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

INCOME TAX APPEAL NO.1685 of 2016

Pr. Commissioner of Income Tax-7 .. Appellant
Versus
M/s. PMP Auto Components Pvt. Ltd. .. Respondents

Mr. Suresh Kumar for appellant
Mr. Atul Jasani for respondents.

CORAM : AKIL KURESHI &
M.S.SANKLECHA, JJ.

DATE : 20th February 2019.

P.C.

This appeal under section 260A of the Income Tax Act (Act for short) challenges the order dated 13th January 2016 passed by the Income Tax Appellate Tribunal (Tribunal for short). The appeal relates to the assessment year 2010-2011.

2] The Revenue has urged following two questions of law for our consideration _

> (A) Whether on the facts and circumstances of the case and in law, was the Tribunal correct in deleting the adjustment of Rs.2,58,94,765/- on account of excess money paid to PMP Bakony (AE) for

acquiring share?

(B) Whether on the facts and circumstances of the case and in law was the Tribunal correct in upholding the deletion of the adjustment of Rs.2,50,95,228/- being interest chargeable on deemed loan transaction with PMP Bakony (AE)?

3] The common facts leading to the aforesaid two questions are as under:-

(a) On 14th October 2010, the respondent filed its return of income declaring income at Rs.2.56 Crores. As the respondent had shown some international transactions, the Assessing Officer referred the same to the Transfer Pricing Officer (TPO) for determining the Arms length Price (ALP) of such international transactions. The TPO by an order dated 20th September 2013, inter alia made following two adjustments :-

(i)	Adjustment on account of excess money paid to PMP Bakony (AE) for acquiring its share	Rs.2,58,94,765/-
(ii)	Interest chargeable on loan transaction with PMP Bakony (AE)	Rs.2,50,95,228/-

The above order dated 20th September 2013 of the TPO led to a draft assessment order dated 14th February 2014 by Assessing

Officer.

(B) Being aggrieved by the draft assessment order dated 14th February 2014, the respondent filed its objections to the draft assessment order with the Dispute Resolution Panel (DRP). By its directions dated 26th September 2015, the DRP disposed of the respondent's objections by inter alia holding as under:-

(i) The excess payment made for acquiring shares of its 100% subsidiary (AE) is taxable as held by the A.O. Thus rejected the objections of respondent assessee; and

(ii) the interest chargeable on the additional capital investment made to purchase shares of the 100 % subsidiary was directed to be deleted. This on the ground that this adjustment done by the TPO is a secondary transfer pricing adjustment.

(C) Consequent upon the above directions, the Assessing Officer passed final assessment order dated 27th November 2014 under section 143(3) read with section 144C(13) of the Act.

(D) Being aggrieved with the assessment order dated 27th

November 2014, the respondent filed an appeal in respect of adjustments made on account of exces money paid to acquire shares of its 100% subsidiary to the Tribunal. While the appellant – Revenue filed an appeal in respect of non-adjustment on account of interest payable on additional amounts paid to acquire shares as a loan to the Tribunal.

(E) In appeal, the tribunal allowed respondent-assess's appeal on the issue of question No.1 raised herein holding that no income arises on account of purchase of shares as it was on capital account. This, it held was an issue covered by the decision of this Court in *Vodafone Services Pvt. Ltd. Vs. Union of India* reported in 268 ITR page 1 , in favour of the respondent.

(F) So far as the appellant – revenue's appeal on the issue raised in question No.2 herein is concerned, the impugned order held that the same does not survive. This in view of the question No.1 being allowed in favour of respondent assessee. Thus, dismissed the appellant – revenue's appeal.

3] We shall now deal with individual question raised for our

consideration.

4] **Regarding Question No.A,**

(a) The issue raised in this question is with regard to respondent investing an amount of Rs.2.67 Crores to acquire shares of its AE (subsidiary company), which had a fair market value of Rs.8.19 lakhs. It is this excess payment of Rs.2.58 Crores, when compared to fair market value of the shares which is sought by the Revenue to be brought to tax under the transfer pricing provisions under Chapter X of the Act.

(b) The impugned order of tribunal rejected the contention of revenue on the ground that this issue stands concluded by the decision of the jurisdictional high court in the case of Vodafone (supra). In the above case this court held that investment in shares is on capital account and does not give rise to any income to trigger the provisions of Chapter X of the Act.

(c) Mr. Suresh Kumar, learned Counsel appearing in support of the appeal submits as under:-

(i) The transaction is an international transaction and, therefore, the transfer pricing adjustment is required to be done in terms of Chapter X. It is submitted that the additional investment of capital by respondent in its AE's shares vis-a-vis its fair market value is subject to transfer pricing adjustment as done by the TPO and upheld by DRP;

(ii) The decision of this Court in Vodafone (supra) is in applicable to the present facts, as it was concerned with inbound investment and was not in respect of out bound investment, as in this case; and

(iii) In any case the investment made in shares if sold in subsequent years, may give rise to potential loss. This when the respondent sells the shares which have been purchased at a price much higher than its fair market value. Thus, this difference has to be brought to tax as sought to be done by the Revenue.

Therefore, it is submitted that the appeal should be entertained and allowed.

(d) There is no dispute before us that the transaction of purchase

of shares by the respondent of its subsidiary company i.e. A.E. at a price much higher than its fair market value would be international transaction as defined in Section 92(B) of the Act. The only issue before us as considered by the impugned order of the Tribunal is whether Chapter X of the Act would at all be applicable in case of any investment made on capital account. This on the premise that the transaction of purchase of equity share capital would not give rise to any income. We note that similar issue was before this Court in Vodafone (supra) and this court inter alia observed that Chapter X of the Act is machinery provision to arrive at the arm's length price of transaction between associated enterprises. However, before the provisions can be kicked in, it is necessary that income must arise under the substantive provisions found in the Act viz., under the heads of salaries or income from house property or profits and gains in business or profession or capital gains and/or income from other sources. Section 92 of the Act requires income to arise from an international transaction while determing the ALP. Therefore the sina qua non is that income must first arise on account of the international transaction.

(e) The view of this Court in Vodafone (supra) has been

accepted by the Central Board of Direct Taxes (CBDT) by issue of instruction No.2/2015 dated 29th January 2015.

(f) In this case also, the shares which have been purchased by the respondent assess are on capital account. The revenue is seeking to bring the difference between the actual investment of Rs.2.67 Crores and fair market value of the shares (investment) at Rs.8.13 lakhs i.e. 2.58 Crores to tax. This without being able to specify under which substantive provision would income arise.. In our view, therefore, the issue arising here stands concluded by the decision of this Court in Vodafone (supra). The distinction which is sought to be made by the revenue on the basis of this being an inbound investment and not an outbound investment as in the case of Vodafone (supra) is a distinction of no significance. On principle, if this court has held that Chapter X of the Act is machinery provision and can only be invoked to bring to tax any income arising from an international transaction, then, it is necessary for the revenue to show that income as defined in the Act does arise from the international transaction. The distinction between inbound and outbound investment is a distinction which does not take the case of

revenue any further, as the Legislature has made no such distinction while providing for determination of any income on adjustments to arrive at ALP arising from an international transaction.

(g) The further submission on behalf of the revenue that in future the respondent may sell these shares at a loss as they have purchased the same at much higher price than its fair market value. Thus gives rise to reduction of its tax liability in future. This submission is in the realm of speculation. At this stage, it is hypothetical. The issue has to be examined on the basis of law and facts as existing before the authorities in the subject assessment year. No provison of the Act has been shown to us, which would allow the Revenue to tax a potential income in the present facts.

(h) We note that with effect from 1st April 2013, the definition of Income as provided under section 2(24) of the Act was amended to include sub-clause (xvi) therein. It provided as income, any consideration received for issue of shares, if it exceeds the fair market value, as falling under clause (viib) of sub-section (2) of Section 56 of the Act. The amendment/ insertion of section 56(2) (viib) of the Act was with effect from 1st August 2013 and reads as

under:-

> "56(2)(viib): Where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares."

(i) However, as this provision was made effective only with effect from 1st April 2013, and it is not even the case of revenue before the authorities or before us that the said provision would apply for the subject assessment year 2010-11. In the above view, there is no occasion to examine the above amendments in the context of this case. This would be done appropriately in a case arising post the amendment.

(j) In the above view, the view taken by the Tribunal being concluded by the decision of this Court in Vodafone (supra) the question as proposed does not give rise to any substantial question. Thus not entertained.

5] **Regarding Question No.B** :-

(a) The issue arising herein is a consequence of Question No.A herein. However, as we have not interfered with the decision of the Tribunal with regard to question No.A, this question becomes academic in the present facts. This, as no amount paid to acquire equity shares of the A.E. can be considered to be a loan to the A.E.

(b) As the issue is now academic, it does not give rise to any substantial question of law. Therefore, it is not entertained.

6] Accordingly, appeal dismissed. No order as to costs.

(M.S.SANKLECHA, J.) (AKIL KURESHI, J)