

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

INCOME TAX APPEAL NO.15 OF 2014

Commissioner of Income Tax-10
Mumbai

.. Appellant

v/s.

M/s. Kodak India Pvt. Ltd.

.. Respondent

Mr. Arvind Pinto for the appellant

Mr. P.J. Pardiwalla, Senior Counsel a/w Mr. Jitendra Jain i/b Atul K.
Jasani for the respondent

**CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.**

DATED : 11th JULY, 2016.

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) challenges the order dated 30th April, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2007-08.

2. Being aggrieved by the impugned order of the Tribunal, the Revenue has preferred the present appeal raising the following two questions for our consideration :-

(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal was in error in not appreciating the fact that the provisions of Section 92B(2) are applicable to the

sale transaction between the two domestic companies since the provisions of sub-section (1) and sub-section (2) are independent of each other ?

(b) Whether on the facts and in the circumstances of the case and in law, the Tribunal failed to appreciate that the sale of the imaging business from the Assessee to the Associated Enterprise of a foreign company in India was not the normal 'International Transaction' falling within the precincts of Section 92B(1); but was a transaction within the precincts of Section 92B(2), being a transaction between unrelated parties, where there exists a prior agreement between the Associate Enterprises and such unrelated party in relation to a relevant transaction OR the terms of the relevant transaction are determined in substance between such other person and the Associated Enterprise, thus qualifying to be a deemed International Transaction ?

3. The respondent assessee is an Indian subsidiary of M/s. Eastman Kodak Co. USA (EKC). During the previous year relevant to the assessment year the respondent assessee sold its imaging business to one M/s. Carestream Health India Pvt. Ltd. The buyer company i.e. M/s. Carestream Health India Pvt. Ltd. was a Indian subsidiary of M/s. Carestream Inc. an USA company. The case of the respondent assessee was that the transaction of sale of imaging business by the respondent

assessee to M/s. Carestream Health India Pvt. Ltd. was a transaction between the two domestic non Associated Enterprises. Hence, the provision of Chapter X of the Act would have no application. Thus, had not even declared this transaction in its 3 CEB report.

4. However the Transfer Pricing Officer (TPO) while examining another Transfer Pricing issue came across the impugned transaction. It held on the basis of Section 92B(2) of the Act that even if the transaction between Kodak India Pvt. Ltd. and M/s. Carestream Health India Pvt. Ltd. was between two domestic non Associated Enterprises, yet it would still be considered to be an International Transaction and Chapter X of the Act would be applicable. This on the basis that the holding companies of both the respondent assessee as well as M/s. Carestream Health India Pvt. Ltd. had entered into a global agreement for sale of its business. This global agreement was prior in point of time to the sale of imaging business by the respondent assessee to M/s. Carestream Health India Pvt. Ltd. The Assessing Officer passed a draft Assessment Order under Section 144C of the Act on the basis of the order of the TPO.

5. Being aggrieved, the respondent assessee approached the Dispute

Resolution Panel (DRP). However, the view of the TPO was upheld by the DRP.

6. On appeal, the Tribunal on interpretation of Section 92B(2) of the Act, as in force during the subject assessment year concluded that the transaction would not be covered by the definition of International Transaction. This *inter alia* on the ground that the prior to amendment to Section 92B(2) of the Act w.e.f. 1st April, 2015 such a transaction was not deemed to be an International Transaction. Further, the impugned order also examined the issue on facts and held that even if the Revenue's interpretation is accepted, no addition on account of Arms Length Price (ALP) is warranted. Moreover, it also held that the ALP was sought to be determined by a method not prescribed under Section 92C of the Act and the prayer for restoration to the TPO to apply the prescribed method was rejected.

7. The grievance of the Revenue as evident from the question formulated is only in respect of interpretation of Section 92B of the Act. On the interpretation put on it by the Revenue, the impugned transaction would be covered by Chapter X of the Act.

8. The Revenue has not raised any grievance to the finding in the impugned order of the Tribunal, that even if one proceeds on the basis of theory of prior agreement, as provided in Sub-Section 2 of Section 92B of the Act, yet the entire exercise of transfer of imaging business done by the Kodak India Pvt. Ltd. to M/s. Carestream Health India Pvt. Ltd. was independently done on its own terms and conditions. The global agreement arrived at between its holding companies did not in any manner control the terms arrived at between the Kodak India Pvt. Ltd. and M/s. Carestream Health India Pvt. Ltd. The aforesaid finding is not disputed by the Revenue before us.

9. Further, we find that the impugned order of the Tribunal rendered a finding of fact that the ALP for transfer of its imaging business as determined by the respondent assessee was reasonable is also not disputed. The impugned order notes that average gross profit was Rs.4.49 crores and respondent assessee had worked out gross profit at Rs.5.98 crores to work out the consideration receivable. Thus, quite reasonable. This finding of fact has also not been challenged by the Revenue.

10. We must also record the fact that the ALP was arrived at by the

Transfer Pricing Officer (TPO) by not adopting any of the methods prescribed under Section 92C of the Act. The method to determine the ALP adopted was not one of the prescribed methods for computing the ALP. It was not even any method prescribed by the Board. At the relevant time, i.e. for A.Y. 2008-09 Section 92C of the Act did not provide for other method as provided in Section 92C(1)(f) of the Act. The impugned order of the Tribunal holds that the method adopted by the Revenue to determine the ALP was alien to the methods prescribed under Section 92C of the Act. In the above circumstances, the Tribunal declined to restore the issue to the Assessing Officer for re-determining the ALP by adopting one of the methods as listed out in Section 92C of the Act. This finding of the Tribunal has also not been challenged by the Revenue.

11. In view of the fact that the Revenue has accepted the order of the Tribunal on its finding on facts on the two issues as pointed out hereinabove as well as the refusal of the Tribunal to restore the issue of determination of ALP to the TPO by following one of the methods prescribed under Section 92C of the Act. Thus, the questions as formulated for our consideration even if answered in favour of the Revenue would become academic in the present facts. Thus, we see

no reason to entertain this appeal. However, we make it clear that the issues of law which has been raised in the present appeal are left open for consideration in an appropriate case.

12. In view of the above, the questions as formulated in the peculiar facts and circumstances of the case, would make the entire exercise academic. Therefore, the questions as proposed do not give rise to any substantial question of law. Thus, not entertained.

The appeal is dismissed. No order as to costs.

(A.K. MENON, J.)

(M.S. SANKLECHA, J.)