IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 21.07.2020
CORAM:
THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case Appeal No.920 of 2018
and
CMP No.22216 of 2018

Motonic India Automotive Private Limited
(In Liquidation),
(earlier Liquidator Saji P.John,
SPJ: Legal Advocates),
Unit No.1002, 10th Floor,
No.30, Prestige Meridian II, M.G.Road,
Bengaluru - 560 001.

Now

K.Dushyantha & Associates (Liquidator),
No.44/2, 7th Main, 9th Cross,
2nd Block, Jayanagar,
Bengaluru - 560 011. .. Appellant

versus

The Dy. Commissioner of Income Tax,
Corporate Circle - 4(1)
Chennai - 600 034. .. Respondent
[cause title accepted vide Court order dated 20.11.2018 made in CMP No.19351/2018 in TCA No.28920/18 [TSSJ & NSKJ]]

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order made in ITA No.801/Mds/2017 dated 17.11.2017 passed by the Income Tax Appellate Tribunal, 'D' Bench, Madras, for the Assessment Year 2012-13.

Against the order dated 14/12/2016 made in F.No. 181/DRP - 2/BANG/2016-17 passed by the Commissioner of Income Tax, Member (DRP-2), Bengaluru 1, 2 and 3 and against the order dated 30/03/2016 passed by the Assistant commissioner of Income Tax, Corporate Circle 4 (1), Chennai made in PAN/GIR.No.AAFCM3603f and against the order dated 28/01/2016 passed by the Deputy Commissioner of Income Tax, transfer pricing Officer - 2 (2) (i/c) Chennai made in No.M516/TPO - 2 (2) Assessment Year 2012-13.

For Appellant : Mr.Vikram Vijayaraghavan

For Respondent : Mr.Karthick Ranganathan
Senior Standing Counsel

JUDGMENT

T.S.SIVAGNANAM, J.

This appeal by the assessee (presently under liquidation), filed under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity), is directed against the order dated 17.11.2017 in ITA No.801/MDS/2017 on the file of the Income Tax Appellate Tribunal, Madras 'D' Bench, for the Assessment Year 2012-13.

2. The Tax Case Appeal was admitted on 10.12.2018 on the following Substantial Questions of Law.

> "1. Whether on the facts and circumstances of the case, the Tribunal has grossly erred in neither referring to nor following Appellant's own case in earlier AY with respect to custom duty adjustment as per the provisions of the IT Act r.w. IT Rules?
>
> 2. Whether on the facts and circumstances of the case, the Tribunal has grossly erred in neither referring to nor following Appellant's own case in earlier AY with respect to foreign exchange fluctuation adjustment as per the provisions of the IT Act r.w. IT Rules?
>
> 3. Whether on the facts and circumstances of the case, the Tribunal erred in not providing working capital adjustment on the comparables as per the transfer pricing provisions of IT Act r/w. IT Rules?
>
> 4. Whether on the facts and circumstances of the case, the Tribunal was justified in law in upholding the decision of DRP to apply transfer pricing adjustment to all transactions i.e., entity level without restricting the same to the proportion of international transactions of the Appellant in contravention to the transfer pricing provisions of the IT Act r/w. Rules?
>
> 5. Whether on the facts and circumstances of the case, the Tribunal erred in rejecting certain comparables of the Assessee by ignoring available financial date while erroneously upholding it as a persistent loss making company in contravention to the transfer pricing provisions of the IT Act r/w. Rules?
>
> 6. Whether on the facts and circumstances of the case, the Tribunal erred in considering foreign exchange loss as an operating item in contravention

to the transfer pricing provisions of the IT Act and Rules?"

3. We have heard Mr.Vikram Vijayaraghavan, learned counsel appearing for the appellant/assessee and Mr.Karthik Ranganathan, learned counsel for the respondent/revenue.

4. The learned counsel appearing for the appellant/assessee prefaced his submission by contending that Substantial Question of Law Nos.1 and 2, which had been entertained by this Court, were already considered by this Court in the assessee's own case in TCA.No.138 of 2007 dated 07.2.2019 for the assessment year 2009-10 wherein there was no TP adjustment made after the matter was remanded to the Transfer Pricing Officer concerned by the Tribunal.

5. Further, it is submitted that for the Assessment Years 2010-11 and 2011-12, no TP adjustment was made and therefore, there were no issues. The assessment order which is subject matter of this appeal is Assessment Year 2012-13. For the Assessment Year 2013-14, the CIT(A) followed the decision of the tribunal for the Assessment Year 2009-10. For the Assessment Year 2014-15, the CIT(A) followed the order of the tribunal for the Assessment year 2009-10 and assessee is awaiting to give effect to the said order. For the Assessment Year 2015-16, there is no TP adjustment and no reference to the Transfer Pricing Officer.

6. It is submitted by the learned counsel for the appellant/assessee that though this was the factual position, the tribunal in the impugned order did not refer to the decision of its Co-ordinate Bench for the Assessment Year 2009-10. This is a serious error of law committed by the tribunal. In support of such contention, the learned counsel for the appellant referred to the decision of the Hon'ble Apex Court in the case of Honda Siel Power Products Lts. Vs. CIT reported in [2007] 295 ITR 466 (SC).

7. In the said decision, while considering the scope of Section 254 of the Act, the Hon'ble Supreme Court pointed out that non consideration of the decision of the Co-ordinate Bench placed before the tribunal, amounts to a mistake apparent from the record, within the meaning of Section 254(2) of the Act and therefore, the tribunal was justified in exercising its powers under Section 254(2), when it was pointed out that an order of the Co-ordinate Bench placed before the tribunal was not considered by it while passing the original order.

8. It is seen that the order passed by the tribunal for the Assessment Year 2009-10 was subject matter of challenge by the revenue before the Division Bench of this Court in TCA No.138 of 2017 and the Hon'ble Division Bench by judgment dated 07.02.2019 has remanded the matter to the Transfer

Pricing Officer to consider all issues afresh and pass a fresh order in pursuance of the remand directions (issued by the tribunal therein) uninfluenced by the observations of the tribunal, on the merits of the case and also by giving due opportunity of hearing to the assessee to make out its case before the Transfer Pricing Officer.

9. With regard to Substantial Question of Law No.3, it is the assessee's contention that the tribunal committed an error in rejecting the working capital adjustment claimed by the assessee stating that receivables and inventory are not influenced by Associated Enterprises, but on the contrary requiring adjustment to be extended to entire cost base of the assessee including third party costs. Therefore, it is submitted that this issue also requires to be reconsidered by the Transfer Pricing Officer.

10. So far as the Substantial Question of Law No.4 is concerned, the learned counsel has referred to the decision of the Delhi High Court, in the case of CIT Vs. Keihin Panalfa Ltd, reported in [2016] 381 ITR 407 and the decisions of the Bombay High Court in CIT Vs. Alstom Projects India Ltd, reported in [2016] 97 CCH 149 and CIT Vs. Firestone International (P) Ltd in ITA No.1354 of 2013.

11. So far as the Substantial Question of Law No.5 is concerned, it is the assessee's case that the tribunal erred in rejecting the comparable of Inzi Controls India Limited, on the ground of non availability of data and the tribunal has observed that this fact has not been challenged by the assessee.

12. The learned counsel for the assessee submitted that such finding by the tribunal is perverse, because the data is available in the public domain and the assessee had been agitating the matter right through.

13. So far as Substantial Question of Law No.6 is concerned, in the assessee's own case for the Assessment Year 2013-14, this issue was decided in favour of the assessee by the CIT(A) by order dated 10.10.2017 in ITA No.409/16-17.

14. Per contra, the learned Senior Standing Counsel for the revenue would submit that so far as Substantial Question of Law Nos.1 and 2, are concerned, it is true that the Hon'ble Division Bench of this Court has remanded the matter to Transfer Pricing Officer for fresh consideration, whereas the other Substantial Questions of Law, viz. 3 to 6 are concerned, the revenue has sufficient material to counter the submissions of the assessee.

15. In our considered view, the assessee's company is in the process of liquidation and obviously it would mean that it is in financial difficulty. Two major issues have been

remanded to Transfer Pricing Officer for fresh consideration and we are of the view that the other 4 issues viz., the issues raised in Substantial Question of Law Nos.3 to 6 also may be remanded to the Transfer Pricing Officer for fresh consideration, uninfluenced by any observations made by the tribunal.

16. For the above reasons, the Tax Case Appeal stands allowed. The impugned order passed by the tribunal is set aside and the matter is remanded to the Transfer Pricing Officer to be considered along with the matter, which has been remanded to the Transfer Pricing Officer for the Assessment Year 2009-10 and while deciding the issues arising in Substantial Question of Law Nos.1 and 2, the Transfer Pricing Officer shall also decide Substantial Question of Law Nos.3 to 6, afresh, in accordance with law, uninfluenced by any of its earlier decision or tribunal's decision and the assessee can be given due opportunity of personal hearing. No costs. Consequently, the connected Civil Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

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TO

1.The Commissioner of Income Tax,
Member (DRP-2) Bengaluru 1, 2 and 3. (3 Copies)

2.The Assistant Commissioner of Income Tax,
Corporate Circle 4 (1), Chennai.

3.The Deputy Commissioner of Income Tax,
Transfer Pricing Officer - 2 (2) (i/c) Chennai.

4.The Deputy Commissioner of Income Tax,
Corporate Circle 4 (1), Chennai 600 034.

5.The Assistant Registrar,
Income Tax Appellate Tribunal,
Besant Nagar, Chennai.

6.The Director,
Central Board of Direct Taxes,
New Delhi.

7.The Income Tax Appellate Tribunal,
Madras 'D' Bench.

TCA No.920 of 2018
and CMP No.22216 of 2018

SAI(CO)
GN(17/08/2020)