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# Transfer Pricing Officer to examine domestic transactions on specific reference from Tax Officer: Bombay HC

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## Summary

The Income-tax Act, 1961 (the Act) was amended in 2012 to bring specified domestic transactions<sup>1</sup> within the purview of transfer pricing provisions. Among other implications, the amendment empowered the Transfer Pricing Officer (TPO) to examine the arm's length nature of such domestic transactions, subject to the satisfaction of certain conditions.

The Hon'ble Bombay High Court (HC)<sup>2</sup> in a recent decision examined the TPO's jurisdiction in this regard and held that the TPO can proceed to determine the arm's length price (ALP) of a domestic transaction during the course of assessment proceedings on a specific reference by the Tax Officer and not on a suo moto basis.

## Facts of the case

- The taxpayer, a subsidiary company of Bennett, Coleman and Company Ltd. (BCCL), is engaged in the business of distribution of television channels for the Times Group entities. With effect from 01 April 2014, the taxpayer demerged one of its business undertakings into BCCL.
- In the accountant's report<sup>3</sup> (AR) filed for assessment year (AY) 2015-16, the taxpayer reported that it had entered into specified domestic transactions for payment of subscription fees earned from distribution business and payment to key managerial personnel.

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<sup>1</sup> Section 92BA was introduced to extend the scope of TP provisions to cover certain domestic transactions with related parties in India.

<sup>2</sup> Times Global Broadcasting Company Ltd. v Union of India & Ors. (Writ Petition No.3386 of 2018)

<sup>3</sup> An annual compliance report (certified by a Chartered Accountant) which is to be furnished by the taxpayer in Form No. 3CEB along with return of income, giving prescribed details in respect of international as well as domestic transactions.

- During the course of the assessment proceedings, the specified domestic transactions reported in the AR were referred by the Tax Officer to the TPO for determination of the ALP.
- On examination, the TPO proposed adjustments with respect to the following domestic transactions:
  - Payment of subscription fees earned from the distribution business
  - Payment to creditors under the demerger process
- The taxpayer contended that payment to creditors was not reported in the AR<sup>4</sup> nor was it referred by the Tax Officer to the TPO for examination.
- Aggrieved by the action of the TPO, the taxpayer filed a writ petition before the Bombay HC, challenging the adjustment made in respect of payment to creditors. The taxpayer argued that the TPO had no jurisdiction to examine the arm's length nature of a domestic transaction in the absence of a specific reference by the Tax Officer.
- The Revenue submitted that the TPO can examine any specified domestic transaction, even in the absence of a specific reference from the Tax Officer. Given that the subject transaction was not reported by the taxpayer, the Revenue contended that the TPO was right in examining it after providing proper notice to the taxpayer.

## HC's key observations and decision

- Transfer pricing provisions<sup>5</sup> require a Tax Officer to obtain prior approval of higher tax authorities<sup>6</sup> before referring any international or domestic transaction to the TPO for examination.
- These provisions empower the TPO to also examine an international transaction irrespective of such transaction being reported by the taxpayer or specifically referred by the Tax Officer.
- However, while amending the Act in 2012 to bring domestic transactions within the purview of transfer pricing, the legislature consciously decided that TPO cannot examine a domestic transaction unless specifically referred by the Tax Officer<sup>7</sup>.

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<sup>4</sup> Under bona-fide belief that it fell outside the purview of transfer pricing provisions

<sup>5</sup> Section 92CA of the Act which deals with reference to the TPO

<sup>6</sup> Principal Commissioner or Commissioner of Income-tax

<sup>7</sup> By specific non-inclusion of "specified domestic transactions" under sub-section (2A) and (2B) of section 92CA of the Act

- Reference by the Tax Officer is not an empty formality; such reference has to be made only on approval of the higher tax authorities. The TPO cannot ignore such requirement by exercising suo moto jurisdiction over a transaction not referred to him.
- The Central Board of Direct Taxes (CBDT) has also clarified<sup>8</sup> that it is always open for the TPO, who notices a transaction during the course of the proceedings before him, to call for a reference by the Tax Officer.
- Relying on the language of the statute, the HC concluded that the TPO had no jurisdiction to examine the transaction of payment to creditors under the demerger process, which was neither reported by the taxpayer nor referred to him by the Tax Officer.

## **Our comments**

This ruling reinforces the widely accepted legal principle that when the language of a statute is plain, certain and unambiguous, the words of the statute must prima facie be given their ordinary meaning. After this ruling, the Tax Officer/TPO may exercise more diligence during the course of assessment proceedings to ensure that any adjustments proposed in respect of domestic transactions (which are either not referred by the Tax Officer to the TPO or not reported by the taxpayer) are legally valid.

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<sup>8</sup> Vide Instruction No. 3 of 2003, dated 20 May 2003

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