IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI

BEFORE HON'BLE SH. R. C. SHARMA, AM & HON'BLE SANDEEP GOSAIN, JM

आयकरअपीलसं./ I.T.A. No. 2445/Mum/2014
(**निर्धारणवर्ष /** Assessment Year: 2010-11)

Shilpa Shetty 7/D, Aditya Apartments, SVP Nagar, Andheri(west) Mumbai-400054	**बनाम**/ Vs.	ACIT CC – 13 Mumbai Pin-
स्थायीलेखासं ./जीआइआरसं ./PAN/GIR No.		ACPPS6622P
(अपीलार्थी/**Assessee**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Assessee by**	:	Shri Arvind V. Sonde & Shri Haresh G. Buch, AR
प्रत्यर्थीकीओरसे/**Respondentby**	:	Shri V. Jenardhanan, DR
सुनवाईकीतारीख/ **Date of Hearing**	:	05/06/2018
घोषणाकीतारीख / **Date of Pronouncement**	:	21/08/2018

आदेश / O R D E R

Per Sandeep Gosain, Judicial Member:

The present Appeal filed by the assessee is against the order of Ld. Commissioner of Income Tax (Appeals)-11,

Mumbai, dated 30.01.14 for AY 2010-11 on the grounds mentioned herein below:-

GROUND I

1. The Commissioner of Income Tax (Appeals) - 11 ('CIT(A)') erred in confirming the action of the Assistant Commissioner of Income Tax, Central Circle -13, Mumbai ('AU') in making an addition of Rs. 3,42,85,714/- on account of transfer pricing adjustment made on the basis of Share Purchase Agreement ('SPA'/'Agreement').

2. He further erred in holding that:

a. M/s. Kuki Investments ('Kuki') was an 'Associated Enterprises" ('AE') of the Appellant within the meaning of section 92A of the Income Tax Act, 1961('the Act').

b. Mr. Raj Kundra ('RK') was a 'relative' of the Appellant within the meaning of section 92A(2)(j).

c. Appellant profession was an 'enterprise' within the meaning of section 92F(iii) of the Act separate from the Appellant being an 'enterprise'.

3. The Appellant therefore, prays that the alleged 'international transaction' was not between AE5 and

therefore the addition be considered as bad in law and be deleted.

WITHOUT PREJUDICE TO GROUND I

GROUND II

1. On the facts and circumstances and in law the CIT(A) erred in considering that agreeing to be associated with 'Rajasthan Royals' franchise ('RR') amounted to an "international transaction" as contemplated in section 92C of the Act.

2. He further erred in holding that the obligation to be associated with RR, free of charge, was an integral component of the consideration paid for the purchase of shares of EM Sporting Holding Limited (EMSHL') by Kuki from the existing shareholders.

3. He particularly failed to appreciate and ought to have held that:

a. the alleged services, if any, were provided by the Appellant, a resident to Jaipur IPL Cricket Private Limited ('JICPC), another resident and also the owner of the RR.

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b. The Appellant becoming associated with RR was already in contemplation of parties even prior to the SPA.

c. Kuki through the SPA had already paid a sum of USD 1 million as 'Association Fee to EMSHL to purchase rights for SS to make appearances and also be associated with RR and therefore, no benefit was accruing to Kuki.

d. If at all the Appellant promoted her image by being associated with RR.

e. It was all the shareholders that benefited from the services provided by the Appellant and not only Kuki and hence, the adjustment if any be restricted to the shareholding of Kuki in EMSHL.

4. The Appellant, therefore prays that the action of the CIT(A) in confirming the adjustment was erroneous and accordingly, liable to be deleted.

WITHOUT PREJUDICE TO GROUND I & II

GROUND III

1. On the facts and circumstances and in law the CIT(A) erred in confirming the action of the AO by computing the Arm's Length Price by considering the Appellant's agreement with Hindustan Unilever

Limited and applied CUP method, however, erred in taking into consideration the incorrect number of days.

2. He failed to appreciate that:

a. In terms of Schedule 2 to the SPA ('SS Obligations'), the Appellant had to be available for 10 work days (of a minimum of 8 hrs a day) to support commercial arrangements/ obligations for photo shoots, etc.

b. The Appellant had to further attend all IPL matches of Rajasthan Royals (14 matches = 14 days) in addition to the aforesaid 10 days.

3. The CIT(A) / AO ought to have held that such 14 days were only for 3 working hours per day, being the actual duration of the IPL matches, which the Appellant was required to attend.

4. Accordingly, the number of days worked out by the AO and confirmed by CIT(A) is erroneous.

5. The Appellant, therefore prays that the AO be directed to recompute the transfer pricing addition accordingly.

GROUND IV

The Appellant craves leave to add to, amend and/or alter all or any of the above grounds of appeal.

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2. The brief facts of the case are that the assessee an individual, is resident in India and is mainly engaged in the profession of film acting and has also functioned as a brand ambassador for various products. During the period relevant to AY 2010-11 she had earned income from business and profession, capital gains and other sources. The assessee filed her return of income on 20.09.2010 declaring a total income of Rs.82,73,481. The return was selected for scrutiny and the assessment order was passed on 31.3.2012 assessing the total income at Rs. 4,25,59,195.

The facts relevant to the addition to the returned income by the AO by way of a transfer pricing adjustment of Rs. 3,42,85,714 are that during the period under consideration the assessee was a party to a Share Purchase Agreement (SPA) signed by the existing shareholders of a Mauritius based company, namely EM Sporting Holding Limited (EMSHL) for the transfer of a portion of the shareholding of that company to M/s Kuki Investments Ltd. (incorporated in Bahamas) ('Kuki')

represented by Shri Raj Kundra ('RK') and under the same SPA, Kuki was also to subscribe to additional shares to be issued by the company EMSHL. After giving effect to the SPA, the shares of the said EMSHL, Mauritius came to be held by M/s. Kuki Investments Limited, Bahamas (11.7%), Blue Water Estates Limited, Hong Kong (11.74%), Tresco International Limited, British Islands (44.15%) and Emerging Media IPL Limited, UK (32.41%). The assessee herself was neither a buyer nor a seller of shares of EMSHL in the SPA. However, under the SPA the assessee undertook to provide brand ambassadorship services to Jaipur IPL Cricket Private Limited (JICPL), an Indian Company that was a 100% subsidiary of EMSHL, in relation to promotional activities of 'Rajasthan Royals', an IPL cricket team owned by JICPL. The SPA also provided that such services were to be provided by the assessee completely without charge or fee to the assessee or any other person.

The AO in the assessment order treated the assessee and EMSHL as Associated Enterprises (AEs) and held that the services rendered by the assessee to JICPL by virtue of the SPA involving the shareholders of EMSHL constituted an

international transaction and therefore the Arms Length Price (ALP) had to be computed for such services rendered by the assessee free of charge. The AO thereafter, based on another contemporaneous brand ambassadorship agreement of the assessee with Hindustan Unilever Limited (HUL), computed an amount of Rs. 3,42,85,714 as the ALP in respect of the services provided by her free of charge to JICPL. As the assessee had not charged anything for the services provided, the entire quantum of the ALP so computed was adopted by the AO as the transfer pricing adjustment to the returned income of the assessee.

Aggrieved by such modification to the return income by the AO, the assessee filed appeal before Ld. CIT(A) and the Ld. CIT(A) considering the case of both the parties, dismissed the appeal filed by the assessee. While doing so, the Ld. CIT(A) held that the Assessee and Kuki were AEs in view of sec. 92A(1). It was also observed that the Assessee's professional activities, which were controlled by her, constituted an 'enterprise' (distinct from Assessee herself as 'enterprise') in view of the term 'enterprise' as defined in sec. 92F(iii), thereby, held that the Assessee and Kuki were AEs in view of sec. 92A(2)(j), as RK

controls Kuki and also controls the profession of assessee through assessee, RK's relative.

Apart from that Ld. CIT(A) further applied sec. 92B(2) to hold that there was a deemed 'international transaction' between the Assessee and JICPL due to the prior agreement, i.e. SPA. Ld. CIT(A) also held that Kuki had benefitted in terms of share purchase consideration to the extent of monetary value of the (brand promotion) services provided by the Assessee to EMSHL and its the then existing shareholders on behalf of Kuki. He then made adjustment to Assessee's income on the basis of ALP.

Aggrieved by the order of Ld. CIT(A), the assessee filed the present appeal before us on the grounds mentioned herein above.

Ground No. 1 & 2

3. Since both the grounds raised by the assessee relates to challenging the order of Ld. CIT(A) in confirming the action of ACIT in making additions on account of transfer pricing

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adjustment made on the basis of share purchase agreement and also challenging the action of Ld. CIT(A) in considering that agreeing to be associated with 'Rajasthan Royals' frenchise ('RR') amounted to an 'international transaction' as contemplated in section 92C of the Act. Since, both the grounds are inter related and also challenges the jurisdiction of Ld. CIT(A) in substituting its satisfaction to that of ACIT, therefore we thought it fit to dispose of the same by this common order.

4. Ld. AR appearing on behalf of the assessee while challenging the jurisdiction of Ld. CIT(A) to substitute its satisfaction to that of ACIT(AO), submitted before us that it is a jurisdictional requirement to *record a satisfaction* by the AO that there was an income or potential of an income in case where the assessee had not filed the report u/s. 92E, but international transaction came to the notice of the AO. In this regard, Ld. AR relied upon i) **Instruction No. 15 of 2015, dated October 16, 2015** and ii) judgment in the case of **Vodafone India Services P. Ltd. v. Union of India and Others [2014] 361 ITR 531 (Born HC).**

It was also submitted that the AO had recorded his satisfaction about the Assessee's potential income on the basis of AE relationship between the Assessee and EMSHL. However, the Ld. CIT(A) substituted the satisfaction by holding that the AE relationship existed between the Assessee and Kuki.

It was also submitted that recording of '**satisfaction**' about the existence of an "international transaction" was only within the jurisdiction of the AO and Ld. CIT(A) could not have substituted his satisfaction for that of the AO. As per the assessee, such substitution of satisfaction is impermissible in law as the same amounts to curing a jurisdictional defect. It was submitted that if lad. CIT(A) had found that the satisfaction of the AO that an 'international transaction' exists between the Assessee and EMSHL was 'erroneous' then in that eventuality, Ld. CIT(A) ought to have struck down the orders of the AO instead of **substituting** his reasons for that of the AO's reasons.

In this respect, assessee relied upon the following submissions/judgments /decisions:-

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i.) "The AO may be confined to those reasons recorded to support his assumption of jurisdiction. "- Kanga & Palkhiwa!a's Commentary at Note 55 at Pg. 2208 of Tenth Edition of "The Law and Practice of Income Tax"

ii.) decision in the case of Hindustan Lever Ltd v. R.B. Wadkar [2004] 268 ITR 332 (Born HC)

iii.) decision in the case of CIT v. Jagadhri Electric Supply & Industrial Co. [1981] 140 ITR 490 (P&H HC)

iv.) decision in the case of Equitable Investment Co. (P.) Ltd. v. ITO [1988] 174 ITR 714 (Cal HC)

5. Whereas on the contrary, Ld. DR relied upon the orders passed by the revenue authorities and submitted that the Ld. CIT(A) is not an ordinary Court of appeal such as ITAT or other appellate authorities and has more powers than them. In this respect, reliance was placed upon the judgment of **Narrondas Manordass vs. CIT [1957] 31 ITR 909 (Born. HC).** Ld. DR also during the course of hearing relied on the decisions of Hon'ble Supreme Court in case of **CIT v. McMillan & Co.**

[1958] 33 ITR 182 and CIT v. Nirbherarn Deluram [1997] 224 ITR 610.

6. We have heard the counsels for both the parties and we have also perused the material placed on record, judgment cited by both the parties as well as orders passed by revenue authorities. We find that although, the powers of Ld. CIT(A) being wider than that of any other appellate authorities or Court is not disputed, but the Ld. CIT(A) cannot cure a **jurisdictional defect,** which the AO derives only by recording a satisfaction as has been held in the case of **Vodafone India Services Pvt. Ltd. Vrs. Union of India and others 920140 361 ITR 531 (Bom HC)**. We have gone through the decision relied upon by Ld. DR, but the *para materia* contained in those judgments are not applicable to the facts of the present case as the same do not deal with exercise of Ld. CIT(A)'s powers to cure jurisdictional defect. In this respect, we rely upon the decision in the case of **Hindustan Lever's case (supra) and Equitable Investment's case (supra).**

7. As far as objection raised by assessee on AE relationship between the Assessee and Kuki u/s. 92A of the Act is concerned, in this respect, Ld. AR submitted that Ld. CIT(A) did not uphold AO's finding that the Assessee and EMSHL were AEs. The revenue has not challenged the order of Ld. CIT(A) and consequently, the issue before us is limited to examine AE relationship between the Assessee and Kuki. In this respect, Ld. AR submitted that Sec. 92A(1) of the Act cannot be applied in isolation to hold that the assessee and Kuki were AEs. It was submitted that in order to constitute a relationship between the AEs, the parameters laid down in both sub-sections (1) and (2) of section 92A of the Act should be fulfilled.

Ld. AR also relied upon the decision in the case of **Page Industries Ltd. v. DCIT [2016] 159 lTD 680 (Bang. ITAT), Obulapuram Mining Co. (P.) Ltd. v. DCIT [2016] 76 taxmann.com 240 (Bang. ITAT) and ACIT v. Veer Gems [2017] 183 TTJ 588 (Ahd. ITAT)**

Ld. AR on the application of Sec. 92A submitted that sec. 92A(1)(a) does not apply to the Assessee's case, as neither Kuki, through /one or more intermediaries, controls the assessee nor the Assessee, through /one or more intermediaries, controls Kuki. It was also submitted that even sec. 92A(1)(b) is also not applicable as, though RK controls Kuki, but he cannot be said to have controlled the assessee.

Ld. AR also submitted that Sec. 92A(2)(J) deems the two 'enterprises' as AEs if one of the enterprises is controlled by an individual and the other 'enterprise' is also controlled by such individual or his relatives. It was submitted in Assessee’s case, sec. 92A(2)(J) cannot be applied as neither RK nor Kuki cannot said to have controlled the Assessee.

It was also submitted that even as per sec. 92F(iii), an 'enterprise' means a 'person', engaged in activities etc. The Assessee's Profession cannot be considered as a person within the meaning of sec. 2(31), separate from her, as the Assessee's profession is not assessable separately from the Assessee. Therefore, the question of Assessee being an AE of Kuki, by

holding that RK controlled Kuki and RK's relative, i.e. Assessee, controlled the 'enterprise' of assessee's profession, does not arise.

8. On the other hand, Ld. DR relied upon the orders passed by revenue authorities and submitted that assessee and Kuki were AE's u/s. 92A(2)(J) as:

> *a) the Assessee's husband, RK, controlled Kuki.*
>
> *b) the Assessee is an individual and as such a 'person' within the meaning of sec. 2(31).*

During the course of hearing, the Ld. DR also argued that Kuki had controlled the Assessee as Kuki had paid association fee on behalf of the Assessee to EMSHL.

9. We have heard the counsels for both the parties, we find that both the above stated facts by Ld.DR, i.e. RK controlling Kuki and Assessee being a "person" u/s. 2(3 1), are not in dispute at all. The Ld. DR's submission on AE relationship between the Assessee and Kuki is based on only one limb of sec. 92A(2)(J), i.e. an individual controlled one enterprise (RK controlled Kuki). Sec. 92A(2)(J) deems the two 'enterprises' as AE <u>if one of the enterprises is controlled by an individual and the other 'enterprise'</u>

is controlled by such individual or his relatives. The Ld. DR did not submit as to how that individual (i.e. RK) or his relative controlled the other 'enterprise' (i.e. Assessee). Without satisfying the second limb, i.e. that individual or his relative controlled the other enterprise, provisions of sec. 92A(2)(j) cannot be applied.

We have further noticed that in order to satisfy the second limb of sec. 92A(2)(J), the Ld. CIT(A) presumed that Assessee's Profession (separate from her) was the other 'enterprise' and RK's relative, i.e. Assessee, controlled that other 'enterprise', i.e. her 'profession'. Against this presumption, it was submitted that her 'profession' cannot be separated from herself (the individual) to consider as an 'enterprise' u/s. 92F(iii) as the 'profession' (independent from individual) is not a 'person' within the meaning of sec. 2(3 1). The Ld. DR had not made any submissions against this stand taken by the assessee.

10. Now, as far as the arguments that Kuki controlled the Assessee by paying association fees is concerned, it was submitted that the association fee was nothing but *earnest money* which in fact *got repaid* to Kuki (by way of adjustment against

the (consideration payable on subscription of shares to EMSHL) on share completion.

11. As far as the objection of assessee on the findings of Ld. CIT(A) on account of holding deemed "international transaction" between the Assessee and JICPL u/s. 92B of the Act is concerned, in this respect, Ld. AR submitted that Sec. 92B(2) deems a transaction between the two non-AEs as 'international transaction' if there exists a prior agreement in relation to the relevant transaction between one of the non-AE and the AE of an assessee. The Ld. CIT(A) considered the two non-AEs as the Assessee and JICPL and held a deemed "international transaction" without establishing as to with which AE of the Assessee had a prior agreement with JICPL.

It was also argued that Sec. 92B(2) of the Act cannot be applied to hold that transaction between Assessee and JICPL was an 'international transaction' as:

> *a) Neither any of the parties to the SPA (i.e. prior agreement) was an AE of the Assessee;*

> *b) Nor JICPL entered into a prior agreement with the AE of the Assessee (JICPL was not a party to the SPA); and as such the pre-requisite of a prior agreement between a non-AE with the AE of an assessee is not fulfilled.*

12. On the contrary, Ld. DR relied upon the orders of Ld. CIT(A).

13. After having considered the submission of both the parties, we find that Section 92B(2) of the Act cannot be applied to hold that transaction between assessee and JICPL was an 'International transaction' as neither any of the parties to the SPA were an AE of the assessee nor JICPL entered into a prior agreement with the AE of the Assessee (JICPL was not a party to the SPA); and as such the pre-requisite of a prior agreement between a non-AE with the AE of an assessee is not fulfilled.

14. Now, we proceed to deal with the objection of assessee on existence of "international transaction" and "price" is concerned, Ld. AR submitted that in order to apply Chapter X, existence of a

'transaction' is a pre-requisite. It was submitted that Sec. 92C(1) makes it clear that the transfer pricing adjustment substitutes the price of the transaction with ALP. Therefore, in order to constitute a 'transaction' there has to be a certain disclosed price. It was argued that existence of an ‘international transaction’ cannot be *presumed* by assigning some price to it and then deducing that since it is not an arm's length price, an "adjustment" has to be made.

15. In this respect, Ld. AR relied upon the decision in the case of **Maruti Suzuki India Ltd. CIT [2016] 381 ITR 117 (Del. HC) and Bausch & Lomb Eyecare (India) (P.) Ltd v. ACIT [2016] 381 ITR 227 (Del HC)**

It was also argued that the word "Price" had not been defined in the Act. It seems to have been used in its ordinary sense as meaning money only. In this respect, reliance was placed on the decision in the case of **CIT v. Ganesh Builders [1979] 116 ITR 911 (BomHC).**

Ld. AR further submitted that in the Assessee's case, she was desirous to enhance her brand image and hence, she got

associated with RR, for which Kuki had paid a deposit of USD 10,00,000/-to EMSHL as Association fee. With the conclusion of transactions of purchase and subscription of shares completing on February 13, 2009, in terms of Cl. 2.3 and Cl.5.2 of the SPA, the rights granted to the Assessee automatically terminated and the said deposit was adjusted against the consideration payable on subscription of shares to EMSHL. Therefore, the association fee was only earnest money and not monetary consideration which can be considered as 'price'.

It was argued that as the Assessee did not receive any consideration for the services rendered to JICPL, there was no 'price' which can be substituted with ALP. In the absence of any 'price', the provision of services could not be considered as an 'international transaction'. In absence of any 'international transaction', the provisions of sec. 92(1) cannot be applied and as such an adjustment on the basis of ALP cannot be made.

It was also submitted that if at all it is held that there was a 'price' and therefore there existed a 'transaction', then in that eventuality, since the services were provided to JICPL, the

alleged transaction was between the Assessee and JICPL, both being residents, then in that eventuality even otherwise the alleged transaction cannot be considered as an "international transaction"

16. On the other hand, Ld. DR relied upon the orders passed by Ld. CIT(A) and also on the decision of Hon'ble Special Bench of Kolkata ITAT in case of Instrumentarium Corporation Ltd. [2016] 179 TTJ 665, to submit that, since no fee was charged by the Assessee, the price was Zero and as such the ALP has to be substituted with the same.

During the course of hearing, the Ld. DR had also relied on the decision of Hon'ble Delhi Tribunal in case of BMW India Pvt. Ltd. v. DOT [2017] ITA No. 1406/Del/2015, wherein, after considering Maruti Suzuki's case, determination of ALP was upheld. He also relied on the decision of Hon'ble Mumbai Tribunal in case of Sabre Asia Pacific Pte. Ltd. [2018] ITA No. 4882/M/2015, to submit that the Tribunal had upheld the transfer pricing adjustment on the basis of ALP determination in case of assessee advancing interest free loan to its AE, by considering

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the income offered as zero. After relying on these decisions, the Ld. DR contended that in Assessee's case, the price was zero and therefore, the transaction is subjected to transfer pricing adjustment based on ALP determination.

17. We have heard the counsels for both the parties and we have also perused the material placed on record, judgments relied upon and orders passed by revenue authorities, we find that none of the 3 decisions cited by the Ld. DR can be applied in Assessee's case, as the facts of the cited cases are distinguishable from that of Assessee's case as under -

> *i)* ***In BMW's case*** *(supra), BMW India had incurred expenses on marketing and promotional activities on behalf of its foreign holding company, against which it had not offered any income. It was found by the Hon'ble ITAT that the agreement between the parties provided for re-imbursement of marketing and promotional expenses by foreign holding co. and certain amount was, in fact, reimbursed to the Indian Co. Therefore, it was not a case where the price of the transaction was not disclosed and the Department had assumed certain price to substitute it with the ALP, unlike the case of the Assessee.*

ii. ***In Instrumentarium's case,*** *the assessee had advanced an interest free loan to its AE. The Hon'ble Special Bench observed that "consideration of loan, i.e. interest, is inherently in the nature of income ". The Tribunal, then, held that*

"when no income is reported in respect of an item in the nature of income, such as interest, but the substitution of transaction price by arm's length price results in an income, it can very well be brought to tax."

The transaction of services provided by the Assessee to JICPL, as against rights granted to her, cannot be equated with that of interest free loan to an AE. In Assessee's case, the deposit of money by Kuki was the price paid for shares to be issued by EMSHL. The Assessee obtained a right to appear against a reciprocal obligation to appear as and when matches were held. The deposit of money was not consideration for the right to appear.

Also, in this case the Hon'ble Special Bench did not consider ***Maruti Suzuki's*** *decision (supra) and to that extent was per-incuriam.*

iii. ***In Sabre Asia's case*** *(supra), the counsel of the assessee had conceded the contention that the transaction of interest free loan is subjected to transfer*

pricing adjustments and as such the contentions raised by the Assessee before the Hon'ble Bench was not considered in that case.

18. As far as the objection of assessee with regard to the applicability of chapter 10, when no income has arisen is concerned. In this respect, the Ld. AR submitted that Chapter X pre-supposes existence of 'income' and lays down machinery provisions to compute ALP of such income, if it arises from an 'international transaction'. Sec. 92 is not an independent charging section to bring in a new head of income or to charge tax on income which is otherwise not chargeable under the Act. Accordingly, since no income had accrued to or received by the Assessee u/s. 5, no notional income can be brought to tax u/s. 92. In this regard, Ld. AR relied upon the following judgments:-

i. Dana Corporation [2010] 321 ITR 178 (AAR) - Pg. 192 & 193

ii. Amiantit International Holding Ltd [2010] 322 ITR 678 (AAR) - Pg. 682, 683 and 692

iii. Praxair Pacific Ltd [2010] 326 ITR 276 (AAR) - Pg. 279 and 286

iv. Deere & Co [2011] 337 ITR 277 (AAR) - Pg. 280 & 284

v. Venenburg Group B.V [2007] 289 ITR 464 (AAR) - Para 15 at Pg. 472

vi. Goodyear Tire & Rubber Co. [2011] 334 ITR 69 (AAR) - Para 10 at Pg. 78

vii. Vodafone India Services (P.) Ltd. v. Union of India [2013] 361 ITR 531 (Born HC) - Para 32 at Pg. 564

viii. Vodafone India Services (P.) Ltd. v. Union of India [2014] 368 ITR 1 (Born HC) - Para 24 (Pg. 30), 40 (Pg. 37-38)

ix. Vodafone India Services (P.) Ltd. v. Union of India [2015] 369 ITR 511 (Born HC) - Para 8 at Pg. 515

x. Vodafone India Services (P.) Ltd. v. CIT [2016] 385 ITR 169 (Born HC) - Pg. 312 and 320

The Ld. AR further submitted that when the machinery provisions fail, then the charging provisions cannot be applied. In

this respect, Ld. AR relied upon the decision in the case of **CIT v. B.C. Srinivasa Setty [1981] 128 ITR 294 (SC) and CIT v. Official Liquidator, Palai Central Bank Ltd. [1979] 117 ITR 676 (Ker. HC)**

19. On the other hand, Ld. DR relied upon the orders passed by revenue authorities and the decision in the case of **Instrumentarium's case** (supra) to contend that the price was zero and the provisions of Chapter X would apply accordingly.

20. After hearing both the parties at length, we find that since we have already rebutted the Ld. DR's reliance on Instrumentarium's case above in detail, therefore the same are not applicable to the facts of the present case and we are of the view that since chapter 10 pre-supposes the existence of 'income' and lays down machinery provison to compute ALP of such income, if it arises from an 'International transaction'. Section 92 is not an independent charging section to bring in a new head of income or to charge tax on income which is otherwise not chargeable under the Act. Accordingly, since no income had accrued to or received by the assessee u/s 5, no notional income

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can be brought to tax u/s 92 of the Act. We draw strength from the following judgments in the case of :-

i. Dana Corporation [2010] 321 ITR 178 (AAR) - Pg. 192 & 193

ii. Amiantit International Holding Ltd [2010] 322 ITR 678 (AAR) - Pg. 682, 683 and 692

iii. Praxair Pacific Ltd [2010] 326 ITR 276 (AAR) - Pg. 279 and 286

iv. Deere & Co [2011] 337 ITR 277 (AAR) - Pg. 280 & 284

v. Venenburg Group B.V [2007] 289 ITR 464 (AAR) - Para 15 at Pg. 472

vi. Goodyear Tire & Rubber Co. [2011] 334 ITR 69 (AAR) - Para 10 at Pg. 78

vii. Vodafone India Services (P.) Ltd. v. Union of India [2013] 361 ITR 531 (Born HC) - Para 32 at Pg. 564

viii. Vodafone India Services (P.) Ltd. v. Union of India [2014] 368 ITR 1 (Born HC) - Para 24 (Pg. 30), 40 (Pg. 37-38)

ix. Vodafone India Services (P.) Ltd. v. Union of India [2015] 369 ITR 511 (Born HC) - Para 8 at Pg. 515

x. Vodafone India Services (P.) Ltd. v. CIT [2016] 385 ITR 169 (Born HC) - Pg. 312 and 320

And keeping in view of our above finding, we allow these grounds and direct the AO to deleted the additions.

21. Since we have already deleted the additions by above reasoned order, therefore there is no need to adjudicate other grounds on merits in view of our above findings as the same become infructous.

22. In the net result, the appeal filed by the assessee stands **allowed.**

Order pronounced in the open court on 21st August, 2018.

Sd/-	Sd/-
(R. C. Sharma)	(Sandeep Gosain)
लेखासदस्य / Accountant Member	न्यायिकसदस्य / Judicial Member

मुंबई Mumbai;दिनांकDated : 21.08.2018
Sr.PS.Dhananjay

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<u>आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी/ The Assessee
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

.**उप/सहायकपंजीकार**
(Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ **ITAT, Mumbai**