आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ

IN THE INCOME TAX APPELLATE TRIBUNAL
"SPECIAL BENCH," AHMEDABAD

BEFORE JUSTICE P.P. BHATT, PRESIDENT,
SHRI RAJPAL YADAV, JUDICIAL MEMBER,
&
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

Sl. No.	ITA No(s)	Asset. Year(s)	Appeal(s) by Appellant vs. Respondent	
			Appellant	Respondent
1.	1352/Ahd/2011	2006-07	M/s. Doshi Accounting Services Pvt. Ltd., 5th Floor, BBC Tower, Sayajigung, Baroda. PAN No. AABCD2974J	D.C.I.T, Tax, Circle 1(1) Baroda.
2.	1285/Ahd/2012	2007-08	-do-	-do-
3.	1822/Ahd/2014	2008-09	-do-	-do-
4.	1874/Ahd/2014	2008-09	D.C.I.T, Tax, Circle 1(1) Baroda.	M/s DoshiAccounting Services Pvt. Ltd., 5th Floor, BBC Tower, Sayajigung, Baroda. PAN No. AABCD2974J

Assessee by :	Shri Tushar Hemani, A.R.
Revenue by :	Shri O.P. Sharma, CIT. D.R & Shri Vinod Tanwani, Sr.D.R

सुनवाई की तारीख/Date of Hearing : 06.08.2019
घोषणा की तारीख /Date of Pronouncement: 24.10.2019

आदेश/O R D E R

PER WASEEM AHMED ACCOUNTANT MEMBER:

These four appeals have been filed at the instance of the Assessee and Revenue against the separate orders of the Ld. Commissioner of Income-Tax (Appeals)-XIV, Ahmedabad ["Ld.CIT(A)" in short] relevant to Assessment Years 2006-07, 2007-08, & 2008-09.

2. The Hon'ble President of the Income Tax Appellate Tribunal on a reference made by a Division Bench vide order dated 15-06-2016 constituted this Special Bench under section 255(3) in the above matter to decide the following question of law:

> *"Whether or not the provisions of Section 92 can be invoked in a situation in which income of the assessee is eligible for tax exemption or tax holiday and thus not actually chargeable to tax in India, or in a situation in which there cannot be any motive in manipulating the prices at which international transactions have been entered into?"*

The subject matter of the above question is emanating in almost all the appeals under consideration. Therefore, for the sake of convenience, we are taking up the facts involved in the issue for the previous year 2005-06 relevant to the assessment year 2006-07, which is the first year under reference.

3. Briefly stated facts of the case are that the assessee is a private limited company and engaged in the activity of business process outsourcing (BPO) services in the field related to accounting & taxation such as book-keeping, VAT returns, payroll, management accounting, and audit. The major shareholder in the company is Mr. Dhiren Doshi, who is also the sole proprietor of the firm M/s Doshi & Co. based in the United Kingdom. The Assessee is providing these services to the firm, which is an AE of the assessee within the meaning of Section 92A of the Act. The assessee provides these services from the unit situated at Baroda which is an STPI unit eligible for deduction/exemption u/s 10A of the Act. The assessee company is 99.99% subsidiary of Doshi & Co., a proprietary firm of Mr. Dhiren Doshi based in United Kingdom (UK).

3.3 The assessee in the year under consideration provided services equating to 1,60,378 hours to its AE and 380 hours services provided to NON-AEs located in

Zambia, Africa. The assessee in the year under consideration in the case of AE has charged a rate of GBP 5 per hour from April 2005 to Feb 2006 and in March at the rate of GBP 6 per hour whereas in case of non-AEs it has charged GBP 4.50 to 4.85 per hour during the same period. Accordingly, the assessee contended that the similar nature of services was provided to both AE and non-AEs from the same facility, but the rate charged to the AE was higher than the average rate charged to NON-AEs. The average rate corresponding to the AE works out to be GBP 5.09 per hour whereas in case of non-AEs it stood at GBP 4.95 per hour. After that, the assessee benchmarked its transaction with AE by applying internal CUP method prescribed under section 92C of the Act and claimed that its transactions with the AE are at Arm Length Price.

3.4 The assessee during the assessment proceedings vide letter dated 18/02/2009 also made available the details of the external comparables (CUP) based upon the quotations of Independent Enterprises where the average rate quoted by them figuring at GBP 5.71 per hour was greater than the rate charged from the AE. However, the assessee contended that difference in the rates arrived in pursuing internal CUP method being GBP 5.09 and external CUP method being GBP 5.71, arose due to the unevenness of the terms and conditions between the subject entities and their clients.

3.5 Nevertheless, the TPO rebutted the rationale proffered by the assessee in the above paragraph for preferring the internal CUP method of benchmarking the transaction with the AE, counter-reasoning that services provided to AE and NON-AE may be similar, but are unalike in quantity and involve dissimilar markets. As such, the TPO was of the view that CUP method requires a high degree of comparability such as the volume, credit terms, timing & geographical area of transaction/services, etc. which is not comparable in the present case.

3.6 Further, the TPO opined that given the facts and circumstances, TNMM is the most appropriate method as in the case of TNMM a high degree of similarity of product/services is not necessary.

3.7 Thus, the TPO employed certain filters in prowess database to adopt more accurate comparables, wherein the process he picked up a set of four such comparables to work out the operating profit/ operating cost as PLI and show caused the assessee for application of TNMM

3.8 In reciprocation, the assessee objected to TNMM as the most appropriate method. However, the assessee at the same time without prejudice also submitted that except one, all the comparables selected by the TPO are involved in different kind of services and business segment. The assessee further filed two comparables and contended that finally, these three comparables should be considered where the average margin would come to 6.82%, and therefore, no adjustment is warranted.

3.9 However, the TPO disregarded the contention of the assessee and calculated the average margin of the comparables which was worked out by him as 33.10% whereas in the case of the assessee it was 7.97% only. Accordingly, the TPO made the upward adjustment of Rs. 1,48,23,848/-.

4. Aggrieved by the order of TPO/AO, assessee carried the matter to Ld. DRP and vehemently objected the rejection of CUP Method, selection of TNM Method by TPO as most appropriate method, comparable selected by the TPO, comparable rejected by the TPO as suggested by the assessee.

4.1 The assessee also propositioned that it is enjoying the benefit of deduction u/s 10A of the Act. Therefore, there is no reason to charge a lower price from the

AE. Moreover, given the circumstances of the case, the effective tax rate in the UK would be higher than the effective tax rate in India, which as a result of section 10A of the Act is 0%. As such, there was no motive and incentive in shifting the profits from India to the UK, where the rate of tax is comparatively higher. The assessee in support of its contention also relied on ITAT Bangalore in case of Philip Software Pvt. Ltd. vs. ACIT (119 TTJ 721).

5. However, Ld. DRP rejected the contention of the assessee after relying on the order of Aztec software & technology services Ltd (for short ASTSL) (107 ITD 141) and ITAT Mumbai in case of Gharda chemicals Ltd vs. DCIT (2009-TIOL-790-ITAT-Mumbai).

Aggrieved by the order of Ld. DRP, the assessee is in appeal before this Tribunal. Before the Division Bench, assessee took the plea that since, it is eligible for tax exemption and not actually chargeable to tax in India, therefore there cannot be any motive to shift the profit from India to U.K. Thus no reference to TPO ought to have been made. The Bench found contradictory orders of the ITAT on the above plea and therefore, recommended the question for determination by the Special Bench. Thus this special bench has been constituted to decide the above-mentioned question.

6.1 Ld. Counsel for the assessee while appraising us with the facts and circumstances very eloquently contended that when an explanation or defence of an assessee based on interpretation of law as well as on number of facts supported by evidence required consideration, whether the explanation is sound or not must be determined not by considering the weight to be attached to each single factor in isolation but by assessing the cumulative effect of all the facts and law in their setting as a whole. He submitted that endeavour at the end of assessee is to demonstrate that though chapter X in the Income Tax Act was

introduced for eliminating the efforts of avoidance of taxes, but can provision in this chapter be implemented without construing the true import of the provision. Accordingly to him, the special provisions relating to avoidance of tax in chapter X be construed in harmonious way and not be impleaded according to thumb rule. He further submitted that in order to bring his point at home, he has divided his arguments in V compartments viz:

(a) purposive of interpretation of Tranfer Pricing provisions ....
(b) purpose of introducing Transfer Pricing provisions.....
(c) why *Aztec Software* & *Technology Services Ltd.* v. *Asstt. CIT*, 107 ITD 141 (Banglore-Special Bench) is no more good law .....
(d) Income is *sine qua non* to apply the provisions of Chapter X ..... and
(e) other arguments in support of this interpretation.

6.2. As far as submissions under first two folds are concerned, they are just two sides of same coin and in a way inter-connected with each other. The ld.counsel for the assessee appriased us purpose and objects required to be achieved by introducing TP regulations in Chapter X of the Income Tax Act. In his stride, he contended that by way of two amendments effected in Finance Act, 2001 and 2002, TP provisions were brought on the statute book. In order to demonstrate the objective required to be achieved through these provisions, he made reference to the speech of the Finance Minister made in the Parliament while introducing the Finance Act, 2001 reported in 248 ITR (Statute) pages 1, 34, 162 and 181 wherein memorandum explaining provisions in the Finance Bill, 2001 is reported in the journal. According to the ld.counsel for the assessee, it was explained that since participation of multinational group companies in the economic activities of the country has arisen, and new complex issues have emerged from the transactions entered between two or more enterprises belonging to the same multinational group, therefore, possibility of manipulation of price charged or paid as such in their group concerns, cannot be ruled out, and can lead to erosion of tax revenue

to the country. With a view to provide statutory framework, which can lead to computation of reasonable, fair and equitable profits and tax in India, in the cases of such multi-national enterprises, new provisions were introduced in the Income Tax Act. The ld.counsel for the assessee, thereafter brought to our notice Circular Bearing No.12 of 2001 dated 23.8.2001 reported in 251 (Statute) ITR page 15 issued by the CBDT for explaining the purpose and objects of these TP provisions and how they are to be implemented. According to the ld.counsel for the assessee, the CBDT had contemplated that these TP provisions have been incorporated with a view to provide a statutory framework which can lead to computation of reasonable, fair and equitable profits and taxes in India so that the profits chargeable to tax in India did not get diverted elsewhere by altering the price charged and paid in their group concern, leading to erosion of tax revenue. Similarly, he brought to our notice other circulars viz. Circular No.14 of 2001, 8 of 2002 and contended that basic thrust of all these circulars is to propound that new provision was intended to ensure the profit taxable in India are not under-stated (or loss are not overstated) by declaring lower receipts or higher outgoings than those which would have been declared by the persons entered into with similar persons with unrelated parties in the same or similar circumstances. The basic intention underline with new TP regulation is to prevent shifting out of profit by manipulating prices charged or paid in international transactions. He also drew or attention towards decision of Hon'ble Supreme Court in the case of Morgan Stanley & Co. 292 ITR 416 in order to contend that object of the TP provisions is to protect India's tax base.

6.3 On the strength of the above, he emphases that fundamental object of these provisions is to ensure that India's tax base should not erode or profits taxable in India should not be shifted to other tax jurisdiction. If in a given situation, there is no motive or object to shift the taxability of profit then there should not be any determination of arm's length price for international transactions because the very object would frustrate. Once it is demonstrated that there is no

chance of avoiding payment of taxes, then this Chapter should not have been applied on such international transactions.

6.4. The ld.counsel for the assessee further contended that assessee is entitled for exemption under section 10A on its eligible profit at the rate of hundred percent. This factor is required to be kept in mind while construing or interpreting TP provisions in Chapter-X. The object of introducing these provisions in Chapter-X was to avoid erosion of tax revenue from Indian tax jurisdiction to foreign tax jurisdiction. If there is no chance to shift such tax basis on the ground that the assessee is eligible for tax exemption at the rate of hundred percent, then the provisions is to be construed which will achieve the objectives. Taking us through judgment of Hon'ble Supreme Court in the case of Goodyear India Ltd. & Others vs. State of Haryana and others (1992) Volme-2 SCC page no.71, whose copy has been placed on 404 of the case law compilation, he contended that Hon'ble Supreme Court in that case held that reasonable construction must be followed and literal construction may be avoid, if that defeats the objects and purpose of the Act. Similarly, he put reliance on the decision of Hon'ble Supreme Court in the case of Allied Motors P.Ltd. Vs. CIT, 224 ITR 677 and submitted that adjudicator should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. Thus, rule of reasonable interpretation should be applied.

6.5 In the third fold of contentions, Shri Hemani, the ld.counsel for the assessee has putforth the stand of the assessee as to why earlier Special Bench order of the ITAT in the case of *Aztec Software* & *Technology Services Ltd.* , 107 ITD 141 be not considered as governing the field. The facts in the case of *Aztec Software* & *Technology Services Ltd.* (supra) are that the assessee was an Indian company engaged in the business of development and export of software. It was also entitled to deduction under section 10A of the Income Tax Act in respect of profits and again derived from export of software. It has filed its return of income

for the Asstt.Year 2002-03 declaring total income at Rs.44,60,830/- after claiming deduction of Rs.7,53,69,376/- under section 10A of the Act. Since there were international transactions with associated enterprise exceeding Rs.5 crores, its case was selected for scrutiny assessment and a reference was sent to the TPO for determining arm's length price of international transaction with AE. The ld.Revenue authorities noticed that the assessee had received a sum of Rs.7.96 crores from its AE i.e. DB Software solutions and it had paid a sum of Rs.37.64 crores on account of marketing services of Rs.9.32 crores and on site software development services of Rs.28.32 crores. While determining ALP of both these transactions, the ld.TPO has recommended upward adjustment of Rs.18.18 crores. This was added in the income of the assessee. Dissatisfied with the adjustment in the assessment order, the assessee went in appeal before the ld.CIT(A). It took various grounds viz.

> *"(a)There is no finding anywhere before or after reference in the communication under section 92CA that transactions were entered into in a manipulative manner so as to avoid the tax payment in India as mentioned in Circular No. 12 of 2001 issued by :-; Board. In this case no such possibility exists as the entire income from the new industrial undertaking is eligible for deduction under section 10A, hence the very assumption of jurisdiction for ALP determination is erroneous and unsustainable in law.*
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> *(b)The reference made to the TPO is without jurisdiction as reasons for such reference has not been furnished to the assessee.*
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> *(c)The TPO ought to have insisted from Assessing Officer the material in his possession which would conclusively establish that the impugned transaction were entered into by the assessee with an intention to avoid the tax before acting upon the purported reference. It may be noted that only those cases which have been entered into with an intention to avoid tax alone are covered under Chapter X and not regular commercial transaction. It is essential that incontrovertible evidences are in the possession of the Assessing Officer before a reference is made as held by the Supreme Court in K.P. Varghese v. [TO [1981] 131 ITR 5971 The onus is on the revenue to establish any transaction leading to the avoidance of tax. From the Circular No. 12 of 2001 issued, under Transfer Pricing, it is clear that only in cases where profits taxable in India are diverted only then transfer pricing provisions are applicable. In this case no such findings are given.*
>
> *(d)In the absence of any evidence to show that the assessee has paid or received or entitled to receive more than what is accounted for, the reference to the TPO could not be made.*
>
> *(e)The mandatory conditions provided in sub-section (3) to section 92CA have not been followed.*

(f)The order of the TPO passed under section 92CA is not binding on the Assessing Officer and the Assessing Officer has to I independently verify and convince himself of the legality of the order before any action is taken."

6.6. The ld.CIT(A) considered the contentions of the assessee on these grounds and held that before invoking Chapter X-A there should be existence of an avoidance of tax by way of transfer price mechanism. These provisions cannot be resorted to in a mechanical manner. The AO must demonstrate on the basis of material/information and documents in its possession that there is an avoidance of tax. Secondly, it was held that before embarking on any determination of ALP, the assessing authority has to pass through the process as prescribed under clause (a) to (d) of sub-section 3 of section 92C of the Income Tax Act not only where the assessing authority does it himself but also made reference to the TPO. In other words, before making reference to the TPO, the AO ought to have passed through the process as prescribed under clause (a) to (d) of section 92C(3). In his third reasoning, the ld.CIT(A) has held that before making reference satisfaction ought to be recorded by the AO for invoking provisions of Chapter X. The ld.CIT(A) in this way has assigned broadly six reasons which were considered by the ITAT. Under these circumstances, the ITAT has formulated the following questions require to be considered by the Special Bench:

Whether is this a legal requirement under the provisions contained in Chapter X of the Income Tax Act, 1961 that the AO should prima facie demonstrate that there is a tax avoidance before invoking relevant provision ?

6.7 This question has been replied in favour of the Revenue and against the assessee by Five Members of the Special Bench of ITAT, Bangalore. Anticipating the stand of the Revenue, on the strength of this order, the ld.counsel for the assessee has submitted as to how ratio laid down in this case is no more a good law. He contended that an identical question was considered by the Hon'ble Bombay High Court in the case of Vodafone India Services P.Ltd., 361 ITR 531. The question before Hon'ble Bombay high Court was –

Whether the existence of a potentially taxable income or an expenditure (capital or revenue) that impacts computation of taxable is a sine qua non for the invocation of jurisdiction under Chapter X ?

6.8 This question has been answered in affirmative i.e. in favour of the assessee and against the Revenue. Hence, Hon'ble Bombay High Court has expressly overruled the ratio laid down in the case of *Aztec Software* & *Technology Services Ltd.* (supra). He further contended that the question before the Special Bench in the case of *Aztec Software* & *Technology Services Ltd.* was not dealing with the question posed before the Special Bench, and those observations or the finding in the case of *Aztec Software* & *Technology Services Ltd.* is concerned, they are obiter in a sense for the purpose of adjudicating this issue before the Special Bench. He drew our attention towards paragraph nos.20 and 22 of the Special Bench order in the case of *Aztec Software* & *Technology Services Ltd.* and contended that the ld.counsel for the assessee in the case of *Aztec Software* & *Technology Services Ltd.* had submitted that even the claim of deduction under section 10A, 10AA and 10B would not alter the situation in so far as answer to the question is concerned. In this background, the Hon'ble Special Bench only noted that claim of deduction under section 10A, AA and B would not compel the AO to *prima facie* demonstrate that there is a tax avoidance before invoking relevant provisions. Thus, this observation was merely an argument by the ld.counsel for the assessee on which the Hon'ble Special Bench has expressed its view. It was not expressly adjudicated and would just an obiter which has no binding value. For buttressing his contentions, he relied upon the judgment of Hon'ble Gujarat High Court in the case of CIT Vs. Baroda People's Cooperative Bank reported in 280 ITR 282. Similarly, he relied upon the decision of Hon'ble Madras High Court in the case of Gerard Perira v. ITO, 389 ITR 547. He placed on record copies of both these decisions in the compilation. The ld.counsel for the assessee further relied upon the decision of Full Bench of Hon'ble Andhra Pradesh High Court in the case of Central Wines Vs. Ito, 244 ITR 307. He emphasised that

ratio of law laid down in any of decisions is to be appreciated in the light of facts and the dispute involved in that case.

6.9 In his fourth fold of contentions, he submitted that income is a *sine qua non* to apply provisions of Chapter X and in support of his contentions, he relied upon the decision of Hon'ble Bombay High Court in the case of Vodafone India Services P.Ltd. (supra). Thereafter, he compiled twenty orders at the end of Hon'ble Bombay high Court, Karnataka High Court as well as of ITAT. Copies of these decisions have been placed in the paper book started from page no.7 upto 371. Apart from these decisions of Hon'ble Bombay High Court in the case of Vodafone Services P.Ltd. and Karnataka High Court decision in the case of Phillips Software, he drew or attention towards order of the ITAT, Mumbai in the case of Tata Consultancy Services. He pointed out that subsequent to the decisions of Hon'ble High Courts, even CBDT has issued circular recognising that this procedure required to be followed. The AO ought to have not made reference blindly to the TPO for determination of ALP of international transaction. He has to first *prima facie* look into whether any element of income or loss is involved in such transaction or not. He drew our attention towards circular nos.15 of 2015 and 3 of 2016 which are placed on page no.185 and 181 of case law compilation. Anticipating interdiction provided in sub-clause (4) of section 92C along with its provisions, he contended that no doubt this clause provides that in case of any adjustment was being recommended either upward side or downward side in the value of ALP deduction under section 10A, 10B, 80IA etc. has been prohibited. He also submitted that he is conscious of the contentions of the Revenue that if arguments of the assessee is being accepted then section 92C(4) would become redundant. According to him, Chapter X is a machinery provisions and not a charging one. Once the income of the assessee is eligible for hundred percent deduction under section 10A then by applying the machinery provision an artificial chargeabilty cannot be invoked upon the assessee. The provision to section 92C is again a step down machinery provisions which gets triggered only when section 92

is found to be applicable. In other words, the stand of the assessee on this issue is that Chapter X itself is a machinery provision, first some adjustment in the value of international transaction would be found out by application of machinery provision, and thereafter that will be disqualified for grant of deduction with help of proviso which is one more step down of the machinery provisions. This proviso cannot be given preference over the section 10A of the Act. For buttressing his contentions, again put reliance upon the decision of Hon'ble Bombay High Court in the case of Vodafone India Services P.Ltd. (supra).

6.10 In the last fold of contentions, he took all residuary arguments of this issue. According to him, sections 10A/10B/10AA and the TP provisions operate in separate and mutually exclusive sphere. On plain reading of these provisions, it would reveal that neither supersede nor overrule the other one. In a case of overlapping there is no legislative or judicial clarity as to which will prevail over the other. In order to buttress this proposition, he took us through section 10A and submitted that this section provides exemptions on the profits derived from eligible business by a newly established undertaking in a free trade zone. In order to determine eligible business for the purpose of computing eligible profits, the Legislature have put various restrictions also, and for that purpose he took us section 80IA and (8) and 10 which have been made applicable to section 10A of this section wherein it has been contemplated that value of all goods and services undertaken by any assessee from the eligible business should correspond equivalent to the market value. If in the opinion of the AO the computation of profits and gain of eligible business in the manner provided in the Act presents exceptional difficulty then the AO may compute such profits and gain as reasonable basis as deemed fit. Similarly, upto Asstt.Year 2012-13, expression "market value" used in section (8) has been explained by way of an explanation. According to this explanation, the expression "market value" in relation to any goods and services means the price that such goods or services would ordinarily fetch in the market. After Asstt.Year 2013-14, the scope of expression "market

value" used in sub-section(8) has been enhanced and it has been provided that it should be at an arm's length price as defined in clause (ii) of section 92F where the transfer of such goods or services is a specified domestic transaction referred to in section 92BA. He further pointed out that in sub-section (10) of section 80IA which is applicable on the computation admissible under section 10A, it has been provided that if the assessee owing to onerous connection between him and any other person arranged, in such a manner which result more than the ordinary profit, then the AO has been empowered to compute reasonably according to his wisdom. Thus, section 10A is a complete code in itself, which authorise the AO to determine the eligible profit for grant of exemption at the rates specified in section. It takes care of any unreasonable profit if computed by the assessee. In other words, the eligible profit has to be computed keeping in view the market value of goods and services transacted by the assessee with any other concern, who may happen to closely associated concern in the domestic market. Referring to section 92C which provides mechanism for computation of ALP, he contended that this also provides for determination of ALP of an international transaction; but under the TP provisions, transaction between associated enterprises can be recomputed. One of the enterprises is a non-resident, and only upward adjustments are permissible. Thrust of his arguments is that when the AO can accept working of eligible profits of which tax exemption at the rate of hundred percent is being provided under identical regulations as are provided in transfer pricing. In other words, eligible profits is to be computed keeping in mind, the market value of the goods and services transacted by the assessee, and it is to be calculated that even on reasonable basis on which hundred percent exemption to be granted to the assessee, then how same computation will be inadmissible for the purpose of ALP of international transactions, which is identical. In these circumstances, though computation under one Chapter and under one scheme of the Act was not disturbed by the AO, but some computation is being sought to be disturbed for the purpose of TP provisions and on such disturbed result, the assessee has been

deprived of exemption under section 10A because of section 92(4) of TP provisions. He culled out the conflicts between both the sections as under:

> *i) S. 10A rws 80IA (8) talks about 'market value' whereas S. 92 talks about ALP.*
>
> *(ii) S.10A rws 80IA(10) talks about reducing 'more than the ordinary profits' whereas S. 92 talks about increasing the profits so as to increase the ALP.*
> *(iii) After AY 13-14, under both the sub-sections the Explanations do make a reference to domestic ALP though.*
>
> *(iv) Further conflict would arise when there is a transaction between closely associated enterprises, one of which is a non-resident, as both, s.10(7) and TP Provisions become applicable to re-determine the profits and transaction price respectively. There is no clarity as to whether the adjustment made by the AO or TPO will prevail.*

6.11 He further contended that since none of the provisions starts with non-obstante clause exhibiting the overriding effect given to any of the provisions, then section 10A being substantive provisions provide incentive from taxation and also a machinery provisions providing the mode of computation, it should be given preference over the TP provisions. Therefore, once it is held that the assessee is entitled for hundred percent exemption of its profit under section 10A, then TP provision ought not to be applied. He relied upon the decision of Hon'ble Karnataka High Court in the case of CIT V. Hewlett Packard Global Soft Ltd., 403 ITR 453. He also relied upon the decision of Hon'ble Bombay High Court in the case of Vodafone India P.Ltd. (supra) as well as made reference to the decision of Hon'ble Supreme Court in the case of Bajaj Tempo Ltd., 196 ITR 188. On the strength of Hon'ble Supreme Court decision, he submitted that section 10A of the Act being a provision intended to promote for economic growth it should be construed liberally with an idea to achieve both these sections and not to frustrate such objects. The ld.counsel for the assessee further contended that Shri Diren Doshi is holding 99% of the shares of the assessee-company. He has a proprietorship concern in UK viz. Doshi & Company. Accordingly, he is a resident of UK. He drew our attention towards clause (4) of Article 26 of the Indo-UK DTA and submitted that this clause is directly applicable to the assessee. India cannot subject the assessee to taxation or requirements more onerous than the similar

enterprises in India. In other words, tax authorities in India cannot discriminate between the assessee vis-à-vis an identical assessee situated in India dealing with identical transaction to other residents in India. Expounding his arguments, he pointed out that when an eligible unit under section 10A of the Act transacts with a related resident, the only action that can be taken is to deduce profit as per section 80IA(8) and 10 of the Act. However, when an eligible unit under section 10 of the Act transacts with a related non-resident, its profit can be re-determined, reduced as per 80IA(10) of the Act, and the transaction price can also be replaced and the assessee's income enhanced under the TP provisions. He drew our attention towards provision to section 92C(4) of the Act wherein it has been provided that if there is an upward adjustment in the ALP of a international transaction, then deduction under section 10A will not be granted on such adjustment. This creates a discrimination between the resident vis-à-vis non-resident and in view of Article 26 of Indo-UK DTA, this cannot be allowed to happen. He made reference to the decision of Hon'ble Delhi High Court in the case of CIT Vs. Herbalife International India P.Ltd., reported in 384 ITR 276. He also relied upon the order of the ITAT, Special Bench, Ahmedabad in the case of Rajeev Sureshbhai Gajwamo v. ACIT, 129 ITD 145. He further contended that when two views are possible, then the view which is favourable to the assessee should prevail. For buttressing his contentions, he made reference to Hon'ble Supreme Court in the case of CIT Vs. Vegetable products India Ld., 88 ITR 192. He also relied upon the judgment of Hon'ble Supreme Court in the case of CIT Vs. Vatika Township, 367 ITR 466.

7. On the other hand, **Shri Vinod Talwani, Ld. Sr. DR** objected to the language of question formulated for reference to the Special Bench and before us submitted that there are two limbs of the question referred to the Special Bench. The first limb is the phrase used 'chargeable to tax' which denotes liable to tax. Thus the person enjoying tax exemption is chargeable to tax though the person may not be actually taxed upon the fulfillment of certain conditions.

7.1 Similarly, the second limb deals with the motive of tax avoidance before invoking the computation machinery, which is an incorrect onus on the Revenue.

7.2 Accordingly, the ld. DR claimed that the question referred to the special bench is not proper, i.e., chargeable to tax means liable to tax, and accordingly, he suggested the questions as under :

> *Whether or not the provisions of section 92 can be invoked in a situation in which the assessee is eligible for tax exemption or tax holiday and thus actually not taxed in India?*
>
> *Whether or not the provisions of section 92 can be invoked in a situation in which the Assessing Officer cannot demonstrate that there is tax avoidance or possible tax avoidance?*

7.3 The ld. DR further submitted that the ratio laid down by the Tribunal in the case of ASTSL is squarely applicable to the facts of the instant case.

7.4 The literal interpretation shall be applied where there is no ambiguity in the interpretation of the provisions of the law. Thus there is no need to take any aid from the rule of the interpretation, as in the case on hand the provisions are clear and unambiguous as specified in the proviso to section 92C(4) of the Act. Thus the argument of the ld. AR to consider the motive of transfer pricing provision is not relevant.

7.5 The power to levy tax is an attribute of Sovereignty. The exercise of this power is controlled by the Constitution wherein Article 265 provides that

> *"Taxes not to be imposed save by authority of law. No tax shall be levied or collected except by authority of law."*

7.6 Thus, in the case on hand, the tax has been levied even on the undertakings enjoying the benefit of the tax holiday in the circumstances specified under the proviso to section 92C(4) of the Act. Accordingly, the tax in India cannot be subject to tax laws prevailing outside India.

7.7 There are incomes which are chargeable to tax, albeit they do not form part of the total income as understood under section 4 r.w.s. 5 of the Act. These incomes are specified under section 158BA r.w.s. 113, section 68 r.w.s. 115BBE of the Act. Similarly, when the proviso to section 92C(4) of the Act comes into play resulting in a disallowance out of the exempted part of income, allowed under section 10A of the Act, will be subject to tax.

7.8 The ld. DR consented to the proposition put forth by the Ld. AR that provisions of section 10A of the Act are a complete code in itself, but qualified that the same is limited for the purpose of the computation.

7.9 The ld. DR further contended that the words used "avoidance of tax" in the heading of chapter X are not to limit the scope only for the cases involving tax avoidance. Instead, it is to include inter-alia the cases involving tax avoidance. Accordingly, if the transaction qualifies to be an international transaction within the meaning of section 92B of the Act than the same has to be seen at arm's length irrespective of the fact that there is or there is not any tax avoidance.

7.10 The facts in the case of Vodafone India Services (P.) Ltd, vs. UOI (2013) 39 taxmann.com 201 (Bombay) (Vodafone-III) are different from the case on hand as there was no income or potential impact on income before referring the matter to the TPO. But the international transaction in the case on hand is relating to sales and chargeable to tax under the Act as per section 2(24) of the Act. Accordingly,

the case of Vodafone will not impact the invocation of Chapter X of the Act in the instant case.

7.11 The ld. DR also claimed that the assessee could not be given the benefit of the undue advantage on account of the non-discrimination clause in the DTAA between the UK and India. The ld. DR also submitted that the general clause in the DTAA could not be given wider meaning than the specific provisions of section 92 of the Act.

7.12 The Ld. DR vehemently argued based on findings culled by the AO and subsequently upheld by the ld. DRP in their respective orders.

8. The Ld. AR in his rejoinder objected on the change of the question either in form or in substance amidst the proceedings. Accordingly, the ld. AR claimed that the assessee is not "chargeable" to tax by virtue of 100% tax holiday u/s 10A of the Act.

8.1 In the case on hand, the AO is not necessitated by the statute to determine the motive of the Assessee. Rather, there is no question of determining the motive of the Assessee in a case such as this where the assessee is receiving/claiming/entitled to 100% tax exemption. Provided the state of affairs, there is no commercial prudence in shifting profits to the UK when the same is exempt in the home country, India. Hence, the argument of the assessee was never that AO should determine motive before invoking Chapter X, but that there cannot be any motive and hence, Chapter X is not to be invoked.

8.2 The question before the Bench in the case of ASTSL was different from the question referred to the present special bench. Hence, it cannot be inferred that the ASTSL case and the present case align with each other.

8.3 The ld. AR also reiterated that while interpreting the provision, one should keep in mind the intent and object of the provision. In the present case, the transfer pricing provisions are intended to prevent shifting of profits outside India, and without establishing such intent, the transfer pricing provisions remain un-triggered.

8.4 There is discrimination between a resident assessee and non-resident assessee, within the meaning of section 6 of the Act, which is against the provisions of the DTAA between India and the UK.

8.5 There is a notional/book adjustment on account of the transfer pricing provisions. As such, there will not be any inflow of the foreign currency even when the exemption is denied by virtue of the proviso to section 92C of the Act.

9. **We have duly considered the rival contentions** of both the parties and gone through the records carefully. Before, we embark upon an inquiry as to what would be correct interpretation or construction of section 92CA, we think it appropriate to bear in mind certain basic principles of interpretation of statute. Both the sides have referred number of authoritative pronouncement on this aspect. ITAT Special Bench, in the case of Aztec (supra) has also considered a large number of decisions on this issue. We think it is not necessary to recapitulate and recite all the decision on this legal aspects, but suffice it is to say that core of all the decisions of the Hon'ble Supreme Court, or Hon'ble High Courts or ITAT is to the effect that it is cardinal rule of interpretation that where the language used by the legislature is clear and unambiguous then plain and natural meaning of those words should be applied to the language and resort to any rule of interpretation to unfold intentions is permissible where the language is ambiguous. The Special Bench of ITAT in Aztec (supra) made reference to the following decision:

"The Hon'ble Supreme Court, in the case of Smt. Tarulata Shyam v. CIT 108 ITR 345 SC, approved the observations in the case of Cape Brandy Syndicate v. Inland Revenue Commission (1921) 1 KB 64 by observing as under:

> *To us, there appears no justification to depart from the normal rule of construction according to which the intention of the Legislature is primarily to be gathered from the words used in the statute. It will be well to recall the words of Rowlatt, J. in Cape Brandy Syndicate v. Inland Revenue Commissioners (1921) 1 KB 64 (KB) at page 71, that :*
>
> *...in the taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.*
>
> *Once it is shown that the case of the assessee comes within the letter of the law, he must be taxed, however, great the hardship may appear to the judicial mind to be.:*

9.1 In the case of Keshavji Ravji & Co. v. CIT , the Apex Court observed as under:

> *"As long as there is no ambiguity in the statutory language, resort to any interpretative process to unfold the legislative intent becomes impermissible. The supposed intention of the Legislature cannot then be appealed to whittle down the statutory language which is otherwise unambiguous. If the intendment is not in the words, it is nowhere else. The need for interpretation arises when the words used in the statute are, on their own terms, ambivalent and do not manifest the intention of the Legislature."*

9.2 In the case of Guru Devdata VKSSS Maryadit v. State of Maharashtra , their Lordships of the Apex Court held as under:

> *"It is a cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless there is something in the context or in the object of the statute to suggest to the contrary. The golden rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the Courts are bound to give effect to that meaning irrespective of consequences. It is said that the words themselves best declare the intention of the Law give. The Courts have adhered to the principle that effort should be made to give meaning to each and every word used by the Legislature and it is not a sound principle of construction to brush aside words in a statute as being inapposite surplus if they can have a proper application in circumstances conceivable within the contemplation of the Statute."*

9.3 Though there are various judgments upholding the above principle but we may only mention that Constitution Bench of the Hon'ble Supreme Court in the case of CIT v. Anjum M.H. Ghaswala , has endorsed the above view by observing as under:

"This exercise of purposive interpretation by looking into the object and scheme of the Act and the legislative intendment would arise, in our opinion, if the language of the statute is either ambiguous or conflicting or gives a meaning leading to absurdity."

9.4 Similarly in the case of Prakash Nath Khanna and Anr. v. CIT and Anr. 266 ITR 1 (S.C), their Lordships have observed as under:

"It is well settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the Legislature itself. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed, not as theorems of Euclid". Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them.

***** **** *****

While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the Legislature to amend, modify or repeal it, if deemed necessary. (see Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd.). The legislative causus omissus cannot be supplied by judicial interpretative process.

Two principles of construction - one relating to casus omissus and the other in regard to reading the statute as a whole - appear to be well settled. Under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute."

9.5 We also support and guidance from the judgment in the case of Mathuram Agrawal vs. state of Madhya Pradesh (Appeal (civil) 1990 of 1995) wherein it was held as under:

"It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e., the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter."

9.6 We also support and guidance from the judgment of Hon'ble High court of Punjab & Haryana (309 ITR 194) in case of coca cola India Inc vs. ACIT wherein it was held as under:

> *"24. The Legislature best understands needs of the people and how best the policy of taxation can be advanced. More elasticity is permissible to Legislature in taxing Statutes and it may be open to the Legislature to deal with apparently overlapping situations by different provisions.*
>
> *25. Though Article 14 of the Constitution applies even to a taxing statute, it does not prevent Legislature from making classification having intelligible differentia and nexus with the object of classification.*
>
> *26. Principles of interpretation are applied to ascertain the intention of the Legislature and though they are considered to be good servants, they are bad masters. Intention of Legislature is best understood from the language used, which is the golden rule of interpretation. Only when there is ambiguity or absurdity, external aids may be pressed into service. Statement of objects and reasons or the speech of the Finance Minister may be referred to, to ascertain the history and object, but cannot control meaning of a provision when language is clear and free from ambiguity.*
>
> *xxxxxxx*
>
> *44. There is, thus, no departure from the settled principle that primary rule of construction is the language used and in case of ambiguity or absurdity, meaning consistent with object and purpose of a statute has to be assigned without doing violence to the statute. Statement of objects can be referred to find out the history and object of the statute and does not control the interpretation when language is clear. We are unable to read the judgments relied upon to the contrary."*

9.7 The above judgment makes it vivid and beyond any reasonable doubt that courts are not required to look into the object or intention of the Legislature by resorting to the aids of interpretation where the language used in the statute is clear and free from any ambiguity. To strengthen our findings, we also find support and guidance from the Apex court in case of M/s Rishabh agro industries Ltd vs. P.N.B. Capital services Ltd. (5 SCC 515) (2000) wherein it was held as under:

> *"While interpreting, this Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the Legislature to amend modify or repeal it by having recourse to appropriate procedure, if deemed necessary."*

9.8 Now, the controversy in the instant case is disguised in the question as to whether the provisions of chapter X shall be invoked in a situation where the assessee is enjoying tax exemption under section 10A of the Act and/or where there is no motive to avoid tax. We find that the purpose of enacting transfer pricing provisions was to put a stop to the avoidance of tax by shifting taxable income outside India. Similarly, extending the fundamental of intendment to section 10A of the Act, we comprehend that this particular section is purported to boost the business of those undertakings which are situated in free trade zones (FTZ) and engaged in export of article or things or computer software services etc. by exempting their income from levy of tax. Thus, here the question arises as to whether the transfer pricing provisions can be invoked concerning the international transaction carried out by the assessee with its AE where the former is enjoying exemption under section 10A of the Act. It is because, in such a situation, the assessee might not have any motive to shift the income from India to a foreign country as the same has already been exempted under section 10A of the Act.

9.9 In this connection, section 92C has direct bearing on the controversy on hand. Therefore, it is imperative upon to take note of this section. It reads as under:

92C. (1) The arm's length price in relation to an international transaction or specified domestic transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or such other relevant factors as the Board may prescribe36, namely :—

(a) comparable uncontrolled price method;

(b) resale price method;

(c) cost plus method;

(d) profit split method;

(e) transactional net margin method;

(f) such other method as may be prescribed36 by the Board.

(2) The most appropriate method referred to in sub-section (1) shall be applied, for determination of arm's length price, in the manner as may be prescribed36 :

Provided that where more than one price is determined by the most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices:

Provided further that if the variation between the arm's length price so determined and price at which the international transaction or specified domestic transaction has actually been undertaken does not exceed such percentage not exceeding three per cent of the latter, as may be notified by the Central Government in the Official Gazette in this behalf, the price at which the international transaction or specified domestic transaction has actually been undertaken shall be deemed to be the arm's length price :

Provided also that where more than one price is determined by the most appropriate method, the arm's length price in relation to an international transaction or specified domestic transaction undertaken on or after the 1st day of April, 2014, shall be computed in such manner as may be prescribed and accordingly the first and second proviso shall not apply.

Explanation.—For the removal of doubts, it is hereby clarified that the provisions of the second proviso shall also be applicable to all assessment or reassessment proceedings pending before an Assessing Officer as on the 1st day of October, 2009.

(2A) Where the first proviso to sub-section (2) as it stood before its amendment by the Finance (No. 2) Act, 2009 (33 of 2009), is applicable in respect of an international transaction for an assessment year and the variation between the arithmetical mean referred to in the said proviso and the price at which such transaction has actually been undertaken exceeds five per cent of the arithmetical mean, then, the assessee shall not be entitled to exercise the option as referred to in the said proviso.

(2B) Nothing contained in sub-section (2A) shall empower the Assessing Officer either to assess or reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154 for any assessment year the proceedings of which have been completed before the 1st day of October, 2009.

(3) Where during the course of any proceeding for the assessment of income, the Assessing Officer is, on the basis of material or information or document in his possession, of the opinion that—

(a) the price charged or paid in an international transaction or specified domestic transaction has not been determined in accordance with sub-sections (1) and (2); or

(b) any information and document relating to an international transaction or specified domestic transaction have not been kept and maintained by the assessee in accordance with the provisions contained in sub-section (1) of section 92D and the rules made in this behalf; or

(c) the information or data used in computation of the arm's length price is not reliable or correct; or

(d) the assessee has failed to furnish, within the specified time, any information or document which he was required to furnish by a notice issued under sub-section (3) of section 92D,

the Assessing Officer may proceed to determine the arm's length price in relation to the said international transaction or specified domestic transaction in accordance with sub-sections (1) and (2), on the basis of such material or information or document available with him:

Provided that an opportunity shall be given by the Assessing Officer by serving a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the arm's length price should not be so determined on the basis of material or information or document in the possession of the Assessing Officer.

(4) Where an arm's length price is determined by the Assessing Officer under sub-section (3), the Assessing Officer may compute the total income of the assessee having regard to the arm's length price so determined :

Provided that no deduction under section 10A or section 10AA or section 10B or under Chapter VI-A shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this sub-section :

Provided further that where the total income of an associated enterprise is computed under this sub-section on determination of the arm's length price paid to another associated enterprise from

which tax has been deducted or was deductible under the provisions of Chapter XVIIB, the income of the other associated enterprise shall not be recomputed by reason of such determination of arm's length price in the case of the first mentioned enterprise.

.....

92CA. (1) Where any person, being the assessee, has entered into an international transaction or specified domestic transaction in any previous year, and the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the Principal Commissioner or Commissioner, refer the computation of the arm's length price in relation to the said international transaction or specified domestic transaction under section 92C to the Transfer Pricing Officer.

(2) Where a reference is made under sub-section (1), the Transfer Pricing Officer shall serve a notice on the assessee requiring him to produce or cause to be produced on a date to be specified therein, any evidence on which the assessee may rely in support of the computation made by him of the arm's length price in relation to the international transaction or specified domestic transaction referred to in sub-section (1).

(2A) Where any other international transaction [other than an international transaction referred under sub-section (1)], comes to the notice of the Transfer Pricing Officer during the course of the proceedings before him, the provisions of this Chapter shall apply as if such other international transaction is an international transaction referred to him under sub-section (1).

(2B) Where in respect of an international transaction, the assessee has not furnished the report under section 92E and such transaction comes to the notice of the Transfer Pricing Officer during the course of the proceeding before him, the provisions of this Chapter shall apply as if such transaction is an international transaction referred to him under sub-section (1).

(2C) Nothing contained in sub-section (2B) shall empower the Assessing Officer either to assess or reassess under section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under section 154, for any assessment year, proceedings for which have been completed before the 1st day of July, 2012.

(3) On the date specified in the notice under sub-section (2), or as soon thereafter as may be, after hearing such evidence as the assessee may produce, including any information or documents referred to in sub-section (3) of section 92D and after considering such evidence as the Transfer Pricing Officer may require on any specified points and after taking into account all relevant materials which he has gathered, the Transfer Pricing Officer shall, by order in writing, determine the arm's length price in relation to the international transaction or specified domestic transaction in accordance with sub-section (3) of section 92C and send a copy of his order to the Assessing Officer and to the assessee.

(3A) Where a reference was made under sub-section (1) before the 1st day of June, 2007 but the order under sub-section (3) has not been made by the Transfer Pricing Officer before the said date, or a reference under sub-section (1) is made on or after the 1st day of June, 2007, an order under sub-section (3) may be made at any time before sixty days prior to the date on which the period of limitation referred to in section 153, or as the case may be, in section 153B for making the order of assessment or reassessment or recomputation or fresh assessment, as the case may be, expires:

Provided that in the circumstances referred to in clause (ii) or clause (x) of Explanation 1 to section 153, if the period of limitation available to the Transfer Pricing Officer for making an order is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to have been extended accordingly.

(4) On receipt of the order under sub-section (3), the Assessing Officer shall proceed to compute the total income of the assessee under sub-section (4) of section 92C in conformity with the arm's length price as so determined by the Transfer Pricing Officer.

(5) With a view to rectifying any mistake apparent from the record, the Transfer Pricing Officer may amend any order passed by him under sub-section (3), and the provisions of section 154 shall, so far as may be, apply accordingly.

(6) Where any amendment is made by the Transfer Pricing Officer under sub-section (5), he shall send a copy of his order to the Assessing Officer who shall thereafter proceed to amend the order of assessment in conformity with such order of the Transfer Pricing Officer.

(7) The Transfer Pricing Officer may, for the purposes of determining the arm's length price under this section, exercise all or any of the powers specified in clauses (a) to (d) of sub-section (1) of section 131 or sub-section (6) of section 133 or section 133A.

Explanation.—For the purposes of this section, "Transfer Pricing Officer" means a Joint Commissioner or Deputy Commissioner or Assistant Commissioner authorised by the Board to perform all or any of the functions of an Assessing Officer specified in sections 92C and 92D in respect of any person or class of persons."

On the perusal of the above provision, it is very clear that the purpose behind the provision of transfer pricing is to determine true profits/income as if such international transaction has been entered with an unrelated party or non-AE, irrespective of the fact that the income of the assessee was eligible for exemption.

9.10 Further, there is no express provision under the Act restricting the application of section 92C of the Act for determining the income at arm's length where such income is eligible for deduction u/s 10A of the Act. On the contrary, there is a proviso to section 92C(4) of the Act which prohibits the deduction u/s 10A of the Act on the income to the extent enhanced as an effect of a determination of ALP. The relevant proviso to section 92C(4) of the Act reads as under:

"Provided that no deduction under section 10A[34][or section 10AA] or section 10B or under Chapter VI-A shall be allowed in respect of the amount of income by which the total income of the assessee is enhanced after computation of income under this sub-section :"

9.11 Thus, the proviso itself vividly reflects the intent of lawmakers that the provisions of chapter X of the Act shall prevail in all the cases of international transactions falling under the umbrella of section 92 of the Act including the income-qualified for exemption under section 10A of the Act. In other words, it can be said that the intention of the statute was very much lucid that section 92 of the

Act should be invoked even when the assessee is entitled to deduction u/s 10A of the Act.

In the light of above perceivance, we are of the view that there is no need to refer to other means of interpretation if the words are clear and free from any ambiguity. However, if the words in the statute are vague and ambiguous, then external aid may be consulted for interpretation. This connotes that the statute should be read as a whole; therefore, the point which is not clear in one section may be explained in another section.

9.12 Accordingly, we are also of the view that if the purpose or object of Chapter X and/or Section 10A of the Act is being defeated, then it is up to the legislature, if they think so, to reconstruct the law as per the required object.

9.13 However, we have already held above that language used in sections 92 of the Act is clear, unambiguous, and do not lead to any absurd meaning. Thus we construe that there is no need to look into the intention or purpose of the statute or application of reasonable construction. Accordingly, it is meaningless to apply the principles of purposive or object-based rules of interpretation as contended by the Ld. Counsel for the assessee, consequently it was fallacious to place reliance on Goodyear India Ltd & ors. vs. State of Haryana & Anr and others case laws cited by the ld. AR for the assessee. Therefore we are reluctant to place our reliance on the rulings referred by the ld. AR.

9.14 Before parting with this issue, we would deal with another contention of the assessee where he relied on apex court in case of Allied Motors (P) Ltd vs. CIT (*supra*). However, on perusal of above case (*supra*), we find that the observation drawn therein were in respect of the first proviso to section 43B inserted with

effect from 1-4-1988 and the question before the Hon'ble Court was whether this proviso should be applied retrospectively or not. In this regard, the Hon'ble court after considering the fact that since the proviso inserted was curative; therefore, the same should be applied retrospectively. The facts of the above case and the question before us are entirely different.

9.15 Regarding *the budget speech & memorandum explaining the provisions,* we note that it is also a settled legal position that headings or marginal notes do not govern a provision where the legislature has used plain and unambiguous language. It is when the language is equivocal only then, help can be taken from the circulars, marginal notes or the Finance Minister speech or memorandum explaining the provisions to interpret the provision of the Act. In holding so, we draw support from the judgment of the Supreme Court in the case of Anandji Haridas & Co. Pvt. Ltd vs. Engineering Mazdoor Sangh & Anr (Civil Appeal No. 2053 of 1971) wherein it was held as under:

> *"We are afraid what the Finance Minister said in his speech cannot be imported into this case and used for the construction of Clause (e) of Section 7. The language of that provision is manifestly clear and unequivocal. It has to be construed as it stands, according to its plain grammatical sense without addition or deletion of any words. As a general principle of interpretation, where the words of a statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external evidence such as Parliamentary Debates, Reports of the Committees of the Legislature or even the statement made by the Minister on the introduction of a measure or by the framers of the Act is admissible to construe those words. It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning, that external evidence as to the evils, if any, which the statute was intended to remedy, or of the circumstances which led to the passing of the statute may be looked into for the purpose of ascertain- ing the object which the Legislature had in view in using the words in question."*

In view of the above, the Finance Minister speech and memorandum explaining the bill will not provide any aid to the assessee in the given facts & circumstances.

10. In the context of the CBDT Circulars bearing Nos. 12/2001 dated 23-08-2001 AND 14/2001 dated 9-11-2001, we are of the view that it is merely explaining the understanding of statutory provisions regarding the transfer pricing. Further, it is a well-settled principle that the departmental circulars are not binding on us. These circulars cannot be used to usurp the power of a judicial body while exercising its jurisdiction, including interpreting the statutory provisions. In this regard, we draw support and guidance from the Apex court in case of Sanjeev coke manufacturing company vs. Bharat coking coal Ltd and another (1983 AIR 239) wherein it was held as under:

> *"No one may speak for the Parliament and Parliament is never before the Court. After Parliament has said what it intends to say, only the Court may say what the Parliament meant to say. None else. Once a statute leaves Parliament House, the Court's is the only authentic voice which may echo (interpret) the Parliament. This the court will do with reference to the language of the statute and other permissible aids. The executive Government may place before the court their understanding of what Parliament has said or intended to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation. When they do so, they do not speak for Parliament. No Act of Parliament may be struck down because of the understanding or misunderstanding of Parliamentary intention by the executive government"*

10.1 Without prejudice to the above, if we agree to apply the purposive interpretation while invoking the provisions of chapter X of the Act in the given facts and circumstances, then in our considered view, the same interpretation should also be extended in the context of the provision of section 10A of the Act. It is because we cannot see the provision of chapter X in isolation as the issue on hand has direct nexus with the provision of section 10A of the Act. Thus it becomes pertinent to refer to the purpose of introducing section 10A of the Act. In this regard, the Memorandum explaining the provision of Finance Bill, 1988 reads as under:

> *INCENTIVES FOR EARNING FOREIGN EXCHANGE*
>
> *Clarificatory amendment to extend tax holidy to the units in free trae zones engaged in devevelping software as also in processing or assembling.*

> *24. Under the existing provisions of section 10A of the Income-tax Act, any profits and gains of an industrial undertaking engaged in the manufacture or production of articles or things in a free trade zone are exempt from tax for a certain number of years.*
>
> *With a view to providing further incentives for earning foreign exchange, it is proposed to clarify that manufacture for the above purposes will include the activities of processing and assembling. It will further include recording of programmes on any disc, tape, perforated media or other information storage device.*
>
> *The amendment will take effect retrospectively from 1st April, 1981, and will, accordingly, apply in relation to the assessment year 1981-82 and subsequent years.*

10.2 From the above, it is clear that the spirit behind introducing section 10A was to bring foreign exchange in India. Granting exemption from Tax under section 10A of the Act was incidental and not the main object. Furthermore where amount fetched by the Indian AE as revenue and/or the amount paid to its counter-part, AE outside India, as expenditure is lower and higher respectively and does not correspond to an ALP, the same will adversely affect the inflow of foreign exchange in India. Perhaps this was the reason to insert the proviso in section 92C(4) of the Act. Accordingly, even if we apply the purposive interpretation in respect to the provisions of chapter X along with provisions of section 10A of the Act, we are not inclined to hold that provision of chapter X should not be applied where the assessee is eligible for the benefit of section 10A of the Act. It is because, in such a situation, the object of inserting section 10A in the statute will stand unaccomplished.

10.3 Indeed, in the instant case, albeit the adjustment in the ALP for the year under consideration may be of notional value, and the same may not actually result in an inflow of foreign exchange. But the said proviso to section 92C(4) of the Act shall deter the practice of manipulating the prices as suiting to the parties. Consequently, the purpose of the provisions of section 10A of the Act will not be defeated.

10.4 We further note that assessee though claiming the exemption under section 10A of the Act can also manipulate the ALP with an objective to avoid corporate dividend tax by shifting its profits to AE. Supposing, the Non-Resident AE being a shareholder in the instant case intends to claim/ draw a share out of profits from the business of the assessee, then the only option available would be to route it by way of dividend which is subject to tax under the provisions of DTAA. Thus the assessee on the disbursement of dividend has to pay tax at the rate mentioned in the DTAA. Now the issue arises that if the Resident AE desires to escape from such tax (CDT), then it can disguise the income transmitted to its Offshore AE within the manipulated transaction price which otherwise, would have been distributed as dividend. This also might be the reason for inserting a proviso to section 92C(4) of the Act as the lawmakers were very much aware of the possibility of manipulating the prices as discussed above.

11. Now coming towards the issue dealt by the Hon'ble Special Bench in ASTSL *(supra)* we note that the question before it was dissimilar from the one in the present case. As such, the Hon'ble Special Bench in ASTSL case has given its observation only in response to the argument placed by the ld. Counsel for the assessee regarding the invocation of chapter X with respect to the assessee enjoying 100% tax exemption under section 10A of the Act. Accordingly, no specific question, for invoking the provision of section 92 of the Act, was raised before the ITAT with respect to the assessee claiming the deduction/exemption under section 10A of the Act. Therefore, the observations/findings given in this regard by the Hon'ble special bench are "obiter dicta" and hence hold no binding value.

11.1 In this regard, we note that the relevant finding of the ITAT in the case of ASTSL (supra) to hold it as *ratio decidendi* has to pass the test as detailed under:

i. Find out the proposition considered as to be ratio decidendi.

ii. Remove the proposition from the judgment or reverse its meaning.

iii. Observe whether the judgment in the absence of such a proposition is still for good.

iv. If yes, then such a proposition cannot be categorized as ratio decidendi irrespective of the fact it was the relevant proposition.

11.2 If we apply the steps above to test whether the findings laid down by the Ld. ITAT in case of ASTSL (supra) in the context of the provisions of section 10A/10AA of the Act is obiter dicta, we note that there will not be any change in the decision of the Ld. ITAT, in the case of ASTSL (supra) qua the question framed before it. Accordingly, we concur with the argument of the Ld. AR that the finding given by the Ld. ITAT, in the case of ASTSL (supra), is obiter dicta. Therefore, we are reluctant to be guided by the order of the Ld. ITAT in the case of ASTSL (supra) for deciding the question framed before us.

12. Proceeding further towards the argument of the ld. AR of the assessee that the question decided by the special bench in ASTSL (supra) case is no longer a good law as the Bombay High court has expressly overruled it in case of Vodafone India Services (P) Ltd vs. UOI (361 ITR 531) by deciding a similar question against the findings drawn in the case of ASTSL*(supra)*. In this connection, we turn our attention towards the question and findings of the Hon'ble Bombay High Court, which is as under:

> *"3. Ld.counsel for the petitioner has raised the following questions for consideration by this Court:*
>
> *"(1) Whether the existence of a potentially taxable income or an expenditure (capital or revenue) that impacts computation of taxable income is a sine qua non for the invocation of jurisdiction under Chapter X ?"*

The relevant finding of the Hon'ble Bombay high court in the case, as discussed above stands as under:

> ***32.*** *It is clear that in view of Section 92(1) , there must be income arising and/or affected or potentially arising and/or affected by an International Transaction for the purpose of application of Chapter X . This would appear to be in the nature of jurisdictional requirement and the Assessing officer must be satisfied that there is an income or a potential of an income arising and/or being affected on determination of an ALP before he proceeds further in determining the ALP or referring the issue to the TPO to determine the ALP. In this case, we find that the petitioner has from the very beginning been challenging the jurisdiction to apply Chapter X on the ground that no income arises and/or is affected or potentially arises and/or is affected on account of issue of its shares to its holding company. The Assessing officer does not deal with this objection/issue before referring the matter to the TPO. The TPO does not deal with the above objection on the ground that in terms of Section 92CA, his mandate is only to compute the ALP in relation to the International Transaction. The TPO in the impugned order dated 28 January 2012 meets the petitioner's objection by stating that the same would be dealt with by the Assessing Officer. However, when the same objection was raised before the Assessing Officer post the order of the TPO, the Assessing Officer does not consider the same in the impugned draft assessment order dated 22 March 2013 on the ground that in view of Section 92 CA (4) , the Assessing Officer is obliged to pass an order in conformity with the ALP determined by the TPO. This jurisdictional issue has to be dealt with either by the TPO or the Assessing Officer when specifically raised by the petitioner/assessee.*

12.1 However, it is also pertinent to mention here that the facts of the case giving rise to the question pleaded before this bench and in case of Vodafone *(supra)* are different. In that case, it was held, after considering section 2(24) and 56(2)(viib), that there was no income accruing in the hands of the assessee. Hence no question arises for invoking of chapter X of the Act. But in the instant case, the assessee has income accruing from the export to the UK based AE, which is on "revenue account" as defined under section 2(24) of the Act. Hence, the same has to be governed by the provisions of chapter X of the Act. As such, there was no income accruing in the case of Vodafone as defined under the section 2(24) whereas in the case on hand there is an income accruing to the assessee from the export of services. Therefore, we are reluctant to place our reliance on the proposition laid down in the case of Vodafone *(supra)*.

Moreover, we also find that the cabinet in its press note dated 28.01.2015 accepted the judgment of Hon'ble Bombay High Court in the case of Vodafone *(Supra)* by clearly observing that transaction is on "capital account" and hence there is no 'income' to be chargeable to tax. Hence we disagree with the contention of ld. AR for the assessee.

12.2 Similarly, we also note that there is difference between the income and total income as held by the Hon'ble Punjab & Haryana court in case of CIT, Rohtak vs. Shri Lalita ashram trust (19 taxmann.com 243). Hon'ble P&H high court held that there is a difference between 'income' and 'total income' as defined under section 11 and section 5 of the Act. Similarly, we also find that the word used under section 92(1) is 'income' and not 'exempted income'. Any gain accruing from the activities defined under section 2(24) will first be construed as 'income,' and after that, due to the applicability of any particular provision, it may be qualified as 'exempted income' as in the case in hand, i.e., due to section 10A of the Act. Thus the income of assessee which accrued from the export of services will eventually become 'exempted income'. Therefore, even when the income of the assessee is exempted under section 10A of the Act, it still fits in the definition of 'income' given under section 2(24) of the Act. Since the word 'income' is used under section 92(1) of the Act, we are of the view that the basic requirement of chapter X is fulfilled and it shall correspondingly apply in the case of the assessee.

13. In respect of opportunity ought to have been given by the AO in terms of the instruction No. 15/2015 and instruction No. 3/2016 which replaced the earlier one, to the assessee before referring to TPO owing to the fact that the assessee was covered by section 10A of the Act and also objected to the applicability of chapter-X of the Act. In this regard, we note that the auditor of the assessee company did not make any qualifying remarks that the impugned international transactions do not impact its income as required in the instruction above. Thus in the absence of such remarks by the auditor in his report u/s 92E of the Act, we are

not inclined to uphold the contention of the Ld. AR regarding the instructions issued by the CBDT.

13.1 The Ld. AR has in his rejoinder counter-argued the allegation put forth by the Ld. DR that no objection was posed by the assessee before AO while reference was made to the TPO stating that although the assessee did not object to the reference initially, he raised a contention before the Ld. DRP which can be deemed to have been posed to AO.

13.2 In our humble understanding, the contention of Ld. AR is not in accordance of instruction No. 15 of 2015 as replaced by Instruction No 3 of 2016 as it is mentioned therein that the qualifying remarks should be made in accountant's report. Therefore, even if the objection was raised before the AO prior to the final order passed in pursuance of the direction issued by ld. DRP, it does not fulfill the requirement of instruction No. 15 of 2015 as replaced by Instruction No 3 of 2016.

13.3 Moreover, when the AO received the order of Ld. DRP, he has to pass the order following the direction issued by the Ld. DRP. Since the Ld. DRP has rejected the objection raised by the assessee; AO would also reject the same. As there were no qualifying remarks regarding the income in the accountant's report, it was not possible for the AO to give him an opportunity of being heard in this regard. As the assessee itself has admitted that the objection was raised first time before the Ld. DRP which was subsequently rejected, it shall be deemed to have been rejected by the AO as well.

13.4 It is also pertinent to note here that Hon'ble Delhi high court in case of Indorama Synthetics (India)Ltd vs. ACIT (71 taxmann.com 349) held the instructions issued by the CBDT as discussed above are a valid legal proposition. The relevant extract is as under:

"Although Mr. Manchanda tried to contend that the above instruction of the CBDT was prospective, in the considered view of the Court, the above CBDT's Instruction No. 15 of 2015 as replaced by CBDT Instruction No.3 of 2016 dated 10th March 2016 clarifies the correct legal position and cannot be construed as not applying to the facts on hand."

13.5 As the Hon'ble Delhi high court has held the said instruction No. 15 of 2015 as replaced by Instruction No 3 of 2016 are valid, respectfully following the same we disagree with the contentions of the ld. AR for the assessee.

13.6 At the same time we also find that the Hon'ble Gujarat High Court also decided a similar question in case of Veer Gems (204 Taxman 16) by observing as under:

"13. We do not find any provision under Chapter-X, which would require the Assessing Officer to hear the assessee, consider his objections and only thereafter make a reference to the TPO to compute the arm's length price. As already observed, it is true that the question of reference to the TPO would arise only in the case where there has been an international transaction between the assessee and the associated person. Such a question in a given case may also be highly disputed question. However, we do not find that under the scheme of the provision contained in Chapter-X of the Act, the Assessing Officer is obliged to grant hearing to the assessee, invite and consider the objections with respect to the question whether during the previous year relevant to the assessment year under consideration, there had been any international transaction between the assessee and the associated enterprise before making a reference to the TPO. Such opinion the Assessing Officer would have to form on the basis of available material on record and such opinion would be having ad-hoc finality in the sense that for the purpose of reference to the TPO and till the stage that the TPO passes an order under sub-section (3) of Section 92CA of the At, such issue would be closed.

14. Before making any such reference, sub-section (1) of Section 92C itself provides certain inbuilt safeguards. Firstly, the Assessing Officer has to consider it necessary or expedient to make a reference to the TPO and secondly the reference has to be made with the previous approval of the commissioner. Thus, not only the Assessing Officer before making a reference should be satisfied that with respect to an international transaction entered into by the assessee, it is necessary or expedient to refer the computation of arm's length price to the TPO, such opinion of the Assessing Officer would have to be approved by the Commissioner, before the same can be acted upon. This is one more filter provided by the statute to ensure that the reference is made only in appropriate cases with approval of the higher authority.

13.7 Our jurisdiction being in Gujarat; therefore, we are bound by Judgment/order passed by the Hon'ble Gujarat High Court. Accordingly, we concluded that there is no expressed provision contained within chapter X advocating to afford a hearing to the assessee before referring to TPO. The Hon'ble Gujarat HC in case of Veer Jems has also put forth that the lack of an expressed provision within the chapter X of giving an opportunity is because there are already two levels of requirements that have to be satisfied before determining ALP. These checks and balances are as 1; AO has to deem it necessary or expedient before making a reference to TPO 2; previous approval of commissioner is required. Accordingly, the contention of the assessee is hereby rejected.

14. In the present case, the Ld. AR for the assessee also argued that the tax rate in the United Kingdom is higher than the tax rate in India. Therefore, there was no reason for the assessee to shift its profit to a foreign country having a higher tax rate, which in the instant case is the UK. However, we note that the Ld. AR has not substantiated his argument based on any documentary evidence. We further note that the Revenue has also not controverted the argument of the Ld. AR. Therefore we can safely presume that the tax rate in the United Kingdom is greater than India.

14.1 Now the question arises, whether the tax levied in pursuance of the provisions laid down in article 265 of the constitution of India can be the subjected to foreign tax laws. In our considered view, the tax laws enacted in India cannot be contingent upon the tax laws of the foreign country. The article 265 of the Constitution of India reads as under:

> *"265. Taxes not to be imposed save by authority of law No tax shall be levied or collected except by authority of law."*

14.2 In this regard, we also find it relevant to refer the OECD guidelines which provide as under:

> *1.8 There are several reasons why OECD member countries and other countries have adopted the arm's length principle. A major reason is that the arm's length principle provides broad parity of tax treatment for members of MNE groups and independent enterprises. Because the arm's length principle puts associated and independent enterprises on a more equal footing for tax purposes, it avoids the creation of tax advantages or disadvantages that would otherwise distort the relative competitive positions of either type of entity. In so removing these tax considerations from economic decisions, the arm's length principle promotes the growth of international trade and investment.*

14.3 As a consequence, in consonance with the aforementioned article and OECD extracts, it is manifestly clear that tax laws in India cannot be subjected to tax laws of a Foreign country.

14.4 We further note that to maintain harmony and avoid double taxation, there have been made various treaties with different countries under section 90 of the Act. Thus the taxes levied under Article 265 of the constitution of India will be subject to such treaties which do not even connote being subject to foreign tax law.

15. In the context of the provision of section 10A of the Act, we opine to hold that although it is a code, the same is limited to the manner of the computation of deduction for the income of the eligible undertaking. In this regard, we draw support from the judgment of Hon'ble Madras High Court in the case of Camiceria Apparels India (P.) Ltd. Vs. ACIT reported in 103 taxmann.com 238 wherein it was held as under:

> *"that "Section 10A/10B of the Act is a complete code providing the mechanism for computing the 'profits of the business' eligible for deduction u/s 10B of the Act. Once an income forms part of the business of the income of the eligible undertaking*

of the assessee, the same cannot be excluded from the eligible profits for the purpose of computing deduction u/s 10B of the Act."

15.1 However, in the instant case we find that the provisions of chapter X are not impeding with the manner of the computation of exemption under section 10A of the Act, but it is to work out the true ALP qua the sale price of the impugned international transaction. Therefore we disregard the contentions of the ld. AR for the assessee that no reference to the TPO can be made for determining the ALP.

15.2 The Ld. AR also contended that it is a settled legal position that where two views are possible, the one in favor of the assessee should prevail. The Ld. AR to support his contention, also placed reliance on a series of case laws. In this regard, we concur with the view of the ld. AR for the assessee. But in the case on hand there are contrary views on the impugned issue, accordingly, this special bench has been constituted to decide the question referred to it after considering the fact, rival submissions, and the legal position.

16. The next controversy arises about the interpretation of the provision of the Act, which gives rise to two different possible views. In the case on hand, the issue relates to the provisions of section 10-A viz-a-viz Chapter-X of the Act which operates in different domains and has different objects. As such, none of the provision has neither been made subject to each other nor superseded by each other. Therefore we are of the view that the question of two views about the interpretation to section 10-A viz a viz chapter-X in the given facts and circumstances does not arise. But these provisions co-exits and their concordance are facilitated by the proviso to section 92C(4) of the Act. As such, there is a direct provision under chapter X of the Act restricting the deduction/ exemption to the assessee in this particular case, which will prevail in the given facts & circumstances.

17. At one point of hearing the Ld. DR also argued to reframe the question as discussed above; we note that the question framed referred to the special bench was approved by the order of the ITAT dated 15-4-2016. The relevant extract of the order is reproduced as under:

> *Whether or not the provisions of Section 92 can be invoked in a situation in which income of the assessee is eligible for tax exemption or tax holiday and thus not actually chargeable to tax in India, or in a situation in which there cannot be any motive in manipulating the prices at which international transactions have been entered into?*

18. A copy of the order above was made available to the Revenue, and it did not register any objection qua the question framed for this special bench.

18.1 We further note that the matter was fixed for hearing on several occasions as evident from order sheet entry maintained by the Registry of this office after treating the same as part-heard. But the Ld. DR never raised any objection on the question framed for the special bench till his turn came for the argument. Therefore, after hearing the Ld. AR in length for the question as discussed above, we are not inclined to entertain the plea of the Ld. DR for framing the question differently. Hence, we reject the plea of the Ld. DR.

19. Regarding the Non-discrimination clause in the DTAA between India and UK, we find that the learned counsel's arguments proceed on the fallacious assumptions that while examining the applicability of the non-discrimination provisions, the transactions with a resident assessee can be compared with transactions of non-resident. Even if at the most the company was to transact business with its non-resident related party, the same course was to follow. There is thus no discrimination viz a viz the assessee and the domestic enterprises.

20. In view of the above discussion, we are of the view that even if an assessee is eligible for tax exemption at the rate of hundred percent under section 10A/10B of the Act, then also the arm's length price on international transactions deserve to be determined under section 92C of the Act. Hence, question posed before the Special Bench is answered in negative against the assessee and in favour of the Revenue.

21. In the result, the question is answered in negative *i.e.* against the assessee.

Order pronounced in the Court on 24th October 2019 at Ahmedabad.

-Sd-	-Sd-	-Sd-
JUSTICE(SHRI) P.P. BHATT	**(RAJPAL YADAV)**	**(WASEEM AHMED)**
PRESIDENT	**JUDICIAL MEMBER**	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 25/10/2019
Manish