year on 5-11-2007.
- Notice for scrutiny assessment under section 143(2) was to be filed on or before 30-9-2008 as per existing provision. Same was not done, hence assessment under section 143 became final and there was no assessment pending.
- Thereafter, on 14-9-2009, reference was made to the TPO for determination of international transaction. The TPO determined total income including TP addition of Rs. 1.75 crores on account of arm's length price of the international transaction of provision of IT enabled services to associate enterprise.

- Thereafter, based on the TPO's order the Assessing Officer recorded reasons in terms of section 147 and had formed a belief that income chargeable to tax relating to the international transaction had escaped income and accordingly he issued a notice under section 148.
- On appeal, the assessee challenged the validity of the proceedings initiated by Assessing Officer by issuing notice under section 148, and also challenging the addition on merits.

HELD

- The crux of the controversy revolves around the provisions of section 147/148 which empower an Assessing Officer to assess or reassess such income which has escaped assessment. Section 147 postulates that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may subject to the provisions of sections 148 to 153, assess or re-assess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of proceedings under this section. A significant expression contained in section 147 is *'reason to believe'*. It is judicially well-settled that such belief of the Assessing Officer must be based on some material on record. In other words, there must be some material on record to enable the Assessing Officer to entertain a belief that certain income chargeable to tax has escaped assessment for the relevant assessment year. [Para 10]
- In the instant case, the pertinent point set up by the assessee is that the Assessing Officer has entertained the belief for escapement of income based on an order of the TPO under section 92CA(3) which is *non est* and *void ab initio*. The fundamental point canvassed by the appellant is that the reference under section 92CA made by the Assessing Officer to the TPO for computing the arm's length price was invalid because when the reference was made, no assessment proceedings were pending in relation to the instant assessment year. [Para 11]

Whether the reference made by the Assessing Officer to the TPO for determination of arm's length price is valid or not ?

- Notably, the entire scheme and mechanism to compute any income arising from an international transaction entered between associated enterprises is contained in sections 92 to 92F.
- The scheme of the Act postulates that arm's length price in relation to an international transaction is determined either by the Assessing Officer as provided in sub-section (3) of section 92C or by the TPO under section 92CA(3) where a reference is made to him by the Assessing Officer. In both situations, the Assessing Officer is required to compute the total income of the assessee having regard to the arm's length price of the international transaction so determined, either in terms of sub-section (4) of section 92C or sub-section (4) of section 92CA. Notably, sub-section (4) of section 92C comes into play where an arm's length price in relation to the international transaction is determined by the Assessing Officer and sub-section (4) of section 92CA comes into play where the arm's length price in relation to an international transaction is determined by the TPO, on a reference by the Assessing Officer. In the instant case, the total income of the assessee has been computed having regard to the arm's length price determined by the TPO under section 92CA(3) and therefore the Assessing Officer has taken recourse to section 92CA(4). [Para 14]
- It is quite clear that the process of determination of arm's length price is to be carried out during the course of assessment proceedings, may it be, under sub-section (3) of section 92C where the Assessing Officer determines the arm's length price or under sub-sections (1) to (3) of section 92CA, where the Assessing Officer refers the determination of arm's length price to the TPO. A reference may also be made to the provisions of section 143(3) dealing with assessment of income. In terms of clause (ii) of sub-section (3) of section 143, it is prescribed that the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund on any amount due to him on the basis of such assessment. It is only in the course of such assessment of total income, that the Assessing Officer is obligated to compute any income arising from an international transaction of an assessee with associated enterprises, having regard to the arm's length price. In this background, is it not appropriate to infer that the provisions of sections 92 to 92F get triggered only during the pendency of the process of assessment of total income before the Assessing Officer, which culminates in an order under section 143(3) or section 144, as the case may be ? [Para 15]

- In fact, the occasion which requires the Assessing Officer to compute income from an international transaction arises only during the assessment proceedings, wherein he is determining the total income of the assessee. [Para 16]

- It is emphasized on the basis of the CBDT Instruction No.3, dated 20-5-2003 that even as per the understanding of the CBDT, a case is to be selected for scrutiny assessment before the Assessing Officer may refer the computation of arm's length price in relation to an international transaction to the TPO under section 92CA. Therefore, the position sought to be canvassed by the assessee that an Assessing Officer can make reference to the TPO under section 92CA only after selecting the case for scrutiny assessment is to be upheld. In fact, the observations of the CBDT Instruction (supra) is a pointer to the legislative import that the reference to the TPO for determining the arm's length price in relation to an international transaction is envisaged only in the course of the assessment proceedings, which is the only process known to the Act, whereby the assessment of total income is done. As per the CBDT (supra), the Assessing Officer may proceed to examine other aspects of the case during pendency of assessment proceedings but await the report of the TPO on the value of the international transactions before making assessment since the case would be selected for scrutiny before making reference to the TPO. [Para 17]

- The CBDT norms also provide that a case which is not directly covered under the aforesaid compulsory scrutiny norm, can also be selected for scrutiny if the Assessing Officer records a satisfaction and seeks the approval of the CCIT/DGIT (International Taxation)/DGIT (Exemption). The aforesaid norm has been pointed out to say that in order to pick-up a case for scrutiny, some satisfaction is required to be recorded before the notice under section 143(2) is to be issued. This exercise, according to the Commissioner, could very well be the reference of the matter of the TPO, therefore, the stipulated period laid down by the CBDT does not pre-suppose that the issue of notice under section 143(2) has to be necessarily and without fail precede the reference to TPO. [Para 18]

- The plea of the Commissioner, that it is open to the department to make a reference to the TPO without issuing notice under section 143(2) has been considered, but, it is not supported by a schematic reading of the relevant provisions relating to the transfer pricing assessment contained in sections 92 to 92F. The entire purpose of computation of arm's length price in relation to an international transaction is found in sub-section (1) of section 92. Section 92(1) mandates that any income arising from an international transaction shall be computed having regard to the arm's length price. Therefore, the sole aim of computing the arm's length price in relation to any international transaction is to compute the income arising therefrom. Thus, the computation of income and the determination of arm's length price in relation to the international transaction have to go hand-in-hand and without there being an occasion to compute income arising from an international transaction, it is difficult to comprehend the process for computation of arm's length price in relation to the relevant international transaction. Therefore, it would not be open for the department to say that the process of computing arm's length price of an international transaction or a reference to the TPO to determine arm's length price can be initiated in the absence of any proceeding for computing total income of the assessee. [Para 19]

- Thus, the scheme of the Act as has been dealt earlier, establishes that the work of computing the arm's length price in relation to international transaction arises only and only when the income from such international transaction is being assessed. Certainly, the reference to the TPO for the computation of arm's length price cannot precede the initiation of the assessment proceedings by the Assessing Officer by issuance of notice under section 143(2). [Para 20]

- The provisions of sections 92 to 92F relate to computation of income from the international transaction having regard to the arm's length price, meaning of associated enterprises, meaning of international transaction, determination of arm's length price, keeping and maintaining of information and documents by persons entering into international transactions, furnishing of a report from an accountant by persons entering into such transaction and the definition of certain expressions occurring in such sections. The aforesaid provisions do not operate in individual spheres but the same operate with a singular purpose of computing income arising from an international transaction. The process of computation of income is necessarily a part and parcel of the assessment proceedings envisaged under the Act. Section 92CA is not an independent provision, but it is triggered only when the occasion arises for application of section 92(1), whereby income from an international transaction is to be computed having regard to its arm's length price; and, the occasion to compute the income would arise only when there is an on-going assessment proceeding. Therefore, reference made by the Commissioner to the phraseology of section

92CA(1) to say that only two conditions are prescribed therein are to be fulfilled by the Assessing Officer before referring the matter to the TPO without considering the entire schematic arrangement of sections 92 to 92F would be incorrect. [Para 22]

- Therefore, the Assessing Officer is precluded from making a reference to the TPO under section 92CA(1) Act for the purposes of computing arm's length price in relation to the international transaction when no assessment proceedings are pending in relation to the relevant assessment year. [Para 23]

Whether when the Assessing Officer made a reference to the TPO under section 92CA(1), was there an assessment proceeding under section 143 pending for the year under consideration ?

- In the instant case, no notice had been issued within six months from the end of the relevant assessment year, thus, the return of income filed by the assessee became final as no scrutiny proceedings were started within the period stipulated in law. The aforesaid position is also reinforced by the CBDT Circular No.549, dated 31-10-1989. As per the CBDT, if, after furnishing return of income, an assessee does not receive a notice under section 143(2) from the department within period stipulated in the proviso to section 143(2), it follows that the return filed by the assessee has become final and no scrutiny proceedings should be started in respect of that return. In other words, in the instant case, assessment proceedings under section 143 came to end and the matter became final on the date within which a notice under section 143(2) was required to be issued, which was not done. [Para 25]

- In this background, if on the date of making of reference to the TPO, the assessment proceedings under section 143 had come to an end and the proceedings for assessment stood terminated, there was no occasion for the Assessing Officer to have made a reference to the TPO for determination of arm's length price of the international transactions in terms of section 92CA. [Para 26]

- In view of the aforesaid discussion, it has to be inferred that when the Assessing Officer made reference to the TPO for determination of arm's length price in relation to an international transaction, there was no assessment proceedings pending, and therefore it was an invalid reference. Consequently, the subsequent order passed by the TPO determining the adjustment to the international transaction is a nullity in law and *void ab initio*. [Para 27]

Whether, in the above circumstances, the order of the TPO can be a valid material for the Assessing Officer to entertain a belief that certain income chargeable to tax has escaped assessment within the meaning of section 147 ?

- The validity of the notice reopening the assessment under section 148 Act has to be determined on the basis of the reasons which are disclosed to the assessee. Those reasons constitute the foundation of the action initiated by the Assessing Officer of reopening the assessment. The averments made by the Commissioner regarding the compulsory scrutiny of returns which involved international transactions and/or that the Form No.3CEB was not filed with the Assessing Officer, are reasons which are not finding a place in the reasons recorded by the Assessing Officer for re-assessment. It's a trite law that the reasons recorded by the Assessing Officer are alone to be examined so as to test their validity. [Para 31]

- Validity of the reopening of assessment has to be determined with reference to the reasons which had weighed with the Assessing Officer and those cannot be added to or supported on a basis which was not present to the mind of the Assessing Officer when he issued the notice to reopen the assessment. Thus the validity of the issuance of notice of re-assessment based on the explanation/reasons now sought to be supplemented by the Commissioner, which otherwise do not find a place in the reasons recorded by the Assessing Officer could not be considered. [Para 32]

- Therefore, since the reasons recorded by the Assessing Officer in the present case do not meet with the requirements of section 147 and therefore the Assessing Officer had no jurisdiction to issue notice under section 148. As a consequence, the subsequent assessment order passed under section 143(3), read with sections 147 and 144C(13) is liable to be quashed. In the result, the appeal of the assessee is allowed [Para 35]

CASE REVIEW

Pooran Mal v. *DIT* [1974] 93 ITR 505 (SC) (para 33) and *Coca Cola India Inc.* v. *Asstt. CIT* [2009] 309 ITR 194/177 Taxman 103 (Punj. & Har.) (para 34) *distinguished.*

Vipan Khanna v. *CIT* [2002] 255 ITR 220/122 Taxman 1 (Punj. & Har.); *CIT* v. *M. Chellappan* [2006] 281 ITR 444 (Mad); *CIT* v. *Deep Baruah* [2010] 329 ITR 362 (Mad.) (para 25) and *Brig B. Lall* v. *WTO* [1981] 127 ITR 308/[1980] 4 Taxman 559 (Raj.) (para 33) *followed*.

CASES REFERRED TO

Rajgarh Liquors v. *CIT* [2004] 89 ITD 84 (Indore) (para 6), *Babulal Lath* v. *Asstt. CIT* [2002] 83 ITD 691 (Mum.) (para 6), *Vipan Khanna* v. *CIT* [2002] 255 ITR 220/122 Taxman 1 (Punj. & Har.) (para 25), *CIT* v. *M. Chellappan* [2006] 281 ITR 444 (Mad.) (para 25), *CIT* v. *Deep Baruah* [2010] 329 ITR 362 (Mad.) (para 25), *Pooran Mal* v. *DIT* [1974] 93 ITR 505 (SC) (para 30), *Northern Exim (P.) Ltd.* v. *Dy. CIT* [2013] 357 ITR 586/[2012] 20 taxmann.com 466/208 Taxman 175 (Delhi) (Mag.) (para 31), *Jamna Lal Kobra* v. *ITO* [1968] 69 ITR 461 (All.) (para 31), *CIT* v. *Agarwalla Bros.* [1991] 189 ITR 786 (Pat.) (para 31), *C.M. Rajgharia* v. *ITO* [1975] 98 ITR 486 (Pat.) (para 31), *Asa John Devinathan* v. *Addl. CIT* [1980] 126 ITR 270 (Mad.) (para 31), *East Coast Commercial Co. Ltd.* v. *ITO* [1981] 128 ITR 326 (Cal.) (para 31), *Equitable Investment Co. (P.) Ltd.* v. *ITO* [1988] 174 ITR 714 (Cal.) (para 31), *S. Sreeramachandra Murthy* v. *Dy. CIT* [2000] 243 ITR 427/111 Taxman 338 (AP) (para 31), *3i Infotech Ltd.* v. *Asstt. CIT* [2010] 329 ITR 257/192 Taxman 137 (Bom.) (para 32), *Brig B. Lall* v. *WTO* [1981] 127 ITR 308/[1980] 4 Taxman 559 (Raj.) (para 33) and *Coca Cola India Inc.* v. *Asstt. CIT* [2009] 309 ITR 194/177 Taxman 103 (Punj. & Har.) (para 34).

Arvind Sondhe, **Pramod Joshi** and **Rugved Apte** *for the Appellant.* **Mrs. M.S. Verma**, CIT *for the Respondent.*

ORDER

G. S. Pannu, Accountant Member - The captioned appeal has been preferred by the assessee pertaining to the assessment year 2007-08, which is directed against the order of the Asstt. Commissioner of Income-tax, Circle 11(2), Pune (in short 'the Assessing Officer') passed u/s 143(3) r.w.s. 147 and 144C(13) of the Income-tax Act, 1961 (in short "the Act") dated 28.09.2012, which is in conformity with the directions given by the Dispute Resolution Panel, Pune (in short 'the DRP') dated 29.08.2012.

2. In this appeal, Grounds of Appeal raised by the assessee read as under: —

> "The Appellant objects to the order dated September 28, 2012 passed by the learned Assistant Commissioner of Income Tax, Circle 11(2), Pune ["ACIT"] under section 143(3) r.w.s. 147 and 144C of the Income-tax Act, 1961 ["the Act'] in pursuance of the directions of the learned Dispute Resolution Panel, Pune ["DRP"] dated August 29, 2012 for the assessment year 2007-08 on the following among other grounds:
>
> **1. Inappropriate re-opening of the assessment under section 148 of the Act**
>
> 1.1 The learned ACIT pursuant to the directions of the learned DRP erred in law and on the facts and in circumstances of the case in re-opening the assessment under section 148 of the Act.
>
> **2. Transfer Pricing adjustment**
>
> 2.1 The learned ACIT pursuant to the directions of the learned DRP erred in law and on the facts and in circumstances of the case in making an adjustment amounting to Rs.17,570,070/- to the value of international transactions entered into by the Appellant with its Associated Enterprise in respect of provision of Information Technology Enabled Services ("ITES").
>
> **3. Inappropriate calculation of operating margin of comparable companies**
>
> 3.1 The learned ACIT pursuant to the directions of the learned DRP erred in calculating the average operating margin of comparable companies.
>
> **4. Inappropriate calculation of working capital adjustment**
>
> 4.1 The learned ACIT pursuant to the directions of the learned DRP erred in law and on the facts and in calculating the working capital adjustment considering the sales as basis for calculation against correct base of operating cost.

4.2 While granting the working capital adjustment, the learned ACIT pursuant to the directions of the learned DRP erred in law and on the facts and in circumstances of the case in not considering the inventory as a part of working capital of Pentamedia Graphics Limited.

5. Erroneous selection of comparable companies

5.1 The learned ACIT pursuant to the directions of learned DRP has erred in law and on the facts and in circumstances of the case in selecting Coral Hub Ltd. as a comparable company.

6. Benefit of the risk adjustment

6.1 The learned ACIT pursuant to the directions of learned DRP has erred in law and on the facts and in circumstances of the case in not granting the risk adjustment.

7. Benefit of the variation/reduction of 5 percent from the arithmetic mean

7.1 The learned ACIT pursuant to the directions of learned DRP has erred in law and on the facts and in circumstances of the case in not granting the benefit of+/- 5 percent as per proviso to section 92C (2) of the Act.

8. Initiation of penalty proceedings

8.1 The learned ACIT erred on the facts and in law in initiating penalty proceedings section 271(1) (c) of the Act.

9. Levy of interest obligation on account of transfer pricing adjustment

9.1 The learned ACIT has erred on the facts and in law by levying interest under section 234B of the Act, on account of the unanticipated adjustments made by the learned TPO.

9.2 The Appellant pleads that the shortfall in advance tax has resulted in view of the adjustments which have been objected in the grounds above and accordingly is consequential in nature.

10. Each one of the above grounds of appeal is without prejudice to the other.

11. The Appellant reserves the right to amend, alter or add to the grounds of appeal."

3. In the Memo of Appeal, various Grounds have been raised, but the first and the foremost issue raised by the appellant is relating to the jurisdiction assumed by the Assessing Officer by issuing notice u/s 148 of the Act in order to make the impugned assessment order u/s 143(3) r.w.s. 147 and 144C of the Act. According to the appellant, the initiation of assessment proceedings by issuance of notice u/s 148 of the Act is bad in law and therefore the consequent assessment order is liable to be set-aside. Since the aforesaid issue goes to the root of the matter, the same is being adjudicated at the threshold.

4. The pertinent facts, which are relevant to adjudicate the aforesaid dispute can be summarized as follows. The appellant before us is a company incorporated under the provisions of the Companies Act, 1956 and is, inter-alia, engaged in the business of providing Information Technology enabled services. For the assessment year under consideration, it filed a return of income on 05.11.2007 declaring a total income of Rs.2,15,31,701/-. The said return of income was duly processed u/s 143(1) of the Act. The said return was not picked-up for scrutiny assessment because no notice u/s 143(2) of the Act was issued by the Assessing Officer within the period prescribed in clause (ii) of sub-section (2) of section 143 of the Act, as it stood at the relevant point of time. On 14.01.2011, the Assessing Officer recorded reasons in terms of section 147 of the Act and formulated a belief that certain income chargeable to tax had escaped assessment for the year under consideration and accordingly he issued a notice u/s 148 of the Act of even date calling for a return of income. In the subsequent assessment made u/s 143(3) r.w.s. 147 and 144C(13) of the Act dated 28.09.2012, Assessing Officer determined the total income at Rs.3,91,01,770/-, which inter-alia, included an addition of Rs.1,75,70,070/- on account of arm's length price of the international transaction of Provision of IT enabled services to associate enterprise abroad. The aforesaid addition was made by the Assessing Officer in conformity with the arm's length price determined by the Transfer Pricing Officer (in short "the TPO") vide order dated 29.10.2010 (as revised on 27.09.2012) passed u/s 92CA(3) of the Act. It may also be noted that on receipt of the order of the TPO dated 29.10.2010, Assessing Officer passed a draft assessment order, against which assessee filed objections before the Dispute Resolution Panel (DRP). The DRP disposed-off the objections vide order dated 22.12.2011 and the TPO thereafter gave a revised working on 27.09.2012 on the basis of which the impugned transfer pricing adjustment of Rs.1,75,70,070/- has been made to the returned

income. Although, assessee has challenged the aforesaid addition on its merits also, we shall deal with the same a little later, but for the present we confine the discussion to the facts relating to assessee's challenge to the validity of the proceedings initiated by the Assessing Officer by issuance of notice u/s 148 of the Act dated 14.01.2011. In this context, it is also relevant to examine the reasons recorded by the Assessing Officer for initiating proceedings u/s 147/148 of the Act, which read as under :—

"M/s. Maximize Learning Pvt. Ltd.

A.Y. 2007-08

In the case reference u/s. 92CA(1) has been made to the TP office for the A.Y. 2007-08. The DCIT (TP-IV), Pune vide order u/s. 92CA(3), dated 29/10/2010 has worked out adjustment in relation to international transactions of Rs.2,49,43,811/-.

In view of the same, as per the adjustment of Rs.2,49,43,811/- to the total income, income chargeable to tax has escaped assessment within the meaning of section 147(C)(1) of the Income-tax Act, 1961.

I have therefore reasons to believe that income of Rs.2,49,43,811/-has escaped assessment for A.Y. 2007-08, on account of adjustment to International transactions carried out by the assessee.

The case satisfies conditions laid down in sections 149(1)(a) and 151(2) of the Income-tax Act, 1961.

Issue notice u/s.148 for A.Y."

5. A perusal of the aforesaid reasons recorded show that as per the Assessing Officer, the TPO vide order u/s 92CA(3) of the Act dated 29.10.2010 had worked out the adjustment in relation to international transaction of Rs.2,49,43,811/- on a reference made to him by the Assessing Officer u/s 92CA(1) of the Act. In view of the aforesaid order of the TPO, according to the Assessing Officer, income chargeable to tax has escaped assessment relating to the adjustment of Rs.2,49,43,811/- to the total income. In nutshell, the Assessing Officer has formed a belief about escapement of income based on the order of the TPO u/s 92CA(3) computing adjustment in relation to the international transactions of the assessee with its associated enterprises.

6. In the above background, now we may briefly record the contentions of the assessee challenging the validity of the proceedings initiated by issuance of notice u/s 148 of the Act and the defense mounted by the learned CIT-DR to support the initiation of proceedings. The learned counsel for the assessee firstly contended that the recourse to sections 147/148 of the Act in order to reopen the assessment is merely to circumvent the situation which arose from the fact that originally no notice was issued u/s 143(2) of the Act within the period prescribed. According to him, the requisite notice u/s 143(2) of the Act in order to frame a scrutiny assessment u/s 143(3) of the Act was to be issued upto 30.09.2008, which in the present case has not been done. Hence, the impugned reopening of assessment by issuance of notice u/s 148 of the Act is clearly to achieve the same goal albeit indirectly. According to him, the powers of reopening the assessment in terms of section 147/148 of the Act are wide, so however, the same cannot be construed so broadly so as to permit the Assessing Officer to rectify his errors under the garb of reopening. It is contended that in the present case, reopening has been done merely to correct an error committed by the Assessing Officer earlier, i.e. non-issuance of a notice u/s 143(2) of the Act, and the same is therefore bad in law. In this connection, reliance has been placed on the following decisions : (i) *Rajgarh Liquors* v. *CIT* [2004] 89 ITD 84 (Indore); and, (ii) *Babulal Lath* v. *Asstt. CIT* [2002] 83 ITD 691 (Mum.).

7. Secondly, it is canvassed by the learned counsel that the basis of reopening is flawed inasmuch as it is based on an incorrect reference made to the TPO u/s 92CA of the Act and therefore any further proceedings resulting therefrom deserve to be treated as illegal. In this context, it was sought to be pointed out that the Assessing Officer made a reference to the TPO for determination of arm's length price of the international transactions entered by the assessee with its associated enterprises on 14.09.2009, which was clearly belated inasmuch as, at that point of time no proceeding for assessment of income was pending before the Assessing Officer. Thus, the reference made to the TPO was incorrect and illegal, therefore the subsequent order of the TPO passed u/s 92CA(3) of the Act dated 29.10.2010 was *void ab initio*. Such an order cannot form a basis to form a belief that certain income chargeable to tax has escaped assessment within the meaning of section 147 of the Act.

8. Thirdly, it is canvassed before us that 'reason to believe' that certain income had escaped assessment as required by section 147 of the Act has to be that of the Assessing Officer alone and not that of any other

authority. By referring to the reasons recorded, it is sought to be pointed out that the only assertion of the Assessing Officer to conclude that he has 'reason to believe' that certain income chargeable to tax has escaped assessment is the fact that the TPO has worked out an adjustment of Rs.2,49,43,811/- in relation to the arm's length price of the international transactions. It is contended that the aforesaid does not fulfill the jurisdictional requirements of section 147 of the Act, which prescribe that the Assessing Officer has to have a 'reason to believe' that certain income chargeable to tax had escaped assessment. It is contended that in the instant case, the belief that any income of the assessee has escaped assessment is clearly not that of the Assessing Officer but it is that of the TPO and hence the impugned reasons recorded are contrary to the requirements of section 147 of the Act and deserve to be struck down.

9. Lastly, it is contended that the reasons recorded are without any application of mind by the Assessing Officer and on this count also the reopening of the assessment has to fail. In this context, it was sought to be pointed out that in the reasons recorded, Assessing Officer has referred to section 147(C)(1) of the Act, which is wrong, but assuming that the Assessing Officer had Explanation 2(c) to section 147 of the Act in his mind, then also it is a wrong assertion because the said Explanation applies "where an assessment has been made", whereas in the present case, no assessment was hitherto made for the year under consideration as the income tax return filed by the assessee was only subject to a processing u/s 143(1) of the Act and it was not picked-up for a scrutiny assessment u/s 143(3) of the Act. This, according to the learned counsel, indicates total non-application of mind by the Assessing Officer and thus on this count also the reopening of assessment has to fail. In sum and substance, the plea of the assessee is that the reasons recorded by the Assessing Officer for issuance of notice u/s 148 of the Act, which merely rely on an order passed by the TPO u/s 92CA(3) of the Act are bad in law and the consequential assessment is liable to be set-aside.

10. The crux of the controversy revolves around the provisions of section 147/148 of the Act which empower an Assessing Officer to assess or re-assess such income which has escaped assessment. Section 147 of the Act postulates that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may subject to the provisions of sections 148 to 153 of the Act, assess or re-assess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of proceedings under this section. A significant expression contained in section 147 of the Act is "reason to believe". It is judicially well-settled that such belief of the Assessing Officer must be based on some material on record. In other words, there must be some material on record to enable the Assessing Officer to entertain a belief that certain income chargeable to tax has escaped assessment for the relevant assessment year.

11. In the present case, the pertinent point setup by the assessee is that the Assessing Officer has entertained the belief for escapement of income based on an order of the TPO dated 29.10.2010 u/s 92CA(3) of the Act which is nonest and *void ab initio*. The fundamental point canvassed by the appellant is that the reference u/s 92CA made by the Assessing Officer to the TPO for computing the arm's length price was invalid because when the reference was made on 14.09.2009, no assessment proceedings were pending in relation to the instant assessment year.

12. At this stage, it would be appropriate to consider whether the reference made by the Assessing Officer to the TPO on 14.09.2009 for determination of arm's length price is valid or not ? For the said purpose, we may briefly touch-upon the relevant provisions relating to the transfer pricing assessment which are contained in sections 92 to 92F of the Act under Chapter – X relating to the "Special Provisions Relating To Avoidance Of Tax". Sections 92 to 92F of the Act were introduced by the Finance Act, 2001 and are effective from the assessment year 2002-03. Section 92(1) of the Act provides that any income arising from an international transaction between associated enterprises shall be computed having regard to the arm's length price. Sections 92A and 92B of the Act contain provisions relating to the meaning of the expressions "associated enterprise" and "international transaction" respectively. Section 92C of the Act contains the powers of the Assessing Officer and the manner of determination of arm's length price in relation to an international transaction. Section 92CA of the Act provides that where the Assessing Officer considers it necessary or expedient to do so, he may refer to the Transfer Pricing Officer the determination of the arm's length price. Section 92CB of the Act relates to the power of the Board to make safe harbour rules. Section 92D of the Act relates to Maintenance and keeping of information and document by persons entering into an international transaction. Section 92E of the Act prescribes that the person entering into international transaction shall furnish a report from a chartered accountant in Form No.3CEB. Section 92F of the Act contains definitions of certain terms which are relevant to compute arm's length price, etc. in terms of sections 92 to 92F of the Act.

13. Notably, the entire scheme and mechanism to compute any income arising from an international transaction entered between associated enterprises is contained in sections 92 to 92F of the Act. Now, we may deal in slight detail the provisions of transfer pricing assessment which are relevant in the context of controversy before us. Section 92(1) of the Act mandates that any income arising from an international transaction shall be computed having regard to the arm's length price. Section 92C, inter-alia, prescribes the methods for computation of arm's length price in relation to an international transaction. Sub-section (3) of section 92C of the Act empowers the Assessing Officer to determine the arm's length price in relation to an international transaction in accordance with the methods prescribed in sub-section (1), on the basis of material or information or documents available with him, after allowing the assessee an opportunity in this regard; and, sub-section (4) of section 92C provides that where the Assessing Officer so determines the arm's length price, he may compute the total income of the assessee having regard to the arm's length price so determined. However, section 92CA of the Act provides that where the Assessing Officer considers it necessary or expedient so to do, he may refer the computation of arm's length price in relation to an international transaction to the TPO. In such a situation, the TPO, after taking into account the material before him, pass an order in writing u/s 92CA(3) of the Act determining the arm's length price in relation to an international transaction. On receipt of this order, sub-section (4) of section 92CA of the Act requires the Assessing Officer to compute the total income of the assessee in conformity with the arm's length price so determined by the TPO. In other words, the determination of the arm's length price, wherever a reference is made to him, is done by the TPO under sub-section (3) of section 92CA but the computation of total income having regard to the arm's length price so determined by the TPO is required to be done by the Assessing Officer under sub-section (4) of section 92C, read with sub-section (4) of section 92CA.

14. In sum and substance, the scheme of the Act postulates that arm's length price in relation to an international transaction is determined either by the Assessing Officer as provided in sub-section (3) of section 92C or by the TPO u/s 92CA(3) of the Act where a reference is made to him by the Assessing Officer. In both situations, the Assessing Officer is required to compute the total income of the assessee having regard to the arm's length price of the international transaction so determined, either in terms of sub-section (4) of section 92C or sub-section (4) of section 92CA. Notably, sub-section (4) of section 92C comes into play where an arm's length price in relation to the international transaction is determined by the Assessing Officer and sub-section (4) of section 92CA comes into play where the arm's length price in relation to an international transaction is determined by the TPO, on a reference by the Assessing Officer. In the case before us, the total income of the assessee has been computed having regard to the arm's length price determined by the TPO under section 92CA(3) of the Act and therefore the Assessing Officer has taken recourse to section 92CA(4) of the Act.

15. It is quite clear that the process of determination of arm's length price is to be carried out during the course of assessment proceedings, may it be, under sub-section (3) of section 92C where the Assessing Officer determines the arm's length price or under sub-sections (1) to (3) of section 92CA, where the Assessing Officer refers the determination of arm's length price to the TPO. We may also refer to the provisions of section 143(3) of the Act dealing with assessment of income. In terms of clause (ii) of sub-section (3) of section 143, it is prescribed that the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund on any amount due to him on the basis of such assessment. It is only in the course of such assessment of total income, that the Assessing Officer is obligated to compute any income arising from an international transaction of an assessee with associated enterprises, having regard to the arm's length price. In this background, is it not appropriate to infer that the provisions of section 92 to 92F of the Act get triggered only during the pendency of the process of assessment of total income before the Assessing Officer, which culminates in an order under section 143(3) or section 144 of the Act, as the case may be ?

16. In-fact, the occasion which requires the Assessing Officer to compute income from an international transaction arises only during the assessment proceedings, wherein he is determining the total income of the assessee. The appellant has canvassed the aforesaid position before us and in this context reference has also been made to the CBDT Instruction No.3 dated 20th May, 2003 the relevant portion of which read as under : —

> ". . . . . The Central Board of Direct Taxes, therefore, have decided that wherever the aggregate value of international transaction exceeds Rs.5 crores, the case should be picked up for scrutiny and reference under section 92CA be made to the TPO. If there are more than one transaction with an associated enterprise or there are transactions with more than one associated enterprises the aggregate value of

which exceeds Rs.5 crores, the transactions should be referred to the TPO. Before making reference to the TPO, the Assessing Officer has to seek approval of the Commissioner/Director as contemplated under the Act. *Under the provisions of section 92CA reference is in relation to the international transaction. Hence all transactions have to be explicitly mentioned in the letter of reference. Since the case will be selected for scrutiny before making reference to the TPO, the Assessing Officer may proceed to examine other aspects of the case during pendency of assessment proceedings but await the report of the TPO on the value of international transaction before making final assessment.*" [underlined for Emphasis by us]

17. It is emphasized on the basis of the CBDT Instruction (supra) that even as per the understanding of the CBDT, a case is to be selected for scrutiny assessment before the Assessing Officer may refer the computation of arm's length price in relation to an international transaction to the TPO u/s 92CA of the Act. Therefore, we are inclined to uphold the position sought to be canvassed by the assessee that an Assessing Officer can make reference to the TPO u/s 92CA of the Act only after selecting the case for scrutiny assessment. In-fact, the aforesaid underlined observations of the CBDT Instruction (supra) is a pointer to the legislative import that the reference to the TPO for determining the arm's length price in relation to an international transaction is envisaged only in the course of the assessment proceedings, which is the only process known to the Act, whereby the assessment of total income is done. As per the CBDT (supra), the Assessing Officer may proceed to examine other aspects of the case during pendency of assessment proceedings but await the report of the TPO on the value of the international transactions before making assessment since the case would be selected for scrutiny before making reference to the TPO.

18. In the context of the aforesaid controversy, we may refer to the arguments raised by the Ld. CIT-DR whereby it is contended that it was open for the Assessing Officer to make a reference to the TPO for determination of arm's length price without issuing notice u/s 143(2) of the Act; in other words, as per the Revenue, reference to the TPO u/s 92CA of the Act can be made even if no assessment proceeding is pending before the Assessing Officer. In this context, it is submitted that the annual norms for selection of cases for scrutiny prescribed by the CBDT for assessment year 2007-08, inter-alia, prescribed compulsory scrutiny in all cases where the total value of international transactions as defined in section 92B exceeded Rs.15 crores. According to her, in such a case, the Assessing Officer can very well issue the notice u/s 143(2) of the Act and then make a reference to the TPO. However, it is submitted that the CBDT norms also provide that a case which is not directly covered under the aforesaid compulsory scrutiny norm, can also be selected for scrutiny if the Assessing Officer records a satisfaction and seeks the approval of the CCIT/DGIT (International Taxation)/DGIT (Exemption). The aforesaid norm has been pointed out to say that in order to pick-up a case for scrutiny, some satisfaction is required to be recorded before the notice u/s 143(2) of the Act is to be issued. This exercise, according to the Ld. CIT-DR, could very well be the reference of the matter of the TPO, therefore, the stipulated period laid down by the CBDT does not pre-suppose that the issue of notice u/s 143(2) of the Act has to be necessarily and without fail precede the reference to TPO.

19. We have carefully considered the plea of the Ld. CIT-DR, that it is open to the Department to make a reference to the TPO without issuing notice u/s 143(2) of the Act, but in our view, it is not supported by a schematic reading of the relevant Provisions relating to the transfer pricing assessment contained in sections 92 to 92F. The entire purpose of computation of arm's length price in relation to an international transaction is found in sub-section (1) of section 92 of the Act. Section 92(1) mandates that any income arising from an international transaction shall be computed having regard to the arm's length price. Therefore, the sole aim of computing the arm's length price in relation to any international transaction is to compute the income arising therefrom. Thus, the computation of income and the determination of arm's length price in relation to the international transaction have to go hand-in-hand and without there being an occasion to compute income arising from an international transaction, it is difficult to comprehend the process for computation of arm's length price in relation to the relevant international transaction. Therefore, it would not be open for the Department to say that the process of computing arm's length price of an international transaction or a reference to the TPO to determine arm's length price can be initiated in the absence of any proceeding for computing total income of the assessee.

20. Further, in our view, the Ld. CIT-DR has relied on one of the norms prescribed for picking a return for scrutiny assessment to say that certain exercise is required to be done on the part of the Assessing Officer to record his satisfaction before the matter is put-up to the CCIT/DGIT who shall approve the selection of case for scrutiny. According to her, the recording of such satisfaction contemplated in the CBDT Instruction, would, inter-alia, envisage a reference to the TPO also. In our considered opinion, the reliance placed by the

Ld. CIT-DR on the aforesaid CBDT Procedure for selection of cases for scrutiny, cannot distract from the relevant statutory provisions relating to the controversy before us. In-fact, the scheme of the Act which we have dealt earlier, establishes that the work of computing the arm's length price in relation to international transaction arises only and only when the income from such international transaction is being assessed. Certainly, the reference to the TPO for the computation of arm's length price cannot precede the initiation of the assessment proceedings by the Assessing Officer by issuance of notice u/s 143(2) of the Act.

21. As per the Ld. CIT-DR, section 92C(3) or 92CA of the Act do not enjoin the Assessing Officer to have any assessment proceedings pending before a reference to the TPO can be made for computation of arm's length price in relation to an international transaction. In this context, reference has been made to the phraseology of section 92CA(1) of the Act to say that only two conditions are prescribed therein which are to be fulfilled by the Assessing Officer before referring the matter to the TPO. Firstly, assessee should have entered into international transaction; and, that if the Assessing Officer considers it necessary and expedient to do so, he may refer the matter to the TPO under approval of the Commissioner. If both the conditions are satisfied there is no bar or requirement of any assessment proceedings being pending, before the reference is made to the TPO.

22. The aforesaid plea of the Ld. CIT-DR also, in our view, fails to take into consideration the entire scheme envisaged for the transfer pricing assessment in sections 92 to 92F of the Act. The provisions of sections 92 to 92F of the relate to computation of income from the international transaction having regard to the arm's length price, meaning of associated enterprises, meaning of international transaction, determination of arm's length price, keeping and maintaining of information and documents by persons entering into international transactions, furnishing of a report from an accountant by persons entering into such transaction and the definition of certain expressions occurring in such sections. The aforesaid provisions do not operate in individual spheres but the same operate with a singular purpose of computing income arising from an international transaction. The process of computation of income is necessarily a part and parcel of the assessment proceedings envisaged under the Act. Section 92CA of the Act is not an independent provision, but it is triggered only when the occasion arises for application of section 92(1) of the Act, whereby income from an international transaction is to be computed having regard to its arm's length price; and, the occasion to compute the income would arise only when there is an on-going assessment proceeding. Therefore, reference made by the Ld. CIT-DR to the phraseology of section 92CA(1) without considering the entire schematic arrangement of sections 92 to 92F would be incorrect.

23. Therefore, we conclude this aspect by holding that the Assessing Officer is precluded from making a reference to the TPO u/s 92CA(1) of the Act for the purposes of computing arm's length price in relation to the international transaction when no assessment proceedings are pending in relation to the relevant assessment year.

24. Now, we may come back to the facts of the present case. In this case, return of income was filed on 05.11.2007, which was processed u/s 143(1) of the Act. On 14.09.2009, the Assessing Officer made a reference to the TPO for computation of arm's length price in relation to an international transaction entered by assessee with its associated enterprise. The TPO, after allowing the assessee opportunity of being heard and after taking into account the material available with him, passed an order dated 29.10.2010 determining the arm's length price in accordance with sub-section (3) of section 92CA of the Act.

25. In the background of the above facts, it needs to be established as to whether on 14.09.2009 when the Assessing Officer made a reference to the TPO u/s 92CA(1) of the Act, was there an assessment proceedings u/s 143 of the Act pending for the year under consideration. In the present case, we are dealing with assessment year 2007-08 and assessee filed its return of income on 05.11.2007. In terms of clause (ii) to sub-section (2) of section 143 of the Act, as it stood at the relevant point of time, notice u/s 143(2) of the Act in order to subject the return of income to scrutiny assessment, should have been issued within this six months from the end of the relevant assessment year i.e. upto 30.09.2008. There is no dispute that no such notice has been issued within the above stipulated period. A consequence of the aforesaid situation is that the return of income filed by the assessee on 05.11.2007 became final as no scrutiny proceedings were started within the period stipulated in law. The aforesaid position is also reinforced by the CBDT Circular No.549 dated 31.10.1989. As per the CBDT, if, after furnishing return of income, an assessee does not receive a notice u/s 143(2) of the Act from the Department within period stipulated in the proviso to section 143(2) of the Act, it follows that the return filed by the assessee has become final and no scrutiny proceedings should be started in respect of that return. In other words, in the present case, assessment proceedings u/s 143 of the Act came to end and the matter became final on 30.09.2008 i.e. the date within which a notice u/s 143(2) of the Act was

required to be issued, which was not done. The judgement of the Hon'ble Punjab & Haryana High Court in the case of *Vipan Khanna* v. *CIT* [2002] 255 ITR 220/122 Taxman 1 is also to the same effect. In-fact, as per the Hon'ble Punjab & Haryana High Court, in case where a return is filed and is processed and no notice under sub-section (2) of section 143 thereafter is served on the assessee within the stipulated period, the assessment proceedings u/s 143 come to an end and matter becomes final. As per the Hon'ble High Court, although technically no assessment is framed in such a case, yet the proceedings for assessment stand terminated. To the similar effect is the ratio of the judgements of the Hon'ble Madras High Court in the case of (i) *CIT* v. *M. Chellappan* [2006] 281 ITR 444 (Mad.); and, (ii) *CIT* v. *Deep Baruah* [2010] 329 ITR 362 (Mad.).

26. In this background, if on the date of making of reference to the TPO, the assessment proceedings u/s 143 of the Act had come to an end and the proceedings for assessment stood terminated, there was no occasion for the Assessing Officer to have made a reference to the TPO for determination of arm's length price of the international transactions in terms of section 92CA of the Act. We have already inferred in the earlier paras that under the provisions of section 92CA of the Act, a reference to the TPO for computation of arm's length price in relation to international transactions is permissible only in the course of the assessment proceedings.

27. In view of the aforesaid discussion, it has to be inferred that when the Assessing Officer made reference to the TPO on 14.09.2009 for determination of arm's length price in relation to an international transaction, there was no assessment proceedings pending, and therefore it was an invalid reference. Consequently, the subsequent order passed by the TPO on 29.10.2010 (supra) determining the adjustment of Rs.2,49,48,811/- to the international transaction is a nullity in law and *void ab initio*.

28. The next aspect is as to whether, in the above circumstances, the order of the TPO dated 29.10.2010 (supra) can be a valid material for the Assessing Officer to entertain a belief that certain income chargeable to tax has escaped assessment within the meaning of section 147 of the Act.

29. In this context, the Ld. CID-DR has vehemently pointed out that the return of income filed by the assessee included international transactions entered with the associated enterprise and such return of income was required to be taken-up for compulsory scrutiny, as per the norms of the CBDT relating to assessment year 2007-08. Therefore, when such a return of income was not picked up for a scrutiny assessment within the stipulated period, the only course for the Revenue was to issue notice u/s 148 of the Act on the ground that certain income chargeable to tax has escaped assessment. Secondly, it is pointed out that the return of income was filed by the assessee on 05.11.2007 with Circle 11(2), Pune whereas Form No.3CEB for the same assessment year was filed in Circle 1(1), Pune on 31.10.2007. It is only on 28.07.2009, Form No.3CEB was received by the present Assessing Officer i.e. Circle 1(1) wherein it was seen that assessee had entered into international transactions with associated enterprises. For this reason, the case of the assessee had escaped from compulsory selection for scrutiny. On this basis, it is sought to be pointed out that the re-opening of assessment by issuance of notice u/s 147/148 of the Act is justified.

30. Apart from the aforesaid, it was also vehemently argued that any illegality or irregularity in making of a reference to the TPO u/s 92CA of the Act cannot render the subsequent order passed by the TPO u/s 92CA(3) of the Act as a nullity *qua* the belief entertained by the Assessing Officer that certain income chargeable to tax had escaped assessment on account of determination of arm's length price of the international transaction with the associated enterprise. The Ld. CIT-DR submitted that in the case of the *Pooran Mal* v. *DIT* [1974] 93 ITR 505 (SC), the Court had refused to exclude from the purview of assessment even the material and evidence which was obtained by the Department even through a illegal search and seizure action. Drawing a similar analogy to the facts of the present case, it is contended that an illegal or incorrect reference to the TPO would not invalidate the arm's length price determined by him u/s 92CA(3) of the Act, which showed that an adjustment of Rs.2,49,43,811/- was required to be made to the stated values of the international transaction. Therefore, the aforesaid material provided a good ground for the Assessing officer to formulate a belief that certain income chargeable to tax had escaped assessment.

31. At the outset, we may notice that the validity of the notice reopening the assessment u/s 148 of the Act has to be determined on the basis of the reasons which are disclosed to the assessee. Those reasons constitute the foundation of the action initiated by the Assessing Officer of reopening the assessment. The averments made by the Ld. CIT-DR regarding the compulsory scrutiny of returns which involved international transactions and/or that the Form No.3CEB was not filed with the Assessing Officer, are reasons which are not finding a place in the reasons recorded by the Assessing Officer for re-assessment. The reasons recorded by the Assessing Officer for re-assessment, have already been reproduced by us in the earlier part of this

order. It's a trite law that the reasons recorded by the Assessing Officer are alone to be examined so as to test their validity. In this context, a reference can be made to the judgement of the Hon'ble Delhi High Court in the case of *Northern Exim (P.) Ltd.* v. *Dy. CIT* [2013] 357 ITR 586/[2012] 20 taxmann.com 466/208 Taxman 175 wherein it has been held that a Court is to be guided only by the reasons recorded for re-assessment and not by the reasons or explanation given by the Revenue at a later stage in respect of the notice of re-assessment. The Hon'ble Delhi High Court after making a reference to the following judgements :—

(*i*) *Jamna Lal Kobra* v. *ITO* [1968] 69 ITR 461 (All.);

(*ii*) *CIT* v. *Agarwalla Bros.* [1991] 189 ITR 786 (Pat.);

(*iii*) *C.M. Rajgharia* v. *ITO* [1975] 98 ITR 486 (Pat.);

(*iv*) *Asa John Devinathan* v. *Addl. CIT* [1980] 126 ITR 270 (Mad.);

(*v*) *East Coast Commercial Co. Ltd.* v. *ITO* [1981] 128 ITR 326 (Cal.);

(*vi*) *Equitable Investment Co. (P.) Ltd.* v. *ITO* [1988] 174 ITR 714 (Cal.); and,

(*vii*) *S. Sreeramachandra Murthy* v. *Dy. CIT* [2000] 243 ITR 427/111 Taxman 338 (AP).

held as under :—

> "The ratio laid down in all these cases is that, having regard to the entire scheme and purpose of the Act, the validity of the assumption of jurisdiction under Section 147 can be tested only by reference to the reasons recorded under Section 148(2) of the Act and the Assessing Officer is not authorized to refer to any other reason even if it can be otherwise inferred and/or gathered from the records. He is confined to the recorded reasons to support the assumption of jurisdiction. He cannot record only some of the reasons and keep the others up his sleeves to be disclosed before the Court if his action is ever challenged in a Court of law."

32. To the similar effect is the judgement of the Hon'ble Bombay High Court in the case of *3i Infotech Ltd.* v. *Asstt. CIT* [2010] 329 ITR 257/192 Taxman 137 wherein it has been held that the validity of the reopening of assessment has to be determined with reference to the reasons which had weighed with the Assessing Officer and those cannot be added to or supported on a basis which was not present to the mind of the Assessing Officer when he issued the notice to reopen the assessment. As a consequence of our aforesaid discussion, we are unable to consider the validity of the issuance of notice of re-assessment based on the explanation/reasons now sought to be supplemented by the Ld. CIT-DR, which otherwise do not find a place in the reasons recorded by the Assessing Officer.

33. We have also carefully considered the other plea raised by the Ld. CIT-DR based on the judgement of the Hon'ble Supreme Court in the case of *Pooran Mal* (*supra*). It is quite well-settled that any illegality or irregularity in obtaining material or evidence would not preclude the Revenue authorities from utilizing the same in assessment of income unless the genuineness and correctness of the material or evidence is in doubt. So however, in the present case, we are not dealing with the power of the Assessing Officer to compute income of the assessee arising from an international transaction based on the arm's length price determined by the TPO. Indeed, as we had seen earlier the computation of total income from an international transaction has to be done by the Assessing Officer under sub-section (4) of section 92C read with sub-section (4) of section 92CA of the Act having regard to the arm's length price determined by the TPO. There is no dispute on the said aspect. In the present case, the point made out by the assessee is that a *nonest* and *void ab initio* order passed by the TPO on 29.10.2010 determining the arm's length price u/s 92CA(3) of the Act cannot form a basis to formulate a belief that certain income chargeable to tax has escaped assessment within the meaning of section 147 of the Act. The controversy in the present case has to be adjudicated in the light of the parameters of section 147/148 of the Act. In a somewhat similar situation, the Hon'ble Rajasthan High Court in the case of *Brig B. Lall* v. *WTO* [1981] 127 ITR 308/[1980] 4 Taxman 559 was dealing with a situation where the reopening of assessment was based on a report submitted by the Valuation Officer in an invalid reference. As per the Hon'ble High Court, a report submitted by the Valuation Officer in an invalid reference must be treated as a nullity in the eyes of law, *nonest* and *void ab initio*. According to the Hon'ble High Court, where the reopening of assessment was based on such illegal, *null* and *void* report, the entire fabric for reopening of the assessment proceedings falls flat. In our considered opinion, the ratio of the judgement of the Hon'ble Rajasthan High Court in the case of *Brig B. Lal* (*supra*) is squarely applicable in the present case.

Therefore, having regard to the peculiar facts of the present case, the proposition sought to be canvassed by the Ld. CIT-DR based on the decision in the case of *Pooran Mal* (*supra*) does not validate the issuance of notice u/s 148 of the Act to reopen the assessment in the present case.

34. The Ld. CIT-DR also relied upon the judgement of the Punjab & Haryana High Court in the case of *Coca Cola India Inc.* v. *Asstt. CIT* [2009] 309 ITR 194/177 Taxman 103 to say that an order passed by the TPO can be a reason for re-assessment of income u/s 147/148 of the Act. The above proposition canvassed by the Ld. CIT-DR is not an absolute proposition, and the judgement of the Hon'ble Punjab & Haryana High Court in the case of *Coca Cola India Inc* (*supra*) has to be appreciated in the light of the fact-situation therein. In the case of *Coca Cola India Inc* (*supra*), the stand of the Revenue was that assessee was suppressing its profit in its transactions with its associated enterprises in the period prior to the assessment year 2002-03. The Revenue contended the suppression of profits on the ground of an order passed by the TPO under Chapter X after 01.04.2002 in relation to an assessment year after 01.04.2002. Such order of the TPO formed the basis for the Assessing Officer to formulate a belief that there was an escapement of income within the meaning of section 147 of the Act for the period prior to assessment year 2002-03. Pertinently, in the period prior to assessment year 2002-03, the un-amended provisions of section 92 of the Act did not provide for an order by the TPO determining arm's length price. The assessee attacked the initiation of proceedings u/s 147/148 of the Act for a period prior to assessment year 2002-03 contending that the order of the TPO passed under Chapter X subsequent to the amendment made with effect from 01.04.2002 in respect of a subsequent assessment year was irrelevant. In other words, assessee canvassed that the order of the TPO in respect of a subsequent assessment year could not be a ground to reopen the assessment of a year which was prior to the amendment of section 92 of the Act with effect from 01.04.2002. The Hon'ble High Court disagreed with the assessee's defense and upheld the action of the Assessing Officer in taking into account the subsequent order of the TPO for forming a belief that certain income liable to tax had escaped assessment even in relation to an assessment year prior to the insertion of 92CA of the Act with effect from 01.04.2002. As per the Hon'ble High Court, the order of the TPO could certainly have nexus for reaching a conclusion that income has been incorrectly assessed or has escaped assessment within the meaning of section 147 of the Act. The proposition laid down by the Hon'ble High Court is to the effect that the order of the TPO passed u/s 92CA of the Act after 01.04.2002 i.e. under the amended Provisions, can be one of the reasons for re-assessment for a period prior to the introduction of the amended Chapter X with effect from 01.04.2002. Clearly, the dispute in the case of *Coca Cola India Inc* (*supra*) stood on a different footing than the dispute before us. In the case of *Coca Cola India Inc.* (*supra*), it was nobody's case that there was any illegality in the reference made to the TPO or that the order of the TPO was *void ab initio* with respect to the assessment year for which the TPO passed the order u/s 92CA(3) of the Act. The only point was whether order of the TPO passed u/s 92CA(3) of the Act for a subsequent assessment year could form a basis for the Assessing Officer to formulate a belief about the escapement of income in a preceding assessment year when the amended regime of Chapter X was not on the statute. The facts and circumstances in the present case are entirely different and therefore the judgement of the Punjab & Haryana High Court in the case of *Coca Cola India Inc.* (*supra*) does not help the case of the Revenue.

35. As a consequence, we conclude by holding that the reasons recorded by the Assessing Officer in the present case do not meet with the requirements of section 147 of the Act and therefore the Assessing Officer had no jurisdiction to issue notice u/s 148 of the Act dated 14.01.2011. As a consequence, the subsequent assessment order passed u/s 143(3) r.w.s. 147 and 144C(13) of the Act is liable to be quashed. We hold so.

36. As the preliminarily issue raised by the assessee regarding the assumption of jurisdiction by the Assessing Officer has been decided in favour of the assessee and the impugned assessment has been quashed, the remaining Grounds of Appeal raised by the assessee regarding the merits of the additions are rendered academic. Therefore, such Grounds are not adjudicated for the present.

37. In the result, the appeal of the assessee is allowed, as above.

JYOTI

*In favour of assessee.