IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B" : HYDERABAD
(THROUGH VIDEO CONFERENCE)

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

I.T.A. No. 634/HYD/2018
Assessment Year: 2013-14

Deputy Commissioner of Income Tax, Circle-16(1), HYDERABAD	Vs	M/s.Nava Bharat Ventures Ltd. HYDERABAD [PAN: AAACN7327C]
(Appellant)		(Respondent)

For Revenue : Shri Rajiv Ranka, CIT-DR
For Assessee : Shri P.V.S.S.Prasad, AR

Date of Hearing : 09-06-2021
Date of Pronouncement : 22-07-2021

O R D E R

PER S.S.GODARA, J.M. :

This Revenue's appeal for AY.2013-14 arises from the CIT(A)-4, Hyderabad's order dated 29-01-2018 passed in case No.0457 / 2016-17 / ACIT,Cir.16(1) / CIT(A)-4 / Hyd / 17-18, in proceedings u/s.143(3) r.w.s.92CA(3) of the Income Tax Act, 1961 [in short, 'the Act'].

Heard both the parties. Case file perused.

2. The Revenue has proposed the following twin substantive grounds in the instant appeal:

"1.In the facts and circumstances of the case whether CIT(A) is justified in holding that DEPB incentives are to be considered for comparability analysis, ignoring the fact that DEPB incentives are export incentives given by Government and are not profits derived from the business directly.

2.In the facts and circumstances of the case whether CIT(A) is justified in holding that DEPB incentives are to be considered for comparability analysis ignoring the fact that considering DEPB incentives for comparability analysis results in shifting of incentives to foreign territory which is against the objecting of Transfer Pricing Law.

3. In the facts and circumstances of the case whether CIT(A) is justified in deleting the adjustment on Corporate Guarantee fees ignoring the fact that no independent party will stand guarantee for any other party charging less that the appropriate fees/commission determined by the market conditions.

4. Any other ground that may be urged at time of hearing".

3. We advert to the former issue of inclusion of the assessee's DEPB incentives in rule 10(B)(1)(a)(ii) of Income Tax Rules as an adjustment in the Comparable Un-controlled Price "CUP" method for the purpose of arriving at arm's length price 'ALP' under the provisions of the Act.

4. We start with the basic relevant facts. This assessee is admittedly a company, manufacturing ferro alloys and sugar, fabrication of equipment and generation of power. It filed its return on 29-11-2013 admitting total income of Rs.173,64,26,290/- after claiming Section 80G deduction of Rs.13.10 lakhs along with Section 80-IA deduction of Rs.121,32,88,080/- followed by Section 115JB book profits at Rs.296,63,14,260/-.

5. The Assessing Officer noticed during the course of scrutiny that the assessee had entered into international transactions with its overseas Associated Enterprise 'AE' in various segments. He thus made Section 92CA reference to the Transfer Pricing Officer 'TPO' to ascertain Arm's Length Price 'ALP' thereof. The assessee's international transactions with its AEs involved sale of Silico Manganese and ferro chrome. The

assessee's endeavour before the TPO was to include DPEB and FPS declared by the Government of India as an adjustment under rule 10B(1)(a)(ii). It quoted rule 10B(a)(vi) applicable in case of the 'CUP' method that the same duly acknowledged such incentives amounting to differences materially affecting the 'ALP' in open market. The TPO's order dt.26-10-2016 quoted Goodyear India Ltd. 152 TTDJ 458 (Del) to hold that export incentives like DPEB etc. are available only in India which could not be passed in favour of any entity outside the territory. He further appears to have considered tribunal's yet another decision in ITA No.6539/Mum/2009 dt.19-11-2012 in case of CIT vs. Welspun Zucchi Textiles Limited (391 ITR 211) deciding the issue in assessee's favour as an adjustment. The Assessing Officer passed his draft assessment dt.15-11-2016 followed the impugned assessment dt.09-01-2017 in view of the fact that this taxpayer had not preferred objections before the 'DRP'. The Assessing Officer's assessment went by the foregoing TPO's proposing "ALP" adjustment relating to sale of Silico Manganese and Ferro Chrome of Rs.2,50,63,257/- against the assessee.

6. The assessee preferred appeal. The CIT(A) has directed the Assessing Officer to verify and consider the foregoing DPEB benefit for comparability analysis and re-work the consequential adjustment of the selling price as under:

"5. I have carefully considered the assessment order, facts of the case and submissions furnished by the appellant. The Assessing Officer made the addition in two aspects viz., shortfall in respect of sale of Silico Manganese at Rs.2,50,63,257/- and in respect of corporate guarantee fee at Rs.3,51,06,335/-, totaling to Rs. 6,01,69,592/- as adjustment u/s 92CA(3) of the I.T.Act, as determined by the TPO. In this regard, the submissions made by the

appellant company were verified and it is noticed that the appellant company has relied upon the Hon'ble Bombay High Court decision in the case of CIT vs. Welspun Zucchi Textiles Limited (391 ITR 211), wherein it was held that DEPB benefits are to be considered for comparison of prices. Further, as per the appellant's submissions, Hon'ble ITAT, Delhi Bench, in the case of Degania Medical Devices (P) Ltd., vs. ACIT, wherein it was held that DEPB/Duty Drawback are part of the operating profits should not be excluded for the purpose of comparability analysis. Therefore, after considering the submissions of the appellant and case laws relied upon, the Assessing Officer is directed to verify and consider the DEPB benefit for comparability analysis and rework out the adjustment on account of selling price".

7. We have given our thoughtful consideration to rival pleadings *qua* the assessee's case that its DPEB benefits derived from sale of Silico Manganese Ferro Chrome deserve to be considered as an adjustment under rule 10B(1)(a)(ii) of the Income Tax Rules. Learned counsel has also filed a written note with catena of case law hon'ble Bombay high court (supra), (2020) 119 taxmann.com 401 (Bangalore-Trib) Reitzel India (P.) Ltd., Vs. DCIT, (2019) 101 taxmann.com 325 (Pune-Trib), Cummins India Ltd., Vs. DCIT, (2018) 97 taxmann.com 494 (Kolkata - Trib) DCIT Vs. JJ Exporters Ltd. holding that since DPEB benefits are export incentives forming part of operating revenues, the same also deserve to be considered as an adjustment under Rule 10B of the rules.

8. We have given our thoughtful consideration to foregoing rival pleadings and find no reason to agree with the assessee's stand supporting the CIT(A)'s foregoing conclusion. This is for the precise reason that we are dealing with Chapter-X of the Act in the nature of (a) '**SPECIAL PROVISION RELATING TO AVOIDANCE OF ACT**' introduced as an anti-avoidance measure by the legislature. Section 92(1) thereunder stipulates that any income arising from an international transaction shall

be computed having regard to the arm's length price. Section 92C prescribes the detailed mechanism for ALP computation. Sub-section (4) 1st proviso thereof envisages that 'no deduction u/s.10A [or Section 10AA] or Section 10B are under chapter-VI 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'.

8.1. The foregoing statutory proviso in Section 92C(4) also formed subject matter of adjudication in this tribunal's Special Bench's decision Doshi Services P. Ltd. Vs. DCIT (TS) 1086-ITAT-2019 (Ahd) wherein the assessee's endeavour seeking to apply purposive construction stands declined on 24-10-2019.

8.2. Coupled with this, the legislature has also invested a definition clause in Section 92F(ii) that "arm's length price" means 'a price which is applied or proposed to be applied in a transaction between persons other than associated enterprises in un-controlled conditions'. Learned counsel is fair enough in highlighting the issue before us as to whether the DPEB benefits derived from the corresponding scheme ought to be considered for adjustment or not under rule 10B(1)(a)(iii) being in the nature of a "difference materially affecting the price in open market". Hon'ble apex court's latest Full Bench decision in Commissioner of Customs Vs. Dilip Kumar (2018) 9 SCC 1 (FB)(SC) holds that taxing and an exemption provisions have to be strictly construed and benefit of doubt in such an instance goes to the assessee and Revenue; respectively. We are unable to loose sight of the fact that chapter-X is 'special' as against all other general provisions including Section(s) 10, 10A, 10AA

and 10B etc; as the case may be. We cite legal maxim 'Generalia Speialibus Non-Derogant' meaning that a general provision does not apply at the cost of the special one or the former of them must make way for the latter; respectively; and, are of the opinion that the assessee's arguments go against arm's length price defined as "a price which is applied or proposed to be applied in a transaction between persons other than associate enterprises, in uncontrolled conditions" only.

So far as the assessee's case that various judicial precedents (supra) have already decided the issue in its favour, we quote the foregoing hon'ble apex court's decision binding on all the "Courts" within the territory of India as per Article 141 of the Constitution and hold that none of them consider the legislature scheme in Chapter-X (supra). And that deviates therefrom would not only violates the same but also would amounts to non-compliance of "between persons" in Section 92F.

9. Hon'ble jurisdictional high court's full bench decision in (1993) 202 ITR 333 (AP) CIT Vs. B.R.Constructions also holds that a judicial precedent ceases to be binding in the following conditions:

"37. The effect of binding precedents in India is that the decisions of the Supreme Court are binding on all the courts. Indeed, article 141 of the Constitution embodies the rule of precedent. All the subordinate courts are bound by the judgments of the High Court. A single judge of a High Court is bound by the judgment of another single judge and a fortiori judgments of Benches consisting of more judges than one. So also, a Division Bench of a High Court is bound by judgments of another Division Bench and Full . A single judge or Benches of High Courts cannot differ from the earlier judgments of co-ordinate jurisdiction merely because they hold a different view on the question of law for the reason that certainty and uniformity in the administration of justice are of paramount importance. But, if the earlier judgment is erroneous or adherence to the rule of precedents results in manifest injustice, differing from the earlier judgment will be permissible. When a Division Bench differs from the judgment of another Division

Bench, it has to refer the case to a Full Bench. A single judge cannot differ from a decision of a Division Bench except when that decision or a judgment relied upon in that decision is overruled by a Full Bench or the Supreme Court, or when the law laid down by a Full Bench or the Supreme Court is inconsistent with the decision.

38. It may be noticed that precedent ceases to be a binding precedent - (i) if it is reversed or overruled by a higher court, (ii) when it is affirmed or reversed on a different ground, (iii) when it is inconsistent with the earlier decisions of the same rank, (iv) when it is sub silentio, and (v) when it is rendered per incuriam.

39. In paragraph 578 at page 297 of Halsbury's Laws of England, Fourth Edition, the rule of per incuriam is stated as follows :

"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, in which case it must decided which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."

40. In Punjab Land Development and Reclamation Corporation Ltd. v. Presiding Officer, Labour Court , the Supreme Court explained the expression "per incuriam" thus (at page 36 of 77 FJR) :

"The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given per incuriam when the Supreme Court has acted in ignorance of a pervious decision of its own or when a High Court has acted in ignorance of a decision of the Supreme Court."

42. As has been noticed above, a judgment can be said to be per incuriam if it is rendered in ignorance or forgetfulness of the provisions of a statute or a rule having statutory force or a binding authority. But, if the provision of the Act was noticed and considered before the conclusion arrived at, on the ground that it has erroneously reached the conclusion the judgment cannot be ignored as being per incuriam. In Salmond on Jurisprudence, Twelfth Edition, at page 151, the rule is sated as follows :

"The mere fact that (as is contended) the earlier court misconstrued a statute, or ignored a rule of construction, is no ground for impugning the authority of the precedent. A precedent on the construction of a statute is as much binding as any other, and the fact that it was mistaken in its reasoning does not destroy its binding force."

43. In Choudhry Brothers' case , as noticed above, the Division Bench treated the judgment in Ch. Atchaiah's case , as per incuriam on the ground that the earlier Division Bench did not notice the significant changes the charging section 3 has undergone by the omission of the words "or the partners of the firm or the members of the association individually"-. In our view, this cannot be a ground to treat an earlier judgment as per incuriam. The change in the provisions of the Act was present in the mind of the court which decided Ch. Atchaiah's case . Merely because the conclusion arrived at on construing the provisions of the charging

section under the old Act as well as under the new Act did not have the concurrence of the latter Bench, the earlier judgment cannot be called per incuriam.

44. Though a judgment rendered per incuriam can be ignored even by a lower court, yet it appears that such a course of action was not approved by the House of Lords in Cassell and Co. Ltd. v. Broome [1972] 1 All ER 801, wherein the House of Lords disapproved the judgment of the Court of Appeal treating an earlier judgment of the House of Lords as per incuriam. Lord Hailsham observed (at page 809) : "It is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way."

45. It is recognised that the rule of per incuriam is of limited application and will be applicable only in the rarest of rare cases. Therefore, when a learned single judge or a Division Bench doubts the correctness of an otherwise binding precedent, the appropriate course would be to refer the case to a Division Bench or Full Bench, as the case may be, for an authoritative pronouncement on the question involved as indicated above. The above-said two questions are answered as indicated above.

46. In the result, the questions referred to us are answered accordingly".

We conclude in this factual and legal backdrop that the assessee's argument seeking to include DEPB as an adjustment for "ALP" computation because it is in the nature of an operating income, ought not be accepted as it tends to have an overriding effect on application of chapter-X of the Act as per stricter interpretation rule. We therefore accept the Revenue's instant former substantive grievance.

9.1. Next comes latter issue of corporate guarantee adjustment of Rs.3,51,06,335/- deleted in the CIT(A)'s detailed discussion as under:

"5.1 With regard to adjustment on amount of shortfall in corporate guarantee commission of Rs.3,51,06,335/-, after considering the submissions of the appellant company and also by following earlier order in the appellant's own case for the AY.2011-12, wherein I decided the issue in favour of the appellant company by observing that, "the Transfer Pricing Officer had charged corporate guarantee commission @ 2% which is higher than the appellant charged. Since the appellant has charged a reasonable corporate guarantee commission i.e. @ 0.875% are more than the Tribunals allowed. Therefore, the addition made by the Assessing Officer is hereby

deleted". Therefore, the addition made by the Assessing Officer is deleted".

9.2. It has come on record that the assessee had itself recorded comparable guarantee commission @8.75% i.e. much more than that that decided by the tribunal (supra). We therefore adopt judicial consistency and decline Revenue's instant latter substantive ground for this precise reason alone.

No other argument has been raised before us.

10. This Revenue's appeal is partly allowed in above terms.

Order pronounced in the open court on 22nd July, 2021

Sd/-	Sd/-
(LAXMI PRASAD SAHU)	**(S.S.GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad,
Dated: 22-07-2021

TNMM

Copy to :

1.The Dy.Commissioner of Income Tax, Circle-16(1), Hyderabad.

2.M/s.Nava Bharat Ventures Ltd., 6-3-1109/1, 3rd Floor, Rajbhavan Road, Somajiguda, Hyderabad.

3.CIT(Appeals)-4, Hyderabad.

4.Pr.CIT-4, Hyderabad.

5.D.R. ITAT, Hyderabad.

6.Guard File.