

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

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

I.T.A. No. 11/HYD/2019
Assessment Year: 2012-13

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

(Appellant)

(Respondent)

For Revenue : Smt.S.Praveena, DR
For Assessee : Shri P.V.S.S.Prasad, AR

Date of Hearing : 16-08-2021
Date of Pronouncement : 21-09-2021

ORDER

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

This Revenue's appeal for AY.2012-13 arises from the CIT(A)-4, Hyderabad's order dated 03-10-2018 passed in case No.0182 / 2016-17 / ACIT,Cir.16(1) / CIT(A)-4 / Hyd / 18-19, 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. Coming to the Revenue's sole substantive grievance raising the issue of inclusion of DEPB entitlement as an adjustment under Rule 10B involving Rs.2,86,71,055/-, it emerges during the course of hearing that this tribunal's co-ordinate bench's order in assessee's case itself involving

departmental appeal ITA No.634/Hyd/2018, dt.22-07-2021 for AY.2013-14 has restored the Transfer Pricing Officer's (TPO's) identical action making adjustment as under:

“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 decide 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 previous 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 stated 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. Atchiaiah'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. Atchiaiah'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”.

3. The assessee is fair enough in not pin-pointing any distinction on facts or law in these twin assessment years. We thus adopt judicial consistency and accept the Revenue’s instant sole substantive grievance.

4. This Revenue’s appeal is allowed in above terms.

Order pronounced in the open court on 21st September, 2021

Sd/-
(LAXMI PRASAD SAHU)
ACCOUNTANT MEMBER

Hyderabad,
Dated: 21-09-2021

TNMM

Sd/-
(S.S.GODARA)
JUDICIAL MEMBER

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, Nava Bharat Chambers, Rajbhavan Road, Somajiguda, Hyderabad.

3.CIT(Appeals)-4, Hyderabad.

4.Pr.CIT-4, Hyderabad.

5.D.R. ITAT, Hyderabad.

6.Guard File.