IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.07.2018

CORAM

THE HON'BLE MS. INDIRA BANERJEE, CHIEF JUSTICE
AND
THE HON'BLE MS.JUSTICE P.T.ASHA

Tax Case (Appeal) No.361 of 2018

The Commissioner of Income,
Chennai. .. Appellant/Respondent

Vs.

M/s.Saipem India Projects Limited,
Yarlagadda Towers,
4, Fourth Lane,
Off: Nungambakkam High Road,
Chennai - 600 034. .. Respondent/Appellant

PRAYER: Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras "D" Bench, Chennai, dated 25.11.2016 passed in I.T.A.No.401/Mds/2016. The order passed by the office of the Deputy Commissioner of Income Tax, Corporate Circle 6(1), Nungambakkam, Chennai, 34, made in PAN/GIR No.AAAC17915F for the Assessment year 2011-2012 and order dated 21.12.2015 against the order passed by the ministry of Finance, Income Tax Department, Dispute Resolution Panel-2, Bangalore made in F.NO.99/DRP-2-BNG/2015-16 dated 19.11.2015 against the order passed by Income Tax Department proceedings of Transfer pricing officer 3 Nungambakka, Chennai 34, made in F.NO.S-312/TPI-3/A.Y.2011-12 dated 22.01.2015 for the Assessment year 2011-12.

For Appellant : Mr.T.R.Senthil Kumar
assisted by
Ms.K.G.Usha Rani

JUDGMENT

(Delivered by Ms.Indira Banerjee, Chief Justice)

This appeal is against a judgment and order dated 25th November, 2016 passed by the Income Tax Appellate Tribunal "D" Bench, Chennai, partly allowing the appeal of the respondent assessee being I.T.A.No.401/Mds/2016, in relation to the assessment year 2011-12 against an order dated 21st December, 2015 of the Assessing Officer under Section 143(3) of the Income Tax Act, 1961, hereinafter referred to as "the said Act").

2. The respondent assessee, which provides engineering services, filed its return for the assessment year 2011-12 disclosing the income of Rs.3,31,83,584/- and Rs.6,37,96,564/- under Section 115JB of the said Act.

3. As the respondent assessee had entered into an international transaction with its Associated Enterprises exceeding a value of Rs.15.00 Crores, a reference was made to the Transfer Pricing Officer, hereinafter referred to as "the TPO".

4. The international transactions entered by the respondent assessee with its Associated Enterprises during the relevant previous year were as under:

Name of the Associate	Details of transaction	Amount of transaction (in Rs.)	Method adopted
Saipem S.A. France, Saipem, Sp.A.Italy, Global Petro Projects Services AG, Switzerland, Saipem Singapaore Pte, Ltd, Singapore	Export of engineering services	122,95,40,811	TNMM

Name of the Associate	Details of transaction	Amount of transaction (in Rs.)	Method adopted
Saipem, Sp. A. Italy, Saipem S.A. France, Saipem Singapore Pte, Ltd, Singapore, Saipem Asia SDN BHD, Malaysia	Reimbursement of expenses	9,59,24,875	--
Saipem S.A. France, Saipem, Sp. A. Italy, Global Petro projects Services AG, Switzerland, Saipem Singapore Pte, Ltd, Singapore and other	Recovery of expenses	16,93,25,014/-	--
	Total	149,47,90,703	

5. For its transfer pricing study, the respondent assessee had selected the Transactional Net Margin Method. The comparables selected by the respondent assessee were M/s.M.N.Dastur & Company (P) Limited; M/s.Stewarts and Lloyds India Limited and M/s.Toyo Engineering India Limited.

6. The respondent assessee worked out its own Profit Level Indicator relating to service income and other income, its total operating cost and expenditures and arrived at operating and/or net profit of Rs.167,506,096/-.

7. The TPO, after considering the comparables selected by the respondent assessee was of the opinion that M/s.Stewarts & Lloyds India Limited was not an appropriate one even though M/s.Stewarts & Lloyds India Limited had been accepted as an acceptable comparable in the earlier assessment years.

8. After considering the respective submissions made by the authorised representative of the respondent assessee and the Revenue, the learned Tribunal held:

> "11. Adverting to the exclusion of M/s.Stewarts & Lloyds Ltd, ld. Authorised Representative submitted that the said company was considered by ld. TPO himself in TP orders for assessment years 2008-09,

2009-10 and 2010-2011 as a good comparable. According to him, there was no change in the functional profile of M/s.Stewarts & Lloyds Ltd which warranted rejected of that comparable for the impugned assessment year. As per ld. Authorised Representative cost of raw material incurred by the said company was insignificantly small when compared to its total operating cost. Thus, according to him, without any rhyme or reason, M/s.Stewarts & Lloyds Ltd was rejected as a proper comparable.

12. In any case, according to him, if M/s.Mahindra Consulting Engineers Ltd was considered as a proper comparable, then two new comparables suggested by the assessee during the course of proceeding before ld. TPO, namely M/s.Desein Private Limited and M/s.Blue Star Design & Engineering Ltd. had also to be considered as good comparables. Ld. Authorised Representative submitted that these two companies were also providing engineering consultancy. Summarizing his arguments, ld. Authorised Representative submitted that M/s.Mahindra Consulting Engineers Ltd had to be excluded and M/s.Stewarts & Lloyds Ltd had to be included in the list of comparables. As per the ld. Authorised Representative in the event M/s.Mahindra Consulting Engineers Ltd was considered as a good comparable, then M/s.Desein Private Ltd and M/s.Blue Star Design & Engineering Ltd also should come in the list.

13. Per contra, ld. Departmental Representative strongly assailing on the orders of the lower authorities submitted that in TNMM analysis perfect tallying of functional profile was not necessary. According to him, functional profile of both assessee as well as M/s.Mahindra Consulting Engineers Ltd were similar, since both were doing engineering consultancy. Taking us through the profiles of both the companies ld. Departmental Representative submitted that there was little that could differentiate these two Viz-z-viz M/s.Stewarts & Lloyds Ltd., Ld. Departmental Representative submitted that each assessment year was different. Just because the said company was considered to be good comparable in earlier years would not make it a good comparable for the subsequent year. According to him, assessee could not show that in the earlier years M/s.Stewarts & Lloyds Ltd had any material cost similar to what

was incurred by it during the relevant previous year. As for the pleading of the ld. Authorised Representative that two companies namely M/s.Desein Private Ltd & M/s.Blue Star Design & Engineering Ltd, also needed to be considered, Ld. Departmental Representative submitted that assessee could not show similarity in the functional profile of these companies with that of assessee.

....

17. Coming to the last limb of the argument of the ld. Authorised Representative that M/s.Stewarts & Lloyds Ltd was unjustifiably rejected as a good comparable, we find that ld. TPO had considered the said company as a good comparable in the transfer pricing study for the assessment years 2008-09, 2009-2010 and 2010-2011. For the impugned assessment year, ld. TPO refused to consider it as a good comparable for a reason that it had material cost of 8.02% to the total operating cost. Argument of the assessee is that, cost of material was not significant enough to consider the said company to be engaged in manufacturing/production. In our opinion, this is an acceptable argument. The cost of materials and total operating cost of M/s.Stewarts & Lloyds Ltd for the relevant previous years was as under:-

Particulars	Amount in INR
Cost of Materials (A)	20,683,368
Total Operating Costs (B)	257,752,236
Percentage of total costs (A/B)	8.02 per cent

We do find that material cost was not significant enough to come to a conclusion that the said company was having an independent manufacturing/production segment, requiring a segmental analysis. Therefore, we are of the opinion that M/s.Stewarts & Lloyds Ltd was a good comparable.

18. As a result of the discussion in para 14 to 17 above, final list of comparables that are to be considered are Mahindra Consulting Engineers Ltd, M.N.Dastur & Company (P) Ltd, Toyo Engineering India Ltd, Kirloskar Consultants Ltd and

M/s.Stewarts & Lloyds Ltd. Ld. TPO is directed to rework the PLI of the above comparables and recomputed the Arms Length Price adjustment if any necessary. Ordered accordingly.”

9. Mr.T.R.Senthil Kumar, learned counsel appearing on behalf of the Revenue, strenuously argued that the cost of material consumption of M/s.Stewarts & Lloyds India Limited as a percentage to its operating cost, which was only 8.02% was a relevant factor for rejection of M/s.Stewarts & Lloyds India Limited as an acceptable comparable. Whether this factor was a yardstick or not is a question of law. We are, however, unable to accept the aforesaid submission.

10. The short question before us is whether this appeal filed by the Revenue against the order of the learned Tribunal should be entertained?

11. Section 260A of the Act provides as follows:

“Section 260A. Appeal to High Court.

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal before the date of establishment of the National Tax Tribunal, if the High Court is satisfied that the case involves a substantial question of law.

(2) The Principal Chief Commissioner or Chief Commissioner or the Principal Commissioner or Commissioner or an Assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be-

(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the Assessee or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner.

(b) [***];

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(2A) The High Court may admit an appeal after the expiry of the period of one hundred and twenty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall at the hearing of the appeal, be allowed to argue that the case does not involve such question:
Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which -
(a) has not been determined by the Appellate Tribunal; or
(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in sub-section (1).
(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section."

12. An appeal lies under Section 260-A of the said Act, only when there is a substantial question of law. We find that there is no question of law involved in this appeal much less any substantial question of law.

13. In Sir Chunilal V. Mehta & Sons Ltd. vs Century Spg. & Mfg. Co. Ltd., reported in AIR 1962 SC 1314, the Supreme Court agreed with and approved a Full Bench Judgment of this Court in Rimmalapudi Subba Rao vs Noony Veeraju And Ors reported in AIR 1951 Mad 969 and laid down the principles for deciding when a question of law becomes a substantial question of law.

14. In Hero Vinoth Vs. Seshammal reported in (2006) 5 SCC 545, the Supreme Court followed Sir Chunilal V. Mehta & Sons (supra) and other judgments and summarized the tests to find out whether a given set of questions of law were mere questions of law or substantial questions of law.

15. The relevant paragraphs of the judgment of the Supreme Court in Hero Vinoth (supra) are set out herein below :

> "21. The phrase "substantial question of law", as occurring in the amended Section 100 CPC is not defined in the Code. The word substantial, as qualifying "question of law", means—of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with—technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta v. Ram Ditta [(1927-28) 55 IA 235 : AIR 1928 PC 172] the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In Sir Chunilal case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju [AIR 1951 Mad 969 : (1951) 2 MLJ 222 (FB)] : (Sir Chunilal case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] , SCR p. 557)
>
> > "When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of

> applying those principles to the particular fact of the case it would not be a substantial question of law."

This Court laid down the following test as proper test, for determining whether a question of law raised in the case is substantial: (Sir Chunilal case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] , SCR pp. 557-58)

> "The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

22. In Dy. Commr. v. Rama Krishna Narain [1954 SCR 506 : AIR 1953 SC 521] also it was held that a question of law of importance to the parties was a substantial question of law entitling the appellant to a certificate under (the then) Section 100 CPC.

23. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It

will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. (See Santosh Hazari v. Purushottam Tiwari [(2001) 3 SCC 179] .)

24.The principles relating to Section 100 CPC relevant for this case may be summarised thus :
(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.
(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law .
(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii)

the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

16. In M.Janardhana Rao Vs. Joint Commissioner of Income Tax [2005] 273 ITR 50 (SC), the Supreme Court held that the principles contemplated under Section 100 of the Code of Civil Procedure would apply to Section 260-A of the IT Act too.

17. Right of appeal is not automatic. Right of appeal is conferred by statute. When statute confers a limited right of appeal only in a case which involves substantial questions of law, it is not open to this Court to sit in appeal over the factual findings arrived at by the Appellate Tribunal.

18. The learned Tribunal considering all materials and relevant facts, including the functional profile of M/s.Stewarts & Lloyds India Limited for successive years, arrived at the conclusion that M/s.Stewarts & Lloyds India Limited was a good comparable. There is no question of law, not to speak any substantial question of law, involved in this appeal.

The appeal is, therefore, not entertained and accordingly, dismissed. No costs.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

To:

1. The Registrar
Income Tax Appellate Tribunal
"D" Bench, Chennai.

2. The Dy. Commissioner of Income Tax,
Corporate Circle 6(1),
Chennai.

3. The Joint Commissioner of Income Tax,
Transfer Pricing Officer -3,
Chennai.

4. The Secretary Dispute Resolution Panel-2,
   7th Floor, Income Tax Office,
   BMTC Building 80 Fect Road,
   Koramangala, Bangalore.

+ 1 cc to Mr. T.R. Senthil Kumar, Advocate Sr.45073

SR(CO)
EU(20/08/2018)