

Whether the arm's length price determined by the Tribunal shall attain finality and the High Court is precluded from re-considering the arm's length price determined by the Tribunal, in exercise of powers under Section 260A of the Act?

The Supreme Court on April 19, 2023 in the case of **SAP Labs India Pvt. Ltd. vs ITO, Bangalore** vide Civil Appeal No. 8463 of 2022 remitted back the cases to the respective High Courts to decide and dispose of the appeals afresh and to examine whether in each case while determining the arm's length price, the guidelines laid down under the Income Tax Act and the Rules are followed or not and whether the findings recorded by the Tribunal while determining the arm's length price are perverse or not preferable within a period of nine months from the date of receipt of the present order.

The Apex Court has held that the arm's length price shall be determined as per the provisions of the Act and the Tribunal while determining the arm's length price, has to follow the guidelines stipulated under Chapter X of the Act, namely, Sections 92, 92A to 92CA, 92D, 92E and 92F and Rules 10A to 10E of the Rules. Any determination of the arm's length price under Chapter X *de hors* the relevant provisions of the guidelines shall be treated as perverse and considered as a substantial question of law. Therefore, there cannot be any absolute proposition of law that the arm's length price determined by the Tribunal is final and cannot be the subject matter of appeal before the High Court.

SC stated that when the determination of the arm's length price is challenged before the High Court, it is always open for the HC:

- to consider and examine whether the arm's length price has been determined while taking into consideration the relevant guidelines under the Act and the Rules.

- to examine whether the same is done judiciously and on the basis of the relevant material/evidence on record.
- to examine whether the comparable transactions have been taken into consideration properly or not, i.e., to the extent non-comparable transactions are considered as comparable transactions or not.

SC further stated that the view taken by the Karnataka High Court in the case of *Softbrands India (P) Ltd.* that in the transfer pricing matters, the determination of the arm's length price by the Tribunal is final and cannot be subject matter of scrutiny and the High Court is precluded from examining the correctness of the determination of the arm's length price by the Tribunal in an appeal under Section 260A on the ground that it cannot be said to be raising a substantial question of law cannot be accepted.

Contention of Departmental Representative

Shri Balbir Singh, learned Additional Solicitor General of India, appearing on behalf of the Revenue has vehemently submitted that the Karnataka High Court in the case of *Softbrands India (P) Ltd. (supra)* has erroneously held that the Tribunal is the final fact-finding authority on determining the arm's length price and therefore once the Tribunal determines the arm's length price the same cannot be subject to judicial scrutiny/scrutiny in an appeal under Section 260A and there shall not be any interference by the High Court in an appeal under Section 260A.

The Ld. DR has focused on the scheme of transfer pricing/arm's length price to be determined under Chapter X, more particularly Sections 92, 92A to 92CA, 92D, 92E and 92F and Rules 10A to 10E of the Income Tax Rules, 1962 wherein as per the scheme of transfer pricing, the arm's length price is to be determined taking into consideration the guidelines stipulated under the aforesaid provisions of the IT Act and the Rules and therefore it is always open for the High Court to consider and/or examine, whether the guidelines stipulated under the Act and the Rules, while determining the arm's length price have been followed by the Tribunal or not.

Contention of Authorized Representative of the assessee

The Id. counsel appearing on behalf of the respective assessee's have vehemently submitted as under:

- once the arm's length price is determined by the Tribunal taking into consideration the relevant guidelines, thereafter challenge to the same cannot be said to be a substantial question of law, to be considered in an appeal under Section 260A.
- an appeal shall lie to the High Court from every order of the Tribunal only if the High Court is satisfied that the case involves a substantial question of law.
- substantial question of law can arise in a case only when a question of law is fairly arguable, where there is room for difference of opinion on it.
- the Tribunal being a final fact-finding authority, in the absence of demonstrated perversity in its finding, interference therewith by the High Court is not warranted. The reliance has been placed upon

the decisions of this Court in the cases of *Vijay Kumar Talwar v. CIT, (2011) 1 SCC 673* and *Sir Chunilal V. Mehta and Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd., reported in AIR 1962 SC 1314*.

- the submission of the Revenue that in each case the High Court should examine whether the guidelines laid down in the IT Act and the Rules are followed to determine the arm's length price is not correct and moreover is too farfetched, as the High Court can only decide substantial questions of law raised and arising before it.
- it is the Revenue which uses the same set of comparable for determining an arm's length price, thus, painting all assessee's with the same brush. These are questions of facts, which would require determination on a case-by-case basis, and unless perversity is demonstrated in the order of the Tribunal, no interference is called for by the High Court.
- The Transfer Pricing analysis involves benchmarking of controlled transactions with uncontrolled transactions (terms specifically defined in the IT Act and the Rules) is largely a statistical exercise using database of companies in public domain as specifically.

Source: Supreme Court in SAP Labs India Pvt. Ltd. vs ITO, Bangalore vide Civil Appeal No. 8463 of 2022 on April 19, 2023

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