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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.2287 OF 2013

The Commissioner of Income Tax-8
Versus
M/s. TCL India Holdings Pvt.Ltd.

..Appellant
..Respondent

Mr. Anil Singh, Addl. Solicitor General a/w Mr. Arvind Pinto for the appellant
Dr. K. Shivram, Senior Counsel a/w Mr. Rahul Hakani, Ms. Neelam Jadhav for the respondent

**CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.
DATE : 12th JULY, 2016**

P.C.:

1. The occasion to pass this order in an appeal pending for admission has arisen in view of the inconsistent stand being taken by the Revenue in different appeals raising identical issues. This has occasioned due to the failure on the part of the Revenue to bring to the notice of the Court that an appeal raising a similar issue had already been admitted, when subsequent appeals on the same issue came up for admission before a different Bench. As a result, the Court on consideration of such subsequent appeals has dismissed these appeals. However, when this appeal comes up for admission the learned Counsel brings to our notice an earlier order admitting an appeal on the same issue, passed much prior to the orders dismissing subsequent appeals on the same issue.

2. This appeal filed by the Revenue raises questions with regard to whether transfer pricing adjustment consequent to arriving at Arms Length Price(ALP) is required to be done only in respect of the international transactions or this adjustment is to be done in respect of all the business transactions of the assessee i.e. at the entity level.

3. A similar issue which was raised by the Revenue before this Court in *Commissioner of Income Tax Vs. M/s. Tara Jewels Exports Pvt. Ltd.* (*Income Tax Appeal No.1814 of 2013*) decided on 5th October, 2015, *Commissioner of Income Tax Vs. Goldstar Jewellery Design (P.)Ltd.* (2016) 67 taxmann.com 86 (Bombay) and *Commissioner of Income Tax Vs. Ratilal Becharlal & Sons* (2016) 65 taxmann.com 155 (Bombay) while challenging the orders of the Tribunal restricting the transfer pricing adjustment only in respect of international transaction between Associated Enterprises. These appeals were not entertained by this Court holding that the adjustments on account of transfer pricing is restricted only to international transactions and is not to be extended across all transaction including those with non Associated Enterprises entered into by the assessee. Mr. Pinto, the learned counsel for the Revenue at the hearing of this appeal invited our attention to the order of this Court in *Commissioner of Income Tax Vs. Global*

Jewellery Pvt. Ltd. (Income Tax Appeal No.1395 of 2013) where similar questions as raised herein has been admitted on 16th April, 2015 for consideration.

4. It must be pointed out that the above order of admission in Global Jewellery Pvt. Ltd. (supra) was not pointed out to this Court while passing orders dismissing the Revenue's appeals in M/s. Tara Jewels Exports Pvt. Ltd.(supra), Goldstar Jewellwery Design (P)Ltd. and M/s. Ratilal Becharlal & Sons (supra). This despite the decision in Global Jewellery Pvt. Ltd.(supra) being available with the Revenue and its Counsel at the hearing of the Appeals filed by the Revenue in respect of M/s. Tara Jewels Exports Ltd. (supra), M/s. Goldstar Jewellery Design (supra) and M/s. Ratilal Becharlal & Sons (supra). We are unable to understand why the Revenue is not taking a consistent view and pointing out decisions in its favour in its subsequent appeals at the stage of admission especially when we have been informed in another context that a Commissioner (Judicial) has been appointed to oversee the litigation in Courts on behalf of the Revenue. It may be pointed out that the Revenue was represented by the same counsel in Global Jewellery Pvt. Ltd. (supra) and in M/s. Tara Jewels Exports Pvt. Ltd. (supra). Moreover the same counsel in M/s. Goldstar Jewellery Design (P) Ltd. (supra) did not dispute that this issue is

concluded against the Revenue by the decision in M/s. Tara Jewels Exports Pvt. Ltd. (supra).

5. We specifically asked the Counsel for the Revenue as to why he or the Assessing Officer did not at the admission hearing of Tara Jewels Exports (P) Ltd. (supra) and the subsequent cases, invite our attention to identical issue having been admitted earlier in M/s. Global Jewellery Pvt. Ltd. (supra). At this the response was that all the appeals arise from different Commissionerates and therefore the earlier order in case of M/s. Global Jewellery Pvt. Ltd. was not known to them. We were unable to understand the above submission which proceeds on the basis that each Commissionerate is a separate entity. All of them are a part of the Income Tax Department. It is this Income Tax department which is an entity in appeal before us in all the above cases. In the above view, it was felt that the Income Tax Department must have in place a system of keeping a record of questions of law which have been admitted or dismissed by this Court. This alone would enable a consistent stand being taken by the Revenue when a similar question arises before the same or different Bench of this Court. This is necessary to ensure that the law is applied equally to all.

6. Therefore, the Principal Chief Commissioner of Income Tax who is the head of all the Commissionerates at Mumbai was directed to place on record the steps being taken to ensure that a consistent view is taken by the Department. The Principal Chief Commissioner of Income Tax had filed an affidavit dated 5th May, 2016. Today, the learned Additional Solicitor General tenders an affidavit of one Mr. Purshotam Tripuri, Commissioner of Income Tax (Judicial) dated 11th July, 2016 indicating the steps being taken by the department to ensure that the Revenue is properly represented. In particular, it is pointed out that the Officers of the Revenue are being sensitized to maintain consistency in preferring appeals to this court. Further, it is stated that the 'Legal Corner' hyperlink on the www.incometaxmumbai.gov.in home page is functional since 10th June, 2016 and entries have been made therein with regard to the questions of law which had been admitted by this Court and/or which are finally decided. This according to the Revenue would make the Assessing Officer as well as the Revenue's Counsel aware of the questions of law which have been admitted and / or dismissed, to enable them to assist the Court in subsequent appeals. We are certain that this website could be further improved upon on receiving suggestion from the users of the Legal Corner over a period of time. The suggestion made by Dr. Shivaram in para 3 of the affidavit dated 17th June, 2016 of the respondent – assessee

should be considered by the Revenue and if found appropriate, could be incorporated in the website.

7. However, on browsing the site, it is evident that the activity of monitoring and updating the site has been outsourced to a private party. One key area that must be borne in mind is authenticity of the information uploaded and updated. If in future the requirements increase the software must be scalable and in any event must be compatible with system of the department. In the event of the third party service provider being different at any point in time, the data available on the site after the change of service provider cannot be put to risk of loss of content and/or authenticity. This will ensure a stable and dependable resource for research and representation. We trust the above concern would have been taken care of by the Revenue.

8. However, the above steps on the part of the Revenue would only partially address the issue of proper representation on behalf of the Revenue. This apprehension is expressed on the basis of the facts pointed out in the affidavit dated 5th May, 2006 of the Principal Chief Commissioner of Income Tax and also our experience. We are setting out what we perceive to be the problem and suggesting possible solutions,

being fully aware that the State knows best to protect its interest. Nevertheless, we are making these suggestions in the hope that if representation on behalf of the Revenue improves, Justice would be served better, as the quality of our orders is entirely dependent upon the quality of the assistance rendered at the Bar.

9. The affidavit dated 5th May, 2006 filed by the Principal Chief Commissioner of Income Tax at para 6 indicates that the questions of law on which appeals are filed are framed by the Principal Commissioner of Income Tax. It therefore appears that the Advocates appearing for the Revenue merely reproduce the same without making any modifications. This is evidenced by the fact that on numerous occasions we have had the Advocate informing us that they have to press all the questions and no question could be excluded unless they obtain permission from the Commissioner of Income Tax. This would not happen if the Advocates were involved in framing the question of law and on discussions a considered view was taken at the time of filing the appeal itself. Further at times the question as framed does not bring out the controversy in an appropriate manner as it is not framed by a lawyer. In fact, we have had occasion to observe at times that the question of law are raised on merits of the issue and not on the issue of jurisdiction / method of arriving at the

Arms Length Price (ALP) decided against the Revenue. Thus, rendering the entire exercise of filing of appeals a futile exercise (See *Income Tax Appeal No.72 of 2014 and connected matters, order dated 27th June, 2016* and *Income Tax Appeal No. 15 of 2015, order dated 11th July, 2016*). The framing of a substantial question of law needs legal acumen and experience in drafting to bring out the controversy appropriately. Therefore, framing of question of law should be done by the counsel briefed to draft the appeal, no doubt with the aid/assistance of the Officers of the Revenue involved in the matter.

10. Further the affidavit of the Principal Chief Commissioner of Income Tax also annexes instructions No.3/12 dated 11th April, 2011 issued by the CBDT to improve the quality of representation on behalf of the Revenue. The instructions set out the manner in which panel counsel are appointed by the Revenue i.e. issue of advertisements inviting applications from Advocates and screening from amongst the applicants by the Committee of Income Tax Officers headed by the Chief Commissioner of Income Tax. Thereafter it appears the CBDT issues an appointment order. The selection process and obligation of the State to appoint the most meritorious Advocate has been best brought out by the Apex Court in its recent Judgment in *State of Punjab V. Brijeshwar Singh Chahal*

2016(6) SCC 1 while dealing with the issue of appointment of law officers by the State Government. We can do no better than usefully extract the following paragraphs from that order :

“35. On the question of public interest involved in the appointment of lawyers, this Court in U.P. State Law Officers' Assn. unequivocally declared that the government or the public body represents public interest and whoever is in charge of running their affairs is no more than a trustee or a custodian of public interest. Protection of public interests in the best possible manner is their primary duty. It follows that public bodies are under an obligation to the society to take the best possible steps to safeguard such interests. That obligation in turn casts on them the duty to engage the most competent servants, agents, advisers etc. Even in the matter of selection of lawyers, those who are running the government or the public bodies are under an obligation to make earnest efforts to select the best from the available lot. This is more so because the claims made by and/or against the public bodies are monetarily substantial and socially crucial with far-reaching consequences.

36. This Court while dealing with the third dimension touching the mode of appointment of lawyers declared that in conformity with the obligation cast upon them those handling the affairs of the State are duty bound to select the most meritorious, whatever the method adopted for such selection and appointment may be. It must be shown that a search for the meritorious was undertaken and that appointments were made only on the basis of the merit and not for any other consideration. The following passage is in this regard apposite.

“18. The mode of appointment of lawyers for the public bodies, therefore, has to be in conformity with the obligation cast on them to select the most meritorious. An open invitation to the lawyers to compete for the posts is by far the best mode of such selection. But sometimes the best may not compete or a competent candidate may not be available from among the competitors. In such circumstances, the public bodies may resort to other methods such as inviting and appointing the best available,

although he may not have applied for the post. Whatever the method adopted, it must be shown that the search for the meritorious was undertaken and the appointments were made only on the basis of the merit and not for any other consideration.” (emphasis supplied)

37. In State of U.P. and Anr. v Johri Mal a three-Judge Bench of this Court had an occasion to deal with somewhat similar question that arose once again in relation to appointment of government lawyers in the State of U.P. This Court reviewed the decisions earlier delivered and ruled that public interest would be safeguarded only when good and competent counsel are appointed by the State. No such appointments should, declared this Court, be made for pursuing a political purpose or for giving some undue advantage to any particular section. The State should replace an efficient, honest and competent lawyer only when it is in a position to appoint a more competent lawyer in his place, observed this Court. The following passage is apposite in this regard:

“44. Only when good and competent counsel are appointed by the State, the public interest would be safeguarded. The State while appointing the public prosecutors must bear in mind that for the purpose of upholding the rule of law, good administration of justice is imperative which in turn would have a direct impact on sustenance of democracy. No appointment of Public Prosecutors or District Counsel should, thus, be made either for pursuing a political purpose or for giving some undue advantage to a section of people. Retention of its counsel by the State must be weighed on the scale of public interest. The State should replace an efficient, honest and competent lawyer, *inter alia*, when it is in a position to appoint a more competent lawyer. In such an event, even a good performance by a lawyer may not be of much importance.” (emphasis supplied)

38. While dealing with the nature of office the government counsel hold, this Court in Johri Mal case declared that the State Government Counsel holds an office of great importance. They are not only officers of the court but also the representatives of the State and that courts repose a great deal of confidence in them. They are supposed to render independent, fearless and

non-partisan views before the court irrespective of the result of litigation which may ensue. So also the public prosecutors have great responsibility. They are required to perform statutory duties independently having regard to various provisions contained in the Code of Criminal Procedure. The State Government counsel represents the State and thereby the interest of the general public before a court of law. This requires that government counsel have character, competence, sufficient experience as also standing at the Bar. The need for employing meritorious and competent persons to maintain the standard of the high office cannot be minimized, observed the court, particularly, when the holders of the post have a public duty to perform. The Court also expressed anguish over the fact that in certain cases the recommendations are made by the District Magistrate having regard to the political affinity of the lawyers to the party in power and that State is not expected to rescind the appointments with the change in the government because a new party has taken over charge of the Government. This Court also recognized the age-old tradition of appointing the District Government Counsel on the basis of the recommendations of the District Collector in consultation with the District Judge. The fact that the District Judge, who is consulted while making such appointment knows the merit, competence and capability of the lawyer concerned, was also recognized by the Court.

39.

40. The State counsel appears for the State Government or for public bodies who together constitute the single largest litigant in our Court system. Statistics show that nearly 80% of litigation pending in the courts today has State or one of its instrumentalities as a party to it. State Counsel/counsel appointed by public bodies thus represent the largest single litigant or group engaged in litigation. It is also undeniable that for a fair, quick and satisfactory adjudication of a cause, the assistance which the Court gets from the Bar is extremely important. It is at times said that the quality of judgment or justice administered by the courts is directly proportionate to the quality of assistance that the courts get from the Counsel appearing in a case. Our system of administration of justice is so modelled that the ability of the lawyers appearing in the cause to present the cases of their respective clients assumes considerable importance. Poor assistance at the Bar by counsel who are either not sufficiently equipped in scholarship, experience or commitment is bound to adversely affect the task of

administration of justice by the Court. Apart from adversely affecting the public interest which State counsel are supposed to protect, poor quality of assistance rendered to the courts by State Counsel can affect the higher value of justice itself. A fair, reasonable or non-discriminatory process of appointment of State Counsel is not thus demanded only by the rule of law and its intolerance towards arbitrariness but also by reason of the compelling need for doing complete justice which the Courts are obliged to do in each and every cause. The States cannot in the discharge of their public duty and power to select and appoint State counsel disregard either the guarantee contained in Article 14 against non-arbitrariness or the duty to protect public interest by picking up the best among those available and willing to work nor can the States by their action frustrate, delay or negate the judicial process of administration of justice which so heavily banks upon the assistance rendered by the members of the Bar.

41. To sum up, the following propositions are legally unexceptionable:

- 41.1
- 41.2
- 41.3
- 41.4
- 41.5
- 41.6

41.7 Appointment of Government Counsel must like the discharge of any other function by the Government and public bodies, be only in public interest unaffected by any political or other extraneous considerations.

41.8. The government and public bodies are under an obligation to engage the most competent of the lawyers to represent them in the Courts for it is only when those appointed are professionally competent that public interest can be protected in the Courts.

41.9 The Government and public bodies are free to choose the method for selecting the best lawyers but any such selection and appointment process must demonstrate that a search for the meritorious was undertaken and that the process was unaffected by any extraneous considerations.”

(emphasis supplied)

11. The above observations, we hope would be kept in mind while making appointments of Advocates on the Revenue's panel. The issues which arise before this Court have at times huge tax implications and as the decision rendered in one case would have a bearing on all similar matters across the State, the importance of proper appointment is paramount. One possible way forward would be to also include the State's law officers such as the Additional Solicitor General and Advocate General in the selection/screening panel. They would also be aware of the meritorious Advocates, who may not be inclined to make an application to be empaneled, but if invited, could be willing to accept the appointments. This would be more particularly so in respect of designated Senior Advocates. It is indeed sad, that the Revenue does not have a single designated Senior Advocate on its panel to represent its interest before this Court.

12. Further, the Instruction No.3/2012 dated 11th April, 2012 of the CBDT also sets out the parameters of performance of the counsel for renewal of his appointment, one of the criteria mentioned therein is the number of cases won by the Counsel for the Income Tax department. This can never be a measure of competence of an Advocate i.e. an officer of the Court. In fact, the quality of the Advocate would be best judged by

his performance and not in the result of the litigation. This evaluation can take place only when the Advocate is seen in action. We find that when the Advocates appear before us, very rarely are the Assessing Officer or other Officers involved in the litigation present in Court. In case, they are present, they would be able to give feedback to the Commissioner of Income Tax which could be factored in while briefing him and / or renewing his engagement.

13. In fact it is because of present parameters of number of cases won, being the basis of renewal, that we have had occasions when Advocates persist in arguing matters which otherwise are covered, by seeking to make distinctions which do not exist. This also leads them to becoming mouthpiece of the department completely forgetting their obligation to the Court as its Officer. In fact in *DIT (IT) V. Credit Agricole Indosuez (Bom.) 377 ITR 102* in respect of the manner of representation by Revenue's Advocate we had observed as under :

“(ii) Questions Nos. 2 and 3 as framed, were conceded by the Revenue at the hearing before the Tribunal. Nevertheless the Revenue sought to challenge what has not been contested before the Tribunal. This without even a whisper as to why the concession made before the Tribunal was not correct or that subsequent decisions of court makes the concession before the Tribunal not sustainable in law.

(iii) The appeal memo has been signed by a senior officer of the Revenue, viz., the Director of Income-tax (IT) and he has also directed the Asst. Director of Income-tax (IT) (2), Mumbai, to file this appeal. Either there is no application of mind to the order of the Tribunal before filing of this appeal or the Revenue is deliberately seeking to keep the pot boiling, so that uncertainty is kept alive. It shows the casual attitude of the Revenue in filing appeals. This is not the first of its kind. We had earlier also passed orders disapproving this conduct of the Revenue but there is no improvement. If filing of such appeals on questions Nos. (1), (2) and (3) by the Revenue without justification is unacceptable, the counsel for the Revenue persisting in arguing those questions of law taking valuable time of court is further objectionable. Such frivolous appeals add to the burden of the court and thoughtless prosecution of these takes time of the court which could be utilised for more meritorious (debatable) cases.

(iv) The manner in which sometimes the unmeritorious appeals are persisted by the advocates for the Revenue reminds us of the famous observations of Mr. Justice Crampton in *R v. O'Connell* [1844] 7 ILR 261 at 312 :

"Another doctrine broached by another eminent counsel I cannot pass by without a comment. That learned counsel described the advocate as the mere mouthpiece of his client, he told us that the speech of the counsel was to be taken as that of the client; and, thence, seemed to conclude that the client only was answerable for its language and sentiments.

Such, I do conceive, is not the office of an advocate. His office is a higher one. To consider him in that light is to degrade him. I would say of him as I would say of a member of the House of Commons - he is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law -- he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior

and perpetual retainer on behalf of truth and justice ; and there is no Crown or other licence which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer."

(emphasis supplied)

14. There are a large number of appeals filed by the Revenue from the orders of the Income Tax Appellate Tribunal. However, we find that the distribution of work amongst the panel lawyers is not equitable and also without any consideration of the issue of law involved vis-a-vis the experience of the Advocate briefed. Moreover, we find that most matters are distributed amongst a few Advocates with the result we have occasions where a single Advocate appears in eight/nine matters a day. This indeed is expecting the moon from the panel Advocate. Resultantly, the preparation suffers, leading to inadequate performance. It would therefore be appropriate to have more number of Advocates on the panel and distribute work amongst them. This would at least give an opportunity to the Advocate to prepare properly for appropriate representation.

15. We hope the Revenue would consider our observations and make attempts to ensure that it is properly represented. This can only happen when meritorious Advocates are appointed. This would ensure that the

Officers of the Revenue would value his advise as a learned man of experience and not treat him as an employee, merely because he is appointed at the instance of the Commissioner of Income Tax.

16. The Registry is directed to send a copy of this order on the Chairman, Central Board of Direct Taxes (CBDT) and the Principal Commissioner of Income Tax.

17. This appeal itself to come up on board for consideration in the regular course.

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(A. K. MENON, J.)

(M. S. SANKLECHA, J.)