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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 901/2019

PR. COMMISSIONER OF INCOME TAX-1 ..... Appellant

Through: Mr. Zoheb Hossain, Senior Standing Counsel.

versus

AMADEUS INDIA PVT.LTD ..... Respondent

Through: Mr. Mayank Nagi and Mr. Pulkit Verma, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

O R D E R

% 16.10.2019

C.M. No. 45245/2019 (delay)

1. By this application, the applicant seeks condonation of delay of 54 days in re-filing the application. For the reasons stated in the application, the delay is condoned.

2. The application stands disposed of in the aforesaid terms.

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3. The Revenue is in appeal to assail the order dated 27.02.2019 passed by the Income Tax Appellate Tribunal, Delhi Bench ‘I’, New Delhi. We are concerned with ITA 1662/Del/2016 relevant to the assessment year 2011-12 in respect of the Respondent assessee. The Tribunal has rejected the said appeal. On the issue of Transfer Pricing Adjustment on account of AMP

expenses, the Tribunal relied upon the Coordinate Bench decision in the Respondent assessee's own case for the assessment year 2010-11 which has been upheld by this Court in ITA 154/2017 deleting the addition on the ground that the TPO has wrongly invoked the provisions of Chapter X of the Act for the said AMP spent. In relation to the issue of deduction under Section 10A, the ITAT has followed its own decision in the Respondent assessee own case for the assessment year 2009-10 and held that the assessee is eligible for the claim of deduction under Section 10A of the Act. It has also relied upon the order of this Court in ITA 154/2017 dated 22.05.2017 which has upheld the findings of the Tribunal for the assessment year 2009-10. Mr. Hossain learned senior standing counsel for the Appellant fairly states that so far as these issues are concerned, they stand concluded by this Court. He further states that Special Leave Petitions have been preferred before the Supreme Court on both the aforesaid aspects which are pending before the Supreme Court. The submission of Mr. Hossain relates to the issue of adjustment on account of interest on delayed receivables. The ITAT has followed its own decision in assessment year 2009-10 and has invoked the decision of this Court in ***Principal Commissioner of Income Tax v. Kusum Healthcare Pvt. Ltd.,[2017] 398 ITR 66 (Delhi)*** to delete this addition. The submission of Mr. Hossain is that in ***Kusum Healthcare*** (supra), this Court held that there has to be a proper inquiry by the Transfer Pricing Officer by analyzing the statistics over a period of time to discern the pattern, if any, which would indicate that viz-a-viz the receivables for supplies made to an associated enterprise, the payment of debts in an international transaction was intended to benefit the associated enterprise, in some way. He submits that in the present case, the Transfer Pricing Officer had undertaken a study of the transactions that the assessee entered into with its associated enterprise and the delay in payment of invoices raised by the assessee, and on that basis had sought to make an addition to the tune of Rs. 8,98,683/-. The Tribunal has dealt with this issue in the following manner:

> *"9.0 We have carefully considered the submissions made and perused the material available on record. It is observed that the coordinate Bench in A. Y. 2009-10 had adjudicated upon the identical, issue in favour of the assessee as under:-*
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> > *"11. We have considered the arguments advanced by the parties and perused the material available on record. Undisputedly, in the present case the benchmarking of the main international transactions applying the transactional net margin method has been accepted by the Transfer Pricing Officer. Considering this, we find that the ratio laid down by the Mumbai Income-tax Appellate Tribunal in Rusabh Diamonds' case (supra) is clearly applicable to the facts instant case. In the said judgment, it has been held by a co-ordinate Bench of the Tribunal as under (head note from Rusabh Diamonds):*
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> > > *"The interest income is an integral part of the PBIT inasmuch as interest income, in cases other than finance companies, is required to be included in the 'other income' and thus affects the profit before interest and taxes. While profit before interest and taxes does not take into account 'interest expenditure, it does take into account 'interest income' because the interest income is part of the 'other income·, under pre-amended as well as post -amended Schedule VI to the Companies Act, which is duly taken into account into computation of PBIT. In a way PBIT is a misnomer, as while PBIT does not take into account interest expenditure, it does take into account interest income appearing in the other income. Once the profitability, as per PBIT, is found to be comparable, there cannot be a separate adjustment for interest income on delayed realisation, which is an integral part of the PBIT figure. (paragraph 12.)*

As for the Revenue's suggestion that it is to be verified whether the comparable's include interest income, if any, all one can say is that the statutory provisions require the interest income, unless it is an interest income of the finance and banking companies, to be included in the other income which is taken into account for computing PBIT. The presumption, therefore, is that the accounts are drawn up as per the statutory requirements, and the exclusions from 'other income' are specifically discussed on the facts of each case, and as such constitute integral part of the transfer pricing documentation. There is nothing on record to show these exclusions. (paragraph 15)·

As regards the contention that normally all interest incomes are excluded in the computation of PBIT as such incomes rarely constitute operational income, there· is no need to be guided by such hypothesis and generalities. There is nothing on the records, to show such exclusions on the facts of this case. In any event, setting off of interest expenditure with interest on account of delay in realisation of debts, even if so, is not too common an occurrence and more of exceptions than the rule. The apprehensions of the 'Revenue ate purely hypothetical and, therefore, devoid of legally sustainable merits. (paragraph 16).

In view of these discussions, as also bearing in mind entirety of the case, no arm's length price adjustments can be made, in respect of delay in relation' or sale proceeds. Such being conclusion, there is no need to address the specific factual arguments advanced by the assessee. In effect thus the grievance of the assessee is upheld and direct the Assessing Officer to delete the impugned arm's length price adjustment. (paragraph 17)

Explanation to section 92B

There is, however, one more aspect of the matter for which *the impugned arm's length price adjustment must be deleted. (paragraph 19)*

It is noted that everything hinges on application of the Explanation to section 92B, vide Finance Act, 2012,, though with retrospective effect from April 1, 2002. (paragraph 20)

The amendment so made by the Finance Act, 2012, stated to be with retrospective effect April 1, 2002, inserts an Explanation to section 92B. ln plain words; this amendment, inter alia, implies that capital financing of any type, including by way of 'deferred payment or receivable or any other debt arising during the course of business' will constitute an international transaction under section 92B. Going by this definition 'any debts arising during the course of business' will constitute an international transaction. A trade debt is, accordingly covered by this definition. However, since the assessment year that one is dealing with is prior to the assessment year 2012-13, the next important question is whether this amendment could be held to be applicable in the assessment year before as well. Undoubtedly, the amendment is said to be retrospective but then the question really is whether just stating the law to be retrospective will make it retrospective in effect. (paragraph 29)

It is very important to bear in mind the fact that right now one is dealing with amendment of a transfer pricing related provision which is in the nature of a SAAR (specific anti-abuse rule) and that every anti-abuse legislation, whether SAAR (specific anti-abuse rule)or GAAR [general anti-abuse rule] is a legislation seeking the taxpayers to organize their affairs in a manner complaint with the norms set out in such anti-abuse legislation. An anti-abuse legislation does not trigger the levy of taxes; it only tells you what behavior is acceptable or what is not acceptable.

What triggers levy of taxes is non-compliance with the *manner in which the anti-abuse regulations require the taxpayers to conduct their affairs. In that sense, all anti-abuse legislations seek a certain degree of compliance with the norms set out therein. It is, therefore, only elementary that amendments in the anti-abuse legislations can only be prospective. It does not make sense that someone tells you today as to how you should have behaved yesterday, and then goes on to levy a tax because you did not behave in that manner yesterday. (paragraph 36)*

When this is put to the Department, his stock reply is that the amendment only clarifies the law, it does not expand the law. (paragraph 37).

Well, if the 2012 amendment does not add anything or expand the scope of international transaction defined under section 92B, assuming that it indeed does not this provision has already been judicially interpreted, and the matter rests there unless it is reversed by a higher judicial forum. However, if the 2012 amendment does increase the scope of international transaction under section 92B, there is no way it could be implemented for the period prior to this law coming on the statute, i.e., May 28, 2012. The law is well settled. It does not expect anyone to perform an impossibility. (paragraph 38)

It is for this reason that the Explanation to section 92B, though stated to be clarificatory and stated to be effective from April 1, 2002, has to be necessarily treated as effective from at best the assessment year 2013-14. 1n addition to this reason, in the light of the Delhi High Court's guidance in the case of DIT v. New Skies Satellite BV [2016] 382 ITR 114 (Delhi); 68 taxmann.com 8; [2016-TII-6-HC-DEL-INTL] also, the amendment in the definition of international transaction under section 92B to the extent it pertains to the issuance of corporate guarantee being outside the scope of 'international transaction', cannot be said to be retrospective in effect. The fact that it is stated to be *retrospective, in the light of the aforesaid guidance of the Delhi High Court would not alter the situation, and it can only be treated as prospective in effect, i.e., with effect from April 1, 2012, onwards. (paragraph 39)*

For the detailed reasons set out above, the amendment in section 92B, at least to the extent it dealt with the question of issuance of corporate guarantees, is effective from April 1, 2012. The assessment year being an assessment year prior to that date, the amended provisions of section 92B have no application in the matter. (paragraph 43)."

Respectfully following the above, ground Nos. 7 and 8 of the appeal are allowed and the Assessing Officer is directed to delete the addition"

9.1 It is not disputed that the revenue has not filed any appeal before ·the Hon'ble High Court against the above decision of the, Tribunal on the issue in dispute in A.Y. 2009-10. Moreover, following the decision in of A.Y. 2009-10, the coordinate Bench, in A.Y. 2010-11, has again decided the issue in favour of the assessee. It will also be relevant to note that there is no adjustment proposed on this issue by the TPO in A.Ys. 2011-12 & 2013-14. The contention of the Ld. DRP that working capital adjustment would not subsume adjustment on account of overdue receivables is no more good law. Support, in this regard is found from the Hon'ble jurisdictional High Court's decision in case of Kusum Healthcare (supra) wherein Hon'ble High Court has

"10. The Court is unable to agree with the above submissions. The inclusion in the Explanation to Section 92B of the Act of the expression 'receivables' does not mean that de hors the context every item of 'receivables' appearing in the accounts of an entity, which may have dealings with foreign AEs would automatically be characterised as an international transaction. There may be a·delay in collection of monies for supplies made, even beyond the agreed limit, due to a variety of factors which

will have to be investigated on a case to case basis. Importantly, the impact this would have on the working capital of the Assessee will have to be studied. In other words, there has to be a proper inquiry by the TPO by analysing the statistics over a period of time to discern a pattern which would indicate that vis-a-vis the receivables for the supplies made to an AE, the arrangement reflects an international transaction intended to benefit the AE in some way.

11. The Court finds that the entire focus of the AO was on just one AY and the figure of receivables in relation to that AY can hardly reflect a pattern that would justify a TPO concluding that the figure of receivables beyond 180 days constitutes an international transaction by itself. With the Assessee having already factored in the impact of the receivables on the working capital and thereby on its pricing/profitability vis-a-vis that of its comparables; any further adjustment only on the basis of the outstanding receivables would have distorted the picture and re-characterised the transaction. This was clearly impermissible in law as explained by this Court in CIT v. EKL Appliancaes Ltd. (2012) 345"

4. The submission of Mr. Hossain is that the principles of *res judicata* are not applicable since assessment in respect of each year is different and therefore merely because the department has not appealed against the decision of the ITAT in respect of the assessee for the assessment year 2009-10, it would not preclude the department from pursuing the present appeal.

5. Having heard Mr. Hossain, we find no merit in the present appeal. This is for the reason that the perusal of the transactions undertaken by the assessee with the associated enterprise in respect whereof the TPO sought to make an addition of Rs. 8,98,683/- towards interest on delayed payment, shows that

no pattern is discernible which would suggest any arrangement or understanding between the assessee and its associated enterprise, that would qualify the said transaction as an international transaction. In fact, the pattern which emerges from several invoices examined by the TPO, is that more often than not, the payment was made by the associated enterprise even before the expiry of the credit period of thirty days. Thus, on facts, there was no basis to make the said addition. The grounds of challenge urged are all factual.

6. In view of the above, no question of law arises in the present appeal and the same is dismissed.

VIPIN SANGHI, J

SANJEEV NARULA, J

OCTOBER 16, 2019
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