

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

**INCOME TAX APPEAL NO.4 OF 2017
WITH
INCOME TAX APPEAL NO.170 OF 2017**

Principal Commissioner of
Income Tax-10

.... Appellant

versus

J.P. Morgan Services India Pvt. Ltd.

... Respondent

.....

- Mr.Arvind Pinto, Advocate for Appellant.
- Mr.Porus Kaka, Senior Counsel a/w Mr.Divesh Chawla i/b. Atul Jasani, Advocate for Respondent.

**CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.
DATE : 25th MARCH, 2019.**

P.C. :

1. These Appeals are filed by the Revenue to challenge the Judgment of Income Tax Appellate Tribunal. Following question was presented for our consideration:

“Whether on the facts and in the circumstances of the case and in law the Hon'ble ITAT was justified in directing the AO/TPO to adopt 14.38% as the Arm's Length margin for transactions with the non-USA nations, based purely on MAP proceedings concluded with the USA competent authority, even though MAP proceedings are

country specific and cannot, therefore, be applied directly to transactions with enterprises in other jurisdictions?”

2. For convenience, we may record facts from Income Tax Appeal No.4/2017.

The Respondent-Assessee is a private limited company. In the return of income-tax filed by the assessee for the assessment year 2007-2008, the question of determination of Arm's Length Price of the transaction entered into by the assessee with its international Associated Enterprises came up for consideration. The Assessee has 96% of its such transactions with its US based associated enterprise. The rest of the transactions are non-US based transactions. In relation to the US based transactions, the Government of India and that of United States of America entered into a Mutually Agreed Procedure for determining the tax to be levied in the two countries in relation to such transactions. This Mutually Agreed Procedure culminated into an order being formally passed in this regard. When it came to the question of determining the Arm's Length Price of assessee's similar transactions, which were non-US

based, the tribunal by the impugned judgment, applied the same parameters and determined the Arm's Length Price on the basis of determination contained in MAP in relation to US based transactions. This approach of the tribunal has given rise to the present Appeals.

3. The main contention of the Department is that the MAP is a non-adjudicatory process and therefore the culmination of such process cannot be automatically projected for determination of Arm's Length Price in terms of section 92C of the Act, where no such agreement has been arrived at. The case of the assessee on the other hand is that in the present case the tribunal has not automatically lifted parameters laid down in the MAP. Firstly, the MAP itself has been drawn after detail consideration of the Arm's Length Price. In absence of any material difference between the US based transactions and assessee's non-US based transactions, the revenue cannot raise any such objection to approach adopted by the tribunal.

4. Previously we had heard the learned Counsel for the parties for some time. We were then prima facie of the opinion, which we still continue to hold, that in absence of any other material on record, it would be doubtful whether the final culmination of the MAP can be projected in the determination of the Arm's Length Price in the mechanism envisaged under the Income Tax Act, 1961, that too, without any other adjustment or consideration. This larger question, however, we are not required to examine in the present Appeal for the following reasons.

5. The tribunal in the impugned judgment, while adopting the same parameters as laid down in relation to US based transaction in the MAP for the purpose of determining Arm's Length Price in relation to the assessee's non-US based transactions, observed that there is no distinction between US and non-US based transactions. Even orders by the authorities had made no such distinction. Even then, an argument may still be open for the revenue to raise, that this would not be

sufficient for the tribunal to mechanically accept the conclusions of the MAP in relation to the transactions which were not subject to such procedure. However, on the previous occasion, Counsel for the assessee had made a statement that the CBDT itself in case of the assessee for the later assessment year had accepted that the consideration in the MAP would also apply to the non-US based transactions. In our order dated 05/03/2019 therefore we had recorded the statement and requested the learned Counsel for the revenue to take instructions with respect to the same.

6. Counsel for the assessee had produced a copy of an Advance Pricing Agreement between the assessee and the CBDT for the later assessment year, in which following observations were made;

***“AND WHEREAS** the outcome agreed under the Mutual Agreement with US for Applicant's international transactions with US AEs would also be applied to its transactions with Non-US AEs and the Applicant has conveyed its acceptance of the same.”*

7. To this, learned Counsel for the revenue stated that the position projected by the learned Counsel for the assessee is correct, however, this was the situation for the later assessment year and cannot be accepted for the present assessment year. In our opinion, two significant features therefore arise in the present Appeal; firstly, the MAP has been drawn after the consideration of relevant aspects giving rise to transfer pricing adjustment and secondly, the CBDT in the later year agreed that such transfer pricing consideration in relation to US based transactions can be safely adopted for the purpose of the assessee's non-US based transactions. In the present year, therefore it would be wholly inappropriate to allow the revenue to argue to the contrary.

8. We notice that the revenue has presented two more questions which read as under;

“(a) Whether in law and on the facts of the instant cases, was the Tribunal justified in holding that

exemption u/s 10A is allowable prior to the setting off, of brought forward losses and unabsorbed depreciation?

(b) Whether in law and on the facts of the instant case, was the Tribunal justified in holding that interest income is business income ignoring the fact that this income was derived from fixed deposits and not from the business of the undertaking?"

9. It is agreed position that both these issues came up for consideration in case of this assessee in revenue's appeal No.2188/13. The Appeal was dismissed in following terms;

4. Regarding Question no.(b)

(i) So far as question no.(b) is concerned, the issue relates to interest on deposit which the impugned order of the Tribunal holds is chargeable to tax under the head 'Profits & Gains of Business or Profession' and consequently eligible for deduction

under Section 10A of the Act. However, Mr.Pinto submits that in any view the interest on delayed tax refund would not be covered under the head 'Profits and Gains of Business'. When asked, Mr.Pinto fairly states that the issue of classification of interest on tax refund was not agitated before the Tribunal. We are of the view that the above issue of interest on tax refund not to be treated as interest on deposits was not agitated by the Revenue before the Tribunal. Thus this issue not arising from the order of the Tribunal, does not arise for our consideration.

- (ii) In any case we find that the impugned order of the Tribunal has followed its decision rendered in the Respondent-Assessee's case reported in 33-SOT page 327 for A.Y. 2004-05. Mr.Pinto is unable to point out any distinguishable features in the present Appeal which would warrant out taking a different view from that having been taken in the order passed by the Tribunal for the A.Y. 2004-05. Moreover, nothing has been shown to us which would indicate that the Tribunal's order for the A.Y. 2004-05 has not been accepted by the Revenue.*
- (iii) In these circumstances, question no.(b) as framed*

also does not give rise to any substantial question of law. Thus not entertained.

Regarding Question no.(c)

3. *So far as question no.(c) is concerned. Mr.Pinto learned Counsel for the Revenue very fairly states that the issue stands covered against the Revenue by the decision of this Court in CIT Vs. Black & Veatch Consulting Pvt. Ltd. (2012) 348 ITR 72. In the above view, the question as framed does not give rise to any substantial question of law. Thus not entertained.*

10. In the circumstances, we do not find any reason to interfere with the decision of the tribunal. Income Tax Appeals are dismissed.

(SARANG V. KOTWAL, J.)

(AKIL KURESHI, J.)