IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.12.2017

CORAM

THE HON'BLE MS. INDIRA BANERJEE, CHIEF JUSTICE
AND
THE HON'BLE MRS.JUSTICE R.HEMALATHA

Tax Case (Appeal) No.567 of 2017

Commissioner of Income Tax
Chennai. .. Appellant

Vs.

Same Deutz – Fahr India Private Limited
No.72, SIPCOT Industrial Complex
SIPCOT, Ranipet – 632 403. .. Respondent

PRAYER: Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal 'D' Bench, Chennai, dated 22.2.2017 in I.T.A.No.2666/MDS/2016.

For Appellant : Mr.M.Swaminathan
Standing Counsel

JUDGMENT
(Delivered by the *Hon'ble Chief Justice*)

This appeal by the Revenue is against an order dated 22.2.2017 passed by the Income Tax Appellate Tribunal, 'D' Bench, Chennai in I.T.A.No.2666/MDS/2016 in relation to the assessment year 2006-2007, whereby the appeal of the respondent assessee has partly been allowed.

2. The respondent appellant is aggrieved by the order of the Appellate Tribunal to the extent that the Transfer Pricing Officer (hereinafter referred to as "*TPO*") has been directed to include M/s.HMT Limited as a comparable and to re-work the comparable margin in determination of the arm's length price (hereinafter referred to as "*ALP*").

3. The respondent assessee Same Deutz – Fahr India Private Limited is a part of the SAME Group of companies which had entered into joint venture agreements with M/s.Greaves Limited and set up two joint venture companies – M/s.SAME Greaves Limited and M/s.SAME Greaves Tractors Limited.

4. In 2002, the SAME Group of companies acquired the stake of Greaves Ltd. in the two joint venture companies, after which the two Indian companies were renamed M/s.SAME India and M/s.SAME Deutz-Fahr India Private Limited.

5. To achieve operational and financial synergy and minimize

operating costs, M/s.SAME Deutz-Fahr India Private Limited was amalgamated with SAME India with effect from 1st April, 2002. The amalgamation was approved by the Madras High Court in February, 2003 and in April, 2004 the amalgamated company (the respondent assessee) was renamed M/s.SAME Deutz Fahr India Private Limited. The respondent assessee is engaged in the manufacture and export of tractors.

6. The respondent assessee filed its return of income for the assessment year in question, declaring a loss of Rs.3,30,16,163/-. In the assessment proceedings, the Assessing Officer found international transactions of Rs.29,86,30,802/- relating to purchase of raw materials and components net sale of returns, Sale of components, purchase of Dies and Moulds, Interest on External Commercial Borrowing, Interest on business advances received for supply of goods, Reimbursement of expenses borne, reimbursement of expenses charges, re-work cost on exported components and reimbursement of expenses charged.

7. Some of the relevant provisions of Chapter X of the Income Tax Act, 1961, as they stood at the material time are set out herein below for convenience:

"Section 92. Computation of income from international transaction having regard to arm's length price.-

(1)Any income arising from an international transaction shall be computed having regard to the arm's length price.

Explanation.- For the removal of doubts, it is hereby clarified that the allowance for any expense or interest arising from an international transaction shall also be determined having regard to the arm's length price.

(2) Where in an international transaction, two or more associated enterprises enter into a mutual agreement or arrangement for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises, the cost or expense allocated or apportioned to, or as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be.

(3) The provisions of this sections hall not apply in a case where the computation of income under sub-section (1) or the determination of the allowance for any expense or interest under that sub-section, or the determination of any

cost or expense allocated or apportioned, or as the case may be, contributed under sub-section (2), has the effect of reducing the income chargeable to tax or increasing the loss, as the case may be, computed on the basis of entries made in the books of account in respect of the previous year in which the international transaction was entered into.

Section 92C. Computation of arm's length price.

(1) The arm's length price in relation to an international 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 b y such persons or such other relevant factors as the Board may prescribe, 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 prescribed 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 prescribed.

Section 92CA. Reference to Transfer Pricing Officer:
(1) Where any person, being the assessee, has entered into an international 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 Commissioner, refer the computation of arm's length price in relation to the said international transaction under Section 92C to the Transfer Pricing Officer."

8. The Assessing Officer referred the international transaction to the Transfer Pricing Officer (TPO) for determination of the Arm's Length Price of the international transaction.

9. The respondent assessee adopted Transactional Net Margin Method (TNMM) as the appropriate method to determine the ALP of its international transactions of purchase of raw materials and components. The assessee identified five comparables and it made adjustment on account of idle capacity on comparables in order to arrive at ALP of its purchase transaction. The respondent assessee arrived at weighted average.

10. The TPO found that M/s.HMT Limited needed to be included in the comparables. However, the TPO found that the turnover of M/s.HMT Limited was more than twice the turnover of

the assessee company and, thus, could not be considered as a comparable.

11. Being aggrieved, the assessee appealed before the Commissioner of Income Tax (Appeals)-13. The appeal, being I.T.A.No.102/CIT(A)-13/2006-2007, was dismissed by an order dated 15.6.2016, the relevant part whereof is set out herein below for convenience:

> *"The appellant has contended that the Assessing Office, i.e., the Transfer Pricing Officer (TPO) has rejected the comparable companies selected by the assessee except VST Tillers in the transfer pricing documentation. The Assessing Officer has rejected all the comparable companies on the ground that the said companies recorded huge turnover whereas the turnover of SAME Deutz Fahr India (P) Ltd. is very small and hence not comparable. Therefore, the Transfer Pricing Officer undertook a fresh search and identified himself two comparable companies:*
>
> *i) Mahendra Gujarat Tractors*
>
> *ii) HMT Limited.*
>
> *Thereafter on his own, the Transfer Pricing Officer removed these two companies as comparable also and only considered the comparable company as given by the assessee, i.e. VST Tillers Ltd., and being the sole comparable and decided the issue of arms-length whereby made addition/adjustment of*

transfer pricing at Rs.1,66,03,225/- and that too also on components of purchase of raw materials by SAME Deutz Fahr India (P) Ltd. from its associate enterprises."

12. Being aggrieved, the respondent assessee appealed to the Income Tax Appellate Tribunal, 'D' Bench, Chennai. The appeal, being I.T.A.No.266/MDS/2016, has partly been allowed by the order dated 22.2.2017 under appeal.

13. The learned Tribunal observed that during the transfer pricing proceedings, the TPO had selected M/s.HMT Limited as one of the comparables on functional similarity, but while determining the ALP, he had not included M/s.HMT limited as a comparable. The learned Tribunal held:

"7.3. We heard the rival submissions and perused the material placed on record.
M/s.HMT Ltd., is in the segment of manufacturing of tractors and power tillers. The functionality of the M/s.HMT Ltd., and the assessee are more or less in similar. The Ld. AR of the assessee submitted that all the functions of M/s.HMT Ltd., and M/s.VST Tillers are one and the same. The TPO has rejected M/s.HMT Ltd., as comparable merely because of the turnover. The turnover of the M/s.HMT Ltd., for the AY 2005-06 was Rs.248.00 Cr. as against the

assessee's company turnover of Rs.120.00 Cr. It is impossible to find out comparable with all similarities inclusive of turnover. Even M/s.VST Tiller selected by TPO was with Rs.130.00 Cr. The turnover filter with turnover 3-5 times is acceptable for selecting the comparable as per the decisions of the tribunals. In the Appellant's case, the TPO has adopted the turnover filter and the M/s.HMT Ltd., being functionally similar and the turnover was only two times of Appellant, we are of the considered opinion that the TPO should include M/s.HMT Ltd., as comparable. The case laws relied upon by the assessee also supports arguments of the assessee. Bo the assessee and TPO adopted TNMM as most appropriate method which would neutralize the differences such as turnover, etc. Therefore, we direct the TPO to include M/s.HMT Ltd., as comparable and re-work the comparable margin. This ground of appeal is allowed."

14. The appeal is to the limited extent that the TPO has been directed to include M/s.HMT Limited as a comparable and re-work the comparable margin.

15. The learned Tribunal very rightly observed and held that refusal to include a company as a comparable only on the ground that the company had far higher turnover was not justified.

16. The learned Tribunal also very rightly observed that no comparables could have exactly the same turnover. The learned Tribunal found, on facts, that both M/s.HMT Limited and the respondent assessee were in the segment of manufacture of tractors and power tillers and that all the functions of M/s.HMT Limited and the respondent assessee were the same. The TPO ought not to have rejected M/s.HMT Limited as a comparable only because of its higher turnover, as it would be impossible to find out comparables with all similarities, including similarity of turnover.

17. In the grounds of appeal, it is urged that the learned Tribunal failed to appreciate that M/s.HMT Limited was a government owned company and the functions performed under government management were altogether different from a private company.

18. There is, however, no provision of law which makes any distinction between a government owned company and a company under private management for the purpose of transfer pricing audit and/or fixation of ALP. There is no reason why a government owned company cannot be treated as a comparable. It is reiterated

that the learned Tribunal found, on facts, that the functionality of M/s.HMT Limited and the assessee were the same.

19. Section 260A of the Income Tax Act, 1961 provides as follows:

> "*Section 260A. Appeal to High Court.*
> *(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal before the date of establishment of the National Tax Tribunal, if the High Court is satisfied that the case involves a substantial question of law.*
>
> *(2) The Principal Chief Commissioner or Chief Commissioner or the Principal Commissioner or Commissioner or an Assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be-*
>
> *(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the Assessee or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner.*
> *(b) [***];*
> *(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.*

(2A) The High Court may admit an appeal after the expiry of the period of one hundred and twenty days referred to in clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall at the hearing of the appeal, be allowed to argue that the case does not involve such question:
Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which -
(a) has not been determined by the Appellate Tribunal; or
(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of

law as is referred to in sub-section (1).

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section."

20. An appeal lies under Section 260-A of the IT Act, only when there is a substantial question of law. We find that there is no question of law involved in this appeal much less any substantial question of law.

21. In *Sir Chunilal V. Mehta & Sons Ltd. vs Century Spg. & Mfg. Co. Ltd.,* reported in *AIR 1962 SC 1314*, the Supreme Court agreed with and approved a Full Bench Judgment of this Court in *Rimmalapudi Subba Rao vs Noony Veeraju And Ors* reported in *AIR 1951 Mad 969* and laid down the principles for deciding when a question of law becomes a substantial question of law.

22. In *Hero Vinoth Vs. Seshammal* reported in *(2006) 5 SCC 545*, the Supreme Court followed *Sir Chunilal V. Mehta & Sons* (supra) and other judgments and summarized the tests to find out whether a given set of questions of law were mere questions of law or substantial questions of law.

23. The relevant paragraphs of the judgment of the Supreme Court in *Hero Vinoth* (supra) are set out herein below :

> *"21. The phrase "substantial question of law", as occurring in the amended Section 100 CPC is not defined in the Code. The word substantial, as qualifying "question of law", means—of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with—technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta v. Ram Ditta [(1927-28) 55 IA 235 : AIR 1928 PC 172] the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In Sir Chunilal case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] the Constitution Bench expressed*

agreement with the following view taken by a Full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju [AIR 1951 Mad 969 : (1951) 2 MLJ 222 (FB)] : (Sir Chunilal case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] , SCR p. 557)

> *"When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law."*

This Court laid down the following test as proper test, for determining whether a question of law raised in the case is substantial: (Sir Chunilal case [1962 Supp (3) SCR 549 : AIR 1962 SC 1314] , SCR pp. 557-58)

> *"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights*

of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

22. In Dy. Commr. v. Rama Krishna Narain [1954 SCR 506 : AIR 1953 SC 521] also it was held that a question of law of importance to the parties was a substantial question of law entitling the appellant to a certificate under (the then) Section 100 CPC.

23. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before *the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. (See Santosh Hazari v. Purushottam Tiwari [(2001) 3 SCC 179] .)*

24.The principles relating to Section 100 CPC relevant for this case may be summarised thus :

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding

precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law .

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

24. In *M.Janardhana Rao Vs. Joint Commissioner of Income Tax [2005 273 ITR 50 (SC)],* the Hon'ble Supreme Court held that the principles contemplated under Section 100 of the Code of Civil

Procedure would apply to Section 260-A of the IT Act too.

25. Right of appeal is not automatic. Right of appeal is conferred by statute. When statute confers a limited right of appeal restricted only to cases which involve substantial questions of law, it is not open to this Court to sit in appeal over the factual findings arrived at by the Appellate Tribunal.

26. In the instant case, whether M/s.HMT Limited can be a comparable or not is a factual issue. The learned Tribunal has factually assessed the similarities between M/s.HMT Limited and the respondent assessee and the same, in our considered opinion, does not warrant interference of this Court under Section 260A of the Income Tax Act, 1961.

The appeal is not entertained and the same is dismissed.

(I.B., CJ.) (R.H., J.)

05.12.2017

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To:

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3. The Assistant Commissioner of Income Tax
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   Chennai.

THE HON'BLE CHIEF JUSTICE
AND
R.HEMALATHA,J.

(sasi)

Tax Case (Appeal) No.567 of 2017

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