

Amol

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 60 OF 2024
WITH
INCOME TAX APPEAL NO. 1087 OF 2024**

Pr. Commissioner of Income Tax 1 ...Appellant

Versus

Capgemini India Pvt. Ltd. ...Respondent

Mr. Arjun Gupta, for the Appellant in both matters.

Mr. Mihir Nanivadekar, with Mr. Rohan Deshpande, Mr. Smit Shah & Mr. Vihit Shah, for the Respondent in both matters.

**CORAM M.S. Sonak &
Advait M. Sethna, JJ.
DATED: 20 November 2025**

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INCOME TAX APPEAL NO. 1087 OF 2024

1. Heard learned Counsel for the Parties.
2. Mr Gupta urges the formulation of the questions for admission of this appeal:-

“(a) Whether on the facts of the case and in law, the Tribunal is justified in deleting the addition on account of mark-up on out-of-pocket expenses incurred by the

appellant without appreciating that the expenses related to salary and other expenses are part of cost of services rendered and therefore assessee shall have charged the same mark-up on this cost?

(b) Whether on the facts of the case and in law, the Tribunal is justified in holding that Transfer pricing Officer had failed to apply the method prescribed under law to benchmark the transactions mark-up on out-of-pocket expenses incurred by the appellant without appreciating that the Transfer Pricing Officer considered the expenses related to salary and other expenses as part of cost of services rendered and therefore assessee shall have charged the same mark-up on this cost?

3. The above two questions do not arise in the present appeal, given the finding of the Income Tax Appellate Tribunal (ITAT) that, in this case, the Transfer Pricing Officer (TPO) has failed to follow any of the methods prescribed by the Act to determine the arm's length price for the impugned transaction. The Tribunal has also recorded that this fact was not controverted by the learned DR,

4. Further, the Tribunal, in this case, has relied upon the decisions in the case of **Commissioner of Income Tax-10, Mumbai Vs. Kodak India (P) Ltd.**¹ and **Barclays Bank PLC Vs. Additional Director of Income Tax**², to hold that it is incumbent upon the TPO to follow the method prescribed under the Act and when such methods are not followed, the

¹ 2017 79 taxmann.com 362 (Bom)

² 2018 90 taxmann.com 378 (Mumbai Tribunal)

decision of the TPO is rendered vulnerable. *Kodak India Ltd.* (supra) also holds that the failure to follow any method prescribed by the law does not entitle the TPO to rectify the mistake in the second innings.

5. As noted above, the TPO has not followed any method prescribed by the Act. This finding was not even controverted by the Revenue. Therefore, the Tribunal cannot be faulted for following the decision in *Kodak India Pvt. Ltd* (supra) and holding against the Revenue in this matter.

6. Mr Gupta, however, submitted that in the peculiar facts of the present case, there was no question of following any method other than what the TPO has followed. This was not the contention raised on behalf of the Revenue before the Tribunal. The Revenue basically conceded that the prescribed methods were not followed, but requested another opportunity to follow the correct method this time.

7. Therefore, the argument now sought to be raised before this Court was not the one which was raised or involved before the ITAT. Incidentally, this is not even the question which is formulated in the Appeal Memo.

8. Given the above circumstances, we do not think this Appeal involves any substantial question of law warranting its admission.

9. However, if in future, such questions arise or are involved in any appeal, we clarify that we have left their

determination open. We are dismissing this appeal because the questions now proposed do not arise or are not involved in this appeal

10. This Appeal is accordingly dismissed for the above reasons without any order for costs.

INCOME TAX APPEAL NO. 60 OF 2024

11. Heard learned Counsels for the parties.

12. This Appeal concerns the assessment year 2011-12 and was taken up for consideration along with connected Income Tax Appeal No. 1087 of 2024.

13. The connected Income Tax Appeal No. 1087 of 2024 also pertains to the same assessment year in which the tax effect was Rs. 8,29,98,353/-.

14. In the present Appeal, the tax effect, by itself, would amount to Rs. 10,18,145/-. However, in paragraph 13 of this Appeal Memo, it is pleaded that the aggregate tax effect for the year under consideration is Rs. 9,05,62,958/-.

15. Mr. Gupta submits that in such matters, the aggregate tax effect for the assessment year under consideration is relevant, and since this Appeal involves a tax effect of more than Rs. 2 Crores, the Central Board of Direct Taxes (CBDT) Circulars regarding the non-institution or non-prosecution of tax Appeals having a tax effect of less than Rs. 2 Crores would

not apply.

16. Mr. Nanivadekar however submits that the CBDT circular dated 15 March 2024 provides that the expression “*tax effect*” as provided in paragraph 5.1 means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income being reduced by the amount of income in respect of the issues against which the Appeal is intended to be filed (hereinafter referred to as “disputed issues”). He therefore submits that the tax effect in this case would be hardly Rs. 10,18,145/- and the Revenue should not pursue this Appeal.

17. The connected Income Tax Appeal No. 1087 of 2024 was considered by us and has been dismissed. Therefore, the tax effect in this Appeal would be only Rs. 10,18,145/-.

18. However, if some credence has to be given to the aggregate tax effect for the year under consideration, the same has to be in the context of the expression “tax effect” defined in paragraph 5.1 of the CBDT Circular of 15 March 2024. Paragraph 5.1 reads thus:-

“5.1 For this purpose, 'tax effect' means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of the issues against which appeal is intended to be filed (hereinafter referred to as 'disputed issues'). Further, 'tax effect' shall be tax including applicable surcharge and cess. However, the tax will not include any interest thereon, except where chargeability of interest itself is in dispute. In case the

chargeability of interest is the issue under dispute, the amount of interest shall be the tax effect. In cases where returned loss is reduced or assessed as income, the tax effect would include notional tax on disputed additions. In case of penalty orders, the tax effect will mean quantum of penalty deleted or reduced in the order to be appealed against.”

19. The emphasis in paragraph 5.1 is on “*the issues against which the Appeal is intended to be filed*”. This expression cannot be ignored while determining the “*tax effect*” for the purpose of the CBDT Circular of 15 March 2024.

20. Even if we were to accept Mr. Gupta’s contention that the substantial questions of law relating to disallowance under Section 14A read with Rule 8(d) arise in this Appeal and further, they are required to be answered in favour of the Revenue still, the Revenue would be entitled to recover from the assessee an amount of only Rs. 10,18,145/- with interest. Thus, effectively, the tax effect in the context of the issue raised in the Appeal is only Rs. 10,18,145/-.

21. Therefore, we are satisfied that the tax effect in this case is nowhere near the ceiling of Rs. 2 Crores provided in the CBDT Circular. This Appeal can be disposed of on the ground of low tax effect by keeping open the questions of law raised in this Appeal.

22. Mr Naniwadekar has submitted that the ITAT has recorded factual findings; therefore, for the assessment year 2011-12, the assessee had earned no exempted income. He submitted that if this is so, there was no question of the

assessee either making any expenditure for earning this income and consequently, there was no further question of the Revenue making any disallowance of such expenditure under Section 14A. He relied on the order of this Court dated 11 June 2019 disposing of Income Tax Appeal No. 597 of 2017 in almost similar circumstances.

23. Mr Naniwadekar also relied upon the order dated 8 January 2025 disposing of Income Tax Appeal No. 661 of 2018, in which this Court has held that the issue of further disallowance under Section 14A can exceed the exempt income, as concluded by a series of judgments of Co-ordinate Benches of this Court by holding against the Revenue.

24. Though the aforesaid decisions *prima facie* support the assessee's case, considering the low tax effect in this Appeal, we refrain from deciding these questions and proceed to dispose of this Appeal on the ground of low tax effect by keeping the questions of law raised in this Appeal open for consideration.

25. However, we clarify that at that stage, the assesses would be entitled to rely on the decisions now referred to by Mr Naniwadekar and contend that the issue stands covered. Similarly, it would be open to the Revenue to urge that the issue is not covered by these decisions. In short, we are keeping these issues open given the low tax effect involved in this Appeal.

26. The Appeal is accordingly disposed of on the ground of low tax effect by keeping the questions of law open. No costs.

(Advait M. Sethna, J)

(M.S. Sonak, J)