

THE INCOME TAX APPELLATE TRIBUNAL  
“J” Bench, Mumbai  
Shri B.R. Baskaran (AM) & Shri ABY T Varkey (JM)

I.T.A. No. 478/Mum/2021 (A.Y. 2012-13)

DCIT, Circle-16(1) Room No. 439 4 <sup>th</sup> Floor Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	Shilpa Shetty 7/D, Aditya Apartment SVP Nagar Andheri West Mumbai-400 054.  PAN : ACPPS6622P
(Appellant)		(Respondent)

Assessee by	Shri Samuel Pitta
Department by	Ms. Ritu Kamalkishore
Date of Hearing	10.08.2022
Date of Pronouncement	11.08.2022

ORDER

Per B.R.Baskaran (AM) :-

The Revenue has filed this appeal challenging the order dated 14.9.2020 passed by learned CIT(A)-48, Mumbai and it relates to A.Y. 2012-13. The Revenue is aggrieved by the decision of learned CIT(A) in deleting the transfer pricing adjustment made in the hands of the assessee by the Assessing Officer.

2. The facts relating to the issue are stated in brief. The assessee is a film actress and she is married to Shri Raj Kundra. The Assessing Officer noticed that the assessee has acted as a brand ambassador for Jaipur IPL Cricket Pvt Ltd, which owned “Rajasthan Royals” IPL team. In the capacity of brand ambassador, the assessee has supported Jaipur IPL Team making herself present in the Match venue, photo shoots, press interview etc. The Assessing Officer noticed that the assessee has not received any professional from Jaipur IPL Team for the services rendered by her to it.

3. The Jaipur IPL Cricket Pvt. Ltd. (JIPL) is engaged in the business of conducting sports and media activities. It is a 100% subsidiary of E M Sporting Holdings Limited, Mauritius (herein after referred to as "EMSHL"). Shri Raj Kundra is assessee's husband and he owned a company named M/s. Kuki Investment Ltd. registered in Bahamas. Shri Raj Kundra purchased shares of EMSHL, Mauritius through Kuki Investment Limited. In that regard, a Shares Purchase Agreement was entered on 02-02-2009 between Kuki Investment, Shri Raj Kundra and Shilpa Shetty (assessee herein) and EMSHL. As per the above said Shares Purchase Agreement, the assessee herein has to provide services at free of cost. The nature of services to be provided by the assessee has been described in the preceding paragraph.

4. The Assessing Officer took the view that the assessee herein and EMSHL could be termed as "Associated Enterprises" within the meaning of the definition given under section 92A(2)(j) of the I.T. Act. The Assessing Officer also took the view that, since the assessee and EMSHL are associated enterprises, the services rendered by the assessee to JIPL, which is 100% subsidiary of EMSHL, shall fall within the meaning of "international transaction" as defined in section 92B of the Act. Accordingly, the Assessing Officer took the view that the arm's length price of services rendered by the assessee to JIPL has to be determined and the same has to be brought to tax in her hands. Accordingly, the Assessing Officer determined the arm's length price of services rendered by the assessee to JIPL at Rs. 1.50 crores and assessed the same as transfer pricing adjustment in the hands of the assessee.

5. Before learned CIT(A), the assessee submitted that the Assessing Officer had made identical additions by way of transfer pricing adjustments in A.Y. 2010-11 and 2011-12 and the said additions has been deleted by the Tribunal vide its order dated 21.8.2018 passed in ITA No. 2445/mum/2014 for A.Y. 2010-11 and in ITA No. 5433/Mum/2017 dated 25.6.2019 for A.Y.

2011-12. Following the above said decisions rendered by the Tribunal, the learned CIT(A) deleted the addition of Rs.1.50 crores made by the Assessing Officer as transfer pricing adjustment. Aggrieved the Revenue has filed this appeal before the Tribunal.

6. We have heard the parties and perused the record. We noticed that learned CIT(A) has deleted the impugned addition by following the decision rendered by the Tribunal in the assessee's own case in earlier years. We notice that the decision rendered by the Tribunal in A.Y. 2010-11 has been followed in A.Y. 2011-12. For the sake of convenience, we extract below the operative portion of the order passed by the Tribunal in A.Y. 2010-11:-

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 ITD 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 be 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(31), 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 if one of the enterprises is controlled by an individual and the other 'enterprise' 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 (Bom HC).

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 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-imbusement 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 provision 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 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 infructuous.”

7. It was submitted that the fact prevailing in the year under consideration are in pari materia with the facts that prevailed in A.Y. 2010-11 and 2011-12. Hence, in our view, the learned CIT(A) was justified in following the decision rendered by the Tribunal in A.Y. 2010-11. Since learned CIT(A) has followed the decision rendered by the Tribunal in assessee’s own case for the earlier years on an identical issue, we do not find any reason to interfere with the order passed by him on this issue. Accordingly, we confirm the order passed by learned CIT(A) on this issue.

8. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in the open court on 11.08.2022.

Sd/-  
(ABY T VARKEY)  
JUDICIAL MEMBER

Sd/-  
(B.R. BASKARAN)  
ACCOUNTANT MEMBER

Mumbai; Dated : 11/08/2022

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
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BY ORDER,

(Assistant Registrar)  
ITAT, Mumbai