

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'K' BENCH, MUMBAI**

[Coram: Pramod Kumar AM and Pawan Singh JM]

**I.T.A. No.139/Mum/2014
Assessment year: 2008-09**

Firestone Diamond Pvt. Ltd.Appellant

(Now known as Firestar Diamond International Pvt. Ltd.),
C/o. Karnavat & Co.,
2A Kitab Mahal, 1st Floor,
192, Dr. D.N. Road
Mumbai.
[PAN: AABCJ 7268 H]

Vs.

Income Tax Officer,Respondent

Ward - 8(1)(4), Mumbai.

Appearances by:

Sunil K. Hirawat, for the appellant
N.K. Chant, for respondent

Date of concluding the hearing : January 13th, 2016
Date of pronouncing the order : March 31st, 2016

ORDER

Per Pramod Kumar, AM:

1. By way of this appeal, the assessee appellant has challenged correctness of the order dated 08.11.2013 passed by the learned CIT(A) in the matter of assessment under section 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) for the assessment year 2008-09.

2. The only grievance raised by the assessee is as follows :-

"1. On facts and in law, the learned Commissioner of Income tax (Appeals) had erred in confirming the addition of Rs.46,127/- made by the learned Assessing

Officer/Transfer Pricing Officer being the deemed interest on delayed sale proceeds. Under the facts and circumstances of the matter, he ought to have deleted the said addition of Rs.46,127/-."

3. To adjudicate on this appeal, only a few material facts need to be taken note of. The assessee is engaged in the business of manufacturing and trading in diamond studded jewellery. The exports made to the AE is benchmarked on the basis of the transactional net margin method (TNMM) and the TPO has accepted the same. However, an adjustment of Rs 46,127 is made in respect of delayed realization of debts, as three export bills dated 26.3.2008, 7.3.2008 and 7.3.2008 on the AEs were realized in 196, 187 and 187 days respectively. It was in this backdrop that the interest for delay of 16, 7 and 7 days in respect of these delays (180 days was taken as the benchmark of reasonable period for realization of debts) by computing interest @ 18.816%. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before us.

4. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

5. We find that the issue is covered, in favour of the assessee, by our order of even date in the case of *Rusabh Diamonds Vs ACIT and vice versa* (I.T.A. Nos. 2497 and 689/Mum/2010, Assessment year: 2009-10), wherein we have held this issue, in general, in favour of the assessee, by observing as follows:

12. In our considered view, even if we proceed on the basis that Explanation to Section 92B is indeed retrospective in effect and it does cover delay in realization of debts, as long as sale is benchmarked on TNMM basis, as in this situation before us, there cannot be any occasion to make a separate adjustment for delay in realization of debts. The reason is that the interest income is an integral part of the PBIT inasmuch as interest income, in cases other than finance companies, is

required to be included in the 'other income' and thus affects the profit before interest and taxes. While profit before interest and taxes does not take into account 'interest expenditure', it does take into account 'interest income' because the interest income is part of the 'other income', under pre amended as well as post amended schedule VI to the Companies Act, which is duly taken into account into computation of PBIT. In a way PBIT is a misnomer, as while PBIT does not take into account interest expenditure, it does take into account interest income-appearing in the other income. Once the profitability, as per PBIT, is found to be comparable, there cannot be a separate adjustment for interest income on delayed realization which is an integral part of the PBIT figure.

13. It is in this background that we may refer to the observations made by a coordinate bench of this Tribunal, in the case of *Micro Ink Ltd Vs ACIT (supra)*, as follows:

7. We find that, as evident from audit report on form 3CEB (pages 39 to 52 of the paper-book), the arm's length price of exports to the AEs, including Micro USA, has been determined on the basis of the transactional net margin method (TNMM). By way of a note at page 51, it is specifically stated that "further, the said amount of Rs 2428.26 millions has also been determined/ computed by the assessee having regard to the arm's length price on application of Transactional Net Margin Method (TNMM), on aggregation of transactions, as prescribed under section 92C of the Income Tax Act, 1961". In this backdrop, we can usefully refer to the decision of Hon'ble Delhi High Court, in the case of *Sony Ericsson Mobile Corporation Pvt Ltd Vs ACIT [(2015) 374 ITR 118(Del)]* wherein Their Lordships had, inter alia, observed as follows:

"Where the Assessing Officer/TPO accepts the comparables adopted by the assessed, with or without making adjustments, as a bundled transaction, it would be illogical and improper to treat AMP expenses as a separate international transaction, for the simple reason that if the functions performed by the tested parties and the comparables match, with or without adjustments, AMP expenses are duly accounted for. It would be incongruous to accept the comparables and determine or accept the transfer price and still segregate AMP expenses as an international transaction,"

8. By way of an example, this aspect of the matter was then explained by Hon'ble Delhi High Court as follows:

"An example given below would make it clear:

Particulars	Case 1	Case 2
Sales	1000	1,000
Purchase Price	600	500
Gross Margin	400 (40%)	500
Marketing Sale promotion	50	150

Overhead expense	300	300
Net profit	50 (5%)	50 (5%)

The above illustrations draw a distinction between two distributors having different marketing functions. In case 2, a distributor having significant marketing functions incurs substantial expenditure on AMP, three times more than in case 1, but the purchase price being lower, the Indian AE gets adequately compensated and, therefore, no transfer pricing adjustment is required. In case we treat the AMP expenses in case 2 as Rs.501-, i.e. identical as case 1 and AMP of Rs. 100 as a separate transaction, the position in case 2 would be:

Particulars	Case 2
Sales	1,000
Purchase Price	500
Gross Margin	500 (50%)
Overhead expenses	300
Marketing expenses	50
Net profit	150 (15%)

It is obvious that this would not be the correct way and method to compute the arm's length price. The purchase price adjustments/set off would be mandated to arrive at the arm's length price, if the AMP expenses are segregated as an independent international transaction....."

9. *By the same logic, even making an adjustment for interest on excess credit allowed on sales to AEs will vitiate the picture, inasmuch as what has already been factored in the TNMM analysis, by taking operating profit figure which incorporate financial impact of the excess credit period allowed, will be adjusted again separately as well. Of course, in the example used by Hon'ble Delhi High Court, the AMP expenses are deductibles in computation of operating profit but that does not make any material difference because the interest levy for late realization of debtors, being inextricably connected with the sales, is also part of operating income. In the case of Nirma Industries Limited Vs DCIT [(2006) 283 ITR 402 (Guj)], Hon'ble High Court has dealing with the nature of interest on debtors, held it to be integral to business income. The same is the principle for the transfer pricing cases to that extent interest is to be taken as integral to sale proceeds, and, as such, includible in operating income. When such an interest is includible in operating income and the operating income itself has been accepted as reasonable under the TNMM, there cannot be an occasion to make adjustment for notional interest on delayed realization of debtors. One can understand separate adjustment for excess credit period when the arm's length price for exports has been benchmarked on the CUP basis but not in a case when the arm's length price of the exports has been benchmarked on the basis of TNMM. The very conceptual foundation, for separate adjustment for delayed realization of*

debtors and on the facts of this case, is thus devoid of legally sustainable merits.

10. The other aspect of the matter is that a separate adjustment for delayed realization of debtors can, even in a fit case, can only be made only to the extent the credit period allowed to the associated enterprises is more than the credit period allowed to independent enterprise in respect of the same or materially similar transactions. In the present case, it is an undisputed position that semi finished goods, as sold to Micro USA, is not sold to any other independent enterprises. The assessee did have trading transactions in respect of the finished goods with trading subsidiaries in China and Hong Kong but it is not even the case of the TPO that excessive credit period was allowed to these AEs vis-à-vis the credit period allowed to independent enterprises, nor any ALP adjustment has been recommended in connection with the same. This fact, if anything, shows that the credit period allowed to the AEs is comparable with credit period of non AEs in respect of similar goods. To compare credit period in respect of finished goods with the credit period in respect of semi-finished goods, is, therefore, somewhat fallacious in approach and untenable in law. In our considered view, merely because there is a delay in realization of debts cannot be reason enough to make an addition as long as such a delay is peculiar to the transactions with AEs. The adjustment before us is an adjustment to arrive at an arm's length price and unless there is something, more than sweeping generalizations as implicit in the arguments before us, to at least indicate that such a delay in realization of debts in similar transactions is absent in arm's length transactions, these adjustments cannot be made even when sales are benchmarked on CUP basis. The delay in realization of debts, resulting in a continuing debit balance, is not a standalone international transaction per se, but is a result of the international transaction as it only reflects that the related payment has not been made by the debtor. As for the learned Departmental Representative's stand that "the supplier is entitled to receipt of payment immediately on delivery irrespective of whether the finished goods is sold in the market, get spoiled in manufacturing or is damaged" would probably be valid in the perfect market conditions which are more of a myth than reality. The only other merit of this approach is its simplicity, or, to put it more appropriately, naivety. The real life trade and commerce is seldom so simple. It is not at all necessary that a payment is to be made as soon as goods or services are delivered. A call is to be taken by the vendor, in consultation with its client and based on the business exigencies, as to what should be the terms on which payments for the supplies is to be made. It is a harsh commercial reality that immediate payments are more of exceptions rather than rule, and more so in a complex case in which the assessee is sole vendor and the very existence of the buyer is to process the semi- finished goods and sell it to the end buyers. Many factors, such normal business practices and the commercial exigencies, influence the fact of payment in respect of a commercial transaction. Whether a payment is made immediately by the AE or is made after six months cannot, therefore, be seen in isolation with what is the position is with respect to similar payments due from non AEs. The whole exercise of ALP adjustments is to neutralize the impact of inter se relationships between the AEs and it is, therefore, not the delay simplicitor in payment but delay

in payment vis-à-vis similar situations with non AEs (i.e. independent enterprises) which is of crucial consideration. Such a comparison cannot be based on the hypothesis as to what would have, in the wisdom of the TPO, happened if assessee was to have similar transactions with non- AEs. The comparison has to be based on real transactions of similar nature, if at all such transactions have taken place. When no such transactions have taken place, as is the case before us, there is obviously no occasion of any comparison. The stand taken by the learned Departmental Representative, therefore, is not only quite detached from commercial reality but also wholly untenable in law. In any case, what can be examined on the touchstone of arm's length principles is the commercial transaction itself, as a result of which the debit balance has come into existence, and the terms and conditions, including terms of payment, on which the said commercial transaction has been entered into. In this view of the matter, learned Departmental Representative's reliance on Aztec decision (supra) is of no assistance to the case of the revenue. The international transaction is exports of goods which been benchmarked on TNMM basis and which is duly accepted by the TPO. In view of these discussions, and respectfully following the decision of the coordinate bench in assessee's own case for the earlier years, we uphold the grievance of the assessee and direct the Assessing Officer to delete the impugned ALP adjustment of Rs 2,10,95,346.

14. *As regards learned Departmental Representative's contention that Sony Ericsson Mobile Corporation decision (supra) will not apply in the case before us in the context of interest on delayed realization of debts for the simple reason that while AMP expenses, as in that case, are taken into account in the computation of the PLI, interest on delayed realization of debts is not taken into account in computation of the PLI, we can only say that it proceeds on the fallacious assumption that interest income is not taken into account in computation of profit before interest and taxes. The profit before tax and interest (PBIT) so computed takes into account interest income because, on the given facts, it is in the nature of 'other income' which is duly included in the PBIT figure. It is only interest expenditure which is not taken into account in the PBIT computation. There is no warrant for the proposition that interest expenditure taken into account is net of interest income on account of delay in realization of debts. We, therefore, reject this contention of the Departmental Representative.*

15. *As for learned Departmental Representative's suggestion that it is to be verified whether the comparables include interest income, if any, all we can say is that the statutory provisions requires the interest income, unless it is an interest income of the finance and banking companies, to be included in the other income which is taken into account for computing PBIT (i.e. profit before interest and taxes). The presumption therefore is that the accounts are drawn up as per the statutory requirements, and the exclusions from 'other income' are specifically discussed on the facts of each case, and as such constitute integral part of the transfer pricing documentation. There is nothing on record to show these exclusions.*

16. *As regards the contention that normally all interest incomes are excluded in the computation of PBIT as such incomes rarely constitute operational income, we see no need to be guided by such hypothesis and generalities. There is nothing on the records, as we have noted earlier, such exclusions on the facts of this case.*

In any event, setting off of interest expenditure with interest on account of delay in realization of debts, even if so, is not too common an occurrence and more of an exceptions than the rule. The apprehensions of the learned DR are purely hypothetical and, therefore, devoid of legally sustainable merits.

17. *In view of these discussions, as also bearing in mind entirety of the case, we are of the considered view that no ALP adjustments can be made, on the facts of this case, in respect of delay in realization of sale proceeds. Such being our conclusions, we also see no need to address ourselves to the specific factual arguments advanced by the learned counsel. In effect thus, we uphold the grievance of the assessee, and direct the Assessing Officer to delete the impugned arm's length price adjustment.*

18. *As we have upheld the grievance of the assessee, and thus deleted the impugned ALP adjustment, grievance raised by the Assessing Officer, which was in respect of the interest rate on the basis of which ALP adjustment was required to be made, is rendered academic and it does not call for any adjudication at this stage.*

19. *There is, however, one more aspect of the matter for which the impugned ALP adjustment may be deleted.*

20. *In order to explain this line of reasoning, a few material factual developments and the legal analysis will have to be taken note of. We have noted that everything hinges on application of Explanation to Section 92B, vide Finance Act 2012, though with retrospective effect from 1st April 2002. This Explanation provides as follows:*

Explanation: - For the removal of doubts, it is hereby clarified that —
(*inserted by the Finance Act 2012, though with retrospective effect from 1st April 2002)*

(i) the expression "international transaction" shall include —

(a) the purchase, sale, transfer, lease or use of tangible property including building, transportation vehicle, machinery, equipment, tools, plant, furniture, commodity or any other article, product or thing;

(b) the purchase, sale, transfer, lease or use of intangible property, including the transfer of ownership or the provision of use of rights regarding land use, copyrights, patents, trademarks, licences, franchises, customer list, marketing channel, brand, commercial secret, know-how, industrial property right, exterior design or practical and new design or any other business or commercial rights of similar nature;

(c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;

(d) provision of services, including provision of market research, market development, marketing management, administration, technical service,

repairs, design, consultation, agency, scientific research, legal or accounting service;

(e) a transaction of business restructuring or reorganisation, entered into by an enterprise with an associated enterprise, irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date;

(ii) the expression "intangible property" shall include —

(a) marketing related intangible assets, such as, trademarks, trade names, brand names, logos;

(b) technology related intangible assets, such as, process patents, patent applications, technical documentation such as laboratory notebooks, technical know-how;

(c) artistic related intangible assets, such as, literary works and copyrights, musical compositions, copyrights, maps, engravings;

(d) data processing related intangible assets, such as, proprietary computer software, software copyrights, automated databases, and integrated circuit masks and masters;

(e) engineering related intangible assets, such as, industrial design, product patents, trade secrets, engineering drawing and schematics, blueprints, proprietary documentation;

(f) customer related intangible assets, such as, customer lists, customer contracts, customer relationship, open purchase orders;

(g) contract related intangible assets, such as, favourable supplier, contracts, licence agreements, franchise agreements, non-compete agreements;

(h) human capital related intangible assets, such as, trained and organised work force, employment agreements, union contracts;

(i) location related intangible assets, such as, leasehold interest, mineral exploitation rights, easements, air rights, water rights;

(j) goodwill related intangible assets, such as, institutional goodwill, professional practice goodwill, personal goodwill of professional, celebrity goodwill, general business going concern value;

(k) methods, programmes, systems, procedures, campaigns, surveys, studies, forecasts, estimates, customer lists, or technical data;

(l) any other similar item that derives its value from its intellectual content rather than its physical attributes.'

21. Shortly before the 2012 amendments were brought, a coordinate bench of this Tribunal, in the case of **Nimbus Communications Ltd Vs ACIT [(2011) 139 TTJ 214 (Bom)]** and speaking through one of us, had observed as follows:

4. *It is only elementary, in terms of the provisions of Section 92, any income arising from an international transaction has to be computed having regard to the arm's length price (ALP), and that this exercise includes the allowance for any expense or interest arising from an international transaction as well. That is the only provisions under which ALP adjustments can be made. In other words, therefore, arm's length price adjustments can only be made in respect of an 'international transactions'. The expression 'international transaction', on the other hand, is defined under section 92 B as a transaction between two or more associated enterprises, either or both of them are non-residents, "in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing of money, or any other transaction having a bearing on the profits, incomes, losses or assets of such enterprises" as also transaction in the nature of cost or expense sharing arrangement. The question that we must address ourselves to is whether a continuing debit balance constitutes a 'transaction' in terms of the provisions of Section 92 B.*

5. *A continuing debit balance, in our humble understanding, is not an international transaction per se, but is a result of the international transaction. In plain words, a continuing debit balance only reflects that the payment, even though due, has not been made by the debtor. It is not, however, necessary that a payment is to be made as soon as it becomes due. Many factors, including terms of payment and normal business practices, influence the fact of payment in respect of a commercial transaction. Unlike a loan or borrowing, it is not an independent transaction which can be viewed on standalone basis. What can be examined on the touchstone of arm's length principles is the commercial transaction itself, as a result of which the debit balance has come into existence, and the terms and conditions, including terms of payment, on which the said commercial transaction has been entered into. The payment terms are an integral part of any commercial transaction, and the transaction value takes into account the terms of payment, such as permissible credit period, as well. The residuary clause in the definition of 'international transaction', i.e. any other transaction having a bearing on the profits, incomes, losses or assets of such enterprises, does not apply to a continuing debit balance, on the given facts of the case, for the elementary reason that there is nothing on record to show that as a result of not realizing the debts from associated enterprises, there has been any impact on profits, incomes, losses or assets of the assessee. In view of these discussions, in our considered view, a continuing debit balance per se, in the account of the associated enterprises, does not amount to an international transaction under section 92 B in respect of which ALP adjustments can be made. The factum of payment has to be considered vis-a-vis terms of payment set out in the transaction arrangement, and not in isolation with the*

commercial terms on which transaction in respect of which payment is, according to the revenue authorities, delayed.

22. We have noted the learned Departmental Representative's contention that the above decision is no longer good in law since a coordinate bench of this Tribunal, in the case of **i-Gate Computer Systems Ltd Vs ACIT and vice versa** (ITA No. 2504/PN/2012 has, inter alia, stated that **"the Hon'ble Bombay High Court, in assessee's own case relating to the assessment year 2002-03 in Income Tax Appeal No. 1148/2012, vide judgment dated 28.2.2013, has held that in view of the amendment by the Finance Act 2012 with retrospective effect from 1st April 2002, the said transaction of charging of interest from the AEs is covered under the amended provision of Section 92B(1) of the Act"**.

23. However, when we perused Hon'ble Bombay High Court's judgment referred to in this coordinate bench's order, we found the factual position to be slightly, but very materially, different.

24. The relevant question before Their Lordships, in the said case and as set out at page 2 of this judgment, was **"(c) whether, on the facts and circumstances of the case and in law, the Tribunal did not err in holding that the loss suffered by the assessee by allowing excess period of credit to the associated enterprises without charging any interest during such period would not amount to international transaction whereas Section 92B(1) of the Income Tax Act, 1961, refers to 'any other transaction having a bearing on the profits, income, losses or assets of such enterprise' ". Rather than answering this question on merits, and with the consent of both the parties, Their Lordships sent the matter back for fresh consideration of the Tribunal. While doing so, at page 3-4 of the judgment, Their Lordships observed as follows:**

2. So far as question (c) is concerned, counsel for the parties state that in view of the amendment to Section 92B(1) of the Income Tax Act, 1961 ('Act' for short) by Finance Act, 2012 with retrospective effect from 1st April 2002, the question as framed may be restored to the file of the Tribunal for fresh decision in light on the amendment. Accordingly, this issue is remitted to the file of the Tribunal for fresh decision on merits

25. The observations so made by Hon'ble jurisdictional High Court, in our limited understanding, cannot be construed as holding that **"in view of the amendment by the Finance Act 2012 with retrospective effect from 1st April 2002, the said transaction of charging of interest from the AEs is covered under the amended provision of Section 92B(1) of the Act"**. As it appears from the plain words of the statute- as extracted earlier, the issue is left open for adjudication by this Tribunal.

26. In any event, to this extent, this judgment does not involve an adjudication on a legal issue as it is a result of consensus of the parties. When both the parties before Their Lordships agreed, and so 'stated' before Their Lordships, to let the matter be restored to the file of the Tribunal, there could not have been, and there was no, adjudication on any legal issue.

27. *It is for this reason that the said decision of the Pune bench of the Tribunal, relied upon by the learned Departmental Representative, is per incurium and does not bind the coordinate benches.*

28. *The question then is as to what is the impact of amendment in section 92B, by the virtue of Finance Act 2012, on the definition of 'international transaction' so far as the interest on delayed realization of debt is concerned.*

29. *The amendment so made by the Finance Act 2012, stated to be with retrospective effect 1st April 2002, inserts an Explanation to Section 92 B which, inter alia, that "For the removal of doubts, it is hereby clarified that **(c) capital financing, including any type of long -term or short -term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business**". In plain words, this amendment inter alia implies that capital financing of any type, including by way of "deferred payment or receivable or any other debt arising during the course of business" will constitute an international transaction under section 92B. Going by this definition "any debts arising during the course of business" will constitute an international transaction. A trade debt is, accordingly, covered by this definition. However, since the assessment year that we are dealing with is prior to the assessment year 2012-13, the next important question is whether this amendment could be held to be applicable in the assessment year before us as well. Undoubtedly, the amendment is said to be retrospective but then the question really is whether just stating the law to be retrospective will make it retrospective in effect.*

30. *The fact that judicial precedents, prior to the insertion of Explanation to Section 92B, held that a continuing debit balance, on a standalone basis, does not constitute an international transaction required to be benchmarked assumes considerable significance in the light of a new judicial development that we will deal with in a short while now. In the present case, we are dealing with a situation in which the amendment was made with retrospective effect and it covered certain issues which were already subjected to a judicial interpretation in a particular manner. The judicial interpretation so given was certainly not the end of the road. The matter could have been carried in appeal before higher judicial forums. If the decision of a judicial body does not satisfy the tax administration, nothing prevents them from going to the higher judicial forum or from so amending the law, with prospective effect, that there is no ambiguity about the intent of legislature and it is conveyed in unambiguous words.*

31. *Nullifying a judicial interpretation though legislative amendment, much as many of us may abhor it, is not too uncommon an occurrence. Of course, when legislature has to take an extreme measure to nullifying the impact of a judicial ruling in taxation, it is the time for, at least on a theoretical note, introspection for the draftsman as to what went so wrong that fundamental intent of law of law could not be conveyed by the words of the statute, or, perhaps for the judicial forums, as to what went so wrong that the interpretation was so off the mark vis-à-vis fundamental principles of taxation or the sound policy considerations. However, amendment so made are generally prospective, and there is a sound conceptual foundation, as has been highlighted in the binding judicial precedents that we will deal with in a short while, for that approach. There is no dearth of*

examples on this aspect of the matter. Take for example, the amendment to Section 263 by the Finance Act, 1961. In many judicial precedents, [such as in the case of CIT Vs Sunbeam Auto Limited (332 ITR 167) wherein it was held that "Learned counsel for the assessee is right in his submission that one has to keep in mind the distinction between "lack of inquiry" and "inadequate inquiry". If there was any inquiry, even inadequate that would not by itself give occasion to the CIT to pass orders under s. 263 of the Act, merely because he has different opinion in the matter. It is only in cases of "lack of inquiry" that such a course of action would be open"], it was reiterated that it was only the lack, not the adequacy, of inquiry which could confer jurisdiction under section 263 on the Commissioner. By inserting Explanation 2 to Section 263(1), which inter alia provided that powers under section 263 could also be invoked in the cases where "the order is passed without making inquiries or verification which should have been made", all ratio of all these decisions was nullified. That, however, is done with prospective effect, i.e. with effect from 1st June 2015. As a matter of fact, it is a laudable policy of the present tax administration to stay away from making the retrospective amendments, and thus contribute to greater certainty and congenial business climate. Nothing evidences it better than this subtle, but easily discernible, paradigm shift in the underlying approach to the amendments made in Section 263 in the very first full budget of the present Government.

32. What has, however, been done in the case before us is to amend the law with retrospective effect. Of course, it happened much before the current awareness about the evils of retrospective taxation having been translated into action.

33. Dealing with such a situation, Hon'ble Delhi High Court has, in the case of *DIT vs New Skies Satellite BV [TS-64- HC -DEL (2016)]*, observed as follows:

30. Undoubtedly, the legislature is competent to amend a provision that operates retrospectively or prospectively. Nonetheless, when disputes as to their applicability arise in court, it is the actual substance of the amendment that determines its ultimate operation and not the bare language in which such amendment is couched.....

36. A clarificatory amendment presumes the existence of a provision the language of which is obscure, ambiguous, may have made an obvious omission, or is capable of more than one meaning. In such case, a subsequent provision dealing with the same subject may throw light upon it. Yet, it is not every time that the legislature characterizes an amendment as retrospective that the Court will give such effect to it. This is not in derogation of the express words of the law in question, (which as a matter of course must be the first to be given effect to), but because the law which was intended to be given retrospective effect to as a clarificatory amendment, is in its true nature one that expands the scope of the section it seeks to clarify, and resultantly introduces new principles, upon which liabilities might arise. Such amendments though framed as clarificatory, are in fact transformative substantive amendments, and incapable of being given retrospective effect.

37. An important question, which arises in this context, is

whether a “clarificatory” amendment remains true to its nature when it purports to annul, or has the undeniable effect of annulling, an interpretation given by the courts to the term sought to be clarified. In other words, does the rule against clarificatory amendments laying down new principles of law extend to situations where law had been judicially interpreted and the legislature seeks to overcome it by declaring that the law in question was never meant to have the import given to it by the Court? The general position of the courts in this regard is where the purpose of a special interpretive statute is to correct a judicial interpretation of a prior law, which the legislature considers inaccurate, the effect is prospective. Any other result would make the legislature a court of last resort. United States v. Gilmore 8 Wall [(75 US) 330, 19L Ed 396 (1869)] Peony Park v. O’Malley [223 F2d 668 (8th Cir 1955)]. It does not mean that the legislature does not have the power to override judicial decisions which in its opinion it deems as incorrect, however to respect the separation of legal powers and to avoid making a legislature a court of last resort, the amendments can be made prospective only ^[Ref County of Sacramento v State (134 Cal App 3d 428) and In re Marriage of Davies (105 Ill App 3d 66)]

(Emphasis, by underlining, supplied by us)

34. Quite clearly, in view of the law so laid down by Their Lordships also, just because a provision is stated to be clarificatory, it does not become entitled to be treated as ‘clarificatory’ by the judicial forums as well. The view taken by Hon’ble Delhi High Court support this line of reasoning. Even without the benefit of guidance of Their Lordships, the views articulated by a coordinate bench of this Tribunal, in the case of Bharti Airtel (supra) were of a somewhat similar opinion when it was observed that, **“Undoubtedly, the scope of a charging provision can be enlarged with retrospective effect, but an anti-avoidance measure, that the transfer pricing legislation inherently is, is not primarily a source of revenue as it mainly seeks compliant behaviour from the assessee vis-à-vis certain norms, and these norms cannot be given effect from a date earlier than the date norms are being introduced”**. We may add that right now we are only concerned with the question of retrospective amendment in the transfer pricing legislation, which has, as we will see, its own peculiarities and significant distinction with normal tax laws which simply impose tax on an income.

35. Legislature may describe an amendment as ‘clarificatory’ in nature, but a call will have to be taken by the judiciary whether it is indeed clarificatory or not. This determination, i.e. whether the amendment is indeed clarificatory or is the amendment to overcome a judicial precedent, assumes great significance because when it is found that the purpose of such interpretive statute, or clarificatory amendment, is “correct a judicial interpretation of prior law, which the legislature considers inaccurate, the effect is prospective” and, as in this case, it deals with transfer pricing legislation which essentially seeks a degree of compliant behavior from the assessee vis-à-vis certain norms- the norms the assessee should know at the time of entering into the transactions rather than at the time of scrutiny of his affairs at a much later stage.

36. It is very important to bear in mind the fact that right now we are dealing with amendment of a transfer pricing related provision which is in the nature of a SAAR (specific anti abuse rule), and that every anti abuse legislation, whether

SAAR (specific anti abuse rule) or GAAR (general anti abuse rule), is a legislation seeking the taxpayers to organize their affairs in a manner compliant with the norms set out in such anti abuse legislation. An anti-abuse legislation does not trigger the levy of taxes; it only tells you what behavior is acceptable or what is not acceptable. What triggers levy of taxes is non-compliance with the manner in which the anti-abuse regulations require the taxpayers to conduct their affairs. In that sense, all anti abuse legislations seek a certain degree of compliance with the norms set out therein. It is, therefore, only elementary that amendments in the anti-abuse legislations can only be prospective. It does not make sense that someone tells you today as to how you should have behaved yesterday, and then goes on to levy a tax because you did not behave in that manner yesterday.

37. When this is put to the learned Departmental Representative that as to how the transfer pricing legislation can be expected to have a retrospective amendment, which is almost like telling people how they should have benchmarked their international transactions in past and thus expecting them to do the impossible, his stock reply is that the amendment only clarifies the law, it does not expand the law.

38. Well, if the 2012 amendment does not add anything or expand the scope of international transaction defined under section 92B, assuming that it indeed does not- as learned Departmental Representative contends, this provision has already been judicially interpreted, and the matter rests there unless it is reversed by a higher judicial forum. However, if the 2012 amendment does increase the scope of international transaction under section 92B, as is our considered view, there is no way it could be implemented for the period prior to this law coming on the statute i.e. 28th May 2012. The law is well settled. It does not expect anyone to perform an impossibility. Reiterating this settled legal position, Hon'ble Supreme Court has, in the case of **Krishnaswamy S Pd Vs Union of India [(2006) 281 ITR 305 (SC)]**, observed as follows:

The other relevant maxim is, *lex non cogit ad impossibilia*—the law does not compel a man to do what he cannot possibly perform. The law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. [See : *U.P.S.R.T.C. vs. Imtiaz Hussain 2006 (1) SCC 380, Shaikh Salim Haji Abdul Khayumsab vs. Kumar & Ors. 2006 (1) SCC 46, Mohammad Gazi vs. State of M.P. & Ors. 2000 (4) SCC 342 and Gursharan Singh vs. New Delhi Municipal Committee 1996 (2) SCC 459*].

39. It is for this reason that the Explanation to Section 92 B, though stated to be clarificatory and stated to be effective from 1st April 2002, has to be necessarily treated as effective from at best the assessment year 2013-14. In addition to this reason, in the light of Hon'ble Delhi High Court's guidance in the case of *New Skies Satellite BV (supra)* also, the amendment in the definition of international transaction under Section 92B, to the extent it pertains to the issuance of delayed realization of debtors being outside the scope of 'international transaction', cannot be said to be retrospective in effect. The fact that it is stated to be retrospective, in the light of the aforesaid guidance of

Hon'ble Delhi High Court, would not alter the situation, and it can only be treated as prospective in effect i.e. with effect from 1st April 2012 onwards.

40. *As we deal with this question, it is also relevant to consider whether this Tribunal can, while adjudicating on the appeals, tinker with the date, as set out in the statute, from which an amendment is effective. In our humble understanding, as a judicial forum, we are bound not only by the law as legislated by the legislature, but by the judge made law as well. We are a part of the judicial hierarchy in this system. We are bound by the law laid down by Hon'ble Courts above, and all that we are expected to do, and we do, is to decide the issues before us in accordance with the provisions of the statute, in accordance with the law laid down by Hon'ble Courts above and in the light of binding judicial precedents. When a binding judicial precedent requires us to deviate from the specific words of the provisions of the statute in a particular manner, we have to do so. There is no escape from this call of duty. Of course, whatever we do is, and shall always remain, subject to the approval by Hon'ble Courts above.*

41. *There are a number of decisions in which our so tinkering with the specific words in the statute have been upheld, as long as this has been so done in accordance with the judicial principles and guidance in the judge made law. In the case of **Rajeev Kumar Agarwal Vs ACIT [(2014) 249 ITD 363 (Agra)]**, insertion of second proviso to Section 40(a)(ia), though specifically stated to be with effect from 1st April 2013, was read to be effective from 1st April 2005. The reasoning adopted by the bench, speaking through one of us, was as follows:*

8. *With the benefit of this guidance from Hon'ble Delhi High Court, in view of legislative amendments made from time to time, which throw light on what was actually sought to be achieved by this legal provision, and in the light of the above analysis of the scheme of the law, we are of the considered view that section 40(a)(ia) cannot be seen as intended to be a penal provision to punish the lapses of non deduction of tax at source from payments for expenditure- particularly when the recipients have taken into account income embedded in these payments, paid due taxes thereon and filed income tax returns in accordance with the law. As a corollary to this proposition, in our considered view, declining deduction in respect of expenditure relating to the payments of this nature cannot be treated as an "intended consequence" of Section 40(a)(ia). If it is not an intended consequence i.e. if it is an unintended consequence, even going by Bharti Shipyard decision (supra), "removing unintended consequences to make the provisions workable has to be treated as retrospective notwithstanding the fact that the amendment has been given effect prospectively". Revenue, thus, does not derive any advantage from special bench decision in the case Bharti Shipyard (supra).*

9. *On a conceptual note, primary justification for such a disallowance is that such a denial of deduction is to compensate for the loss of revenue by corresponding income not being taken into account in computation of taxable income in the hands of the recipients of the payments. Such a policy motivated deduction restrictions should, therefore, not come into play when an assessee is able to establish that there is no actual loss of revenue. This disallowance does deincevize not deducting tax at source, when such tax deductions are due, but, so far as the legal framework is*

concerned, this provision is not for the purpose of penalizing for the tax deduction at source lapses. There are separate penal provisions to that effect. Deincentivizing a lapse and punishing a lapse are two different things and have distinctly different, and sometimes mutually exclusive, connotations. When we appreciate the object of scheme of section 40(a)(ia), as on the statute, and to examine whether or not, on a "fair, just and equitable" interpretation of law- as is the guidance from Hon'ble Delhi High Court on interpretation of this legal provision, in our humble understanding, it could not be an "intended consequence" to disallow the expenditure, due to non deduction of tax at source, even in a situation in which corresponding income is brought to tax in the hands of the recipient. The scheme of Section 40(a)(ia), as we see it, is aimed at ensuring that an expenditure should not be allowed as deduction in the hands of an assessee in a situation in which income embedded in such expenditure has remained untaxed due to tax withholding lapses by the assessee. It is not, in our considered view, a penalty for tax withholding lapse but it is a sort of compensatory deduction restriction for an income going untaxed due to tax withholding lapse. The penalty for tax withholding lapse per se is separately provided for in Section 271 C, and, section 40(a)(ia) does not add to the same. The provisions of Section 40(a)(ia), as they existed prior to insertion of second proviso thereto, went much beyond the obvious intentions of the lawmakers and created undue hardships even in cases in which the assessee's tax withholding lapses did not result in any loss to the exchequer. Now that the legislature has been compassionate enough to cure these shortcomings of provision, and thus obviate the unintended hardships, such an amendment in law, in view of the well settled legal position to the effect that a curative amendment to avoid unintended consequences is to be treated as retrospective in nature even though it may not state so specifically, the insertion of second proviso must be given retrospective effect from the point of time when the related legal provision was introduced. In view of these discussions, as also for the detailed reasons set out earlier, we cannot subscribe to the view that it could have been an "intended consequence" to punish the assessee's for non deduction of tax at source by declining the deduction in respect of related payments, even when the corresponding income is duly brought to tax. That will be going much beyond the obvious intention of the section. Accordingly, we hold that the insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004.

42. While approving this approach, and upholding the decision of the Tribunal do read these provisions as effective from 1st April 2005, Hon'ble Delhi High Court, in case of **CIT Vs Ansal Landmark Townships Pvt Ltd [(2015) 377 ITR 635 (Del)]**, has observed as follows:

14. The Court is of the view that the above reasoning of the Agra Bench of ITAT as regards the rationale behind the insertion of the second proviso to Section 40(a) (ia) of the Act and its conclusion that the said proviso is declaratory and curative and has retrospective effect from 1st April 2005, merits acceptance.

15. In that view of the matter, the Court is unable to find any legal infirmity in the impugned order of the ITAT in adopting the ratio of the decision of the Agra Bench, ITAT in (Rajiv Kumar Agarwal v. ACIT).

43. When such are the views of Hon'ble High Court, it is not open to us to proceed on the basis that even though the amendment is required to be read as prospective, the Tribunal cannot do so as it is a creature of the Income Tax Act itself. In our considered view, and for the detailed reasons set out above, at best the amendment in Section 92B, at least to the extent it dealt with the question of interest on delayed realization of debtors, is effective from 1st April 2012. The assessment year before us being an assessment year prior to that date, the amended provisions of Section 92 B have no application in the matter.

44. For this reason also, the impugned ALP adjustment must stand deleted. We must, however, make it clear that what we have stated above, in the context of retrospective amendment, is specifically in the context of transfer pricing legislation which, as we have observed earlier, being an anti-abuse legislation, seeks a degree of compliant conduct by the taxpayers rather than being primarily a source of revenue. In all fairness to the learned Departmental Representative, we may add that the decision of Hon'ble Delhi High Court, in the case of New Skies Satellite (supra), was not available at the point of time when this matter came up for hearing, and we had, therefore, no occasion to hear revenue's perspective on the same. While this hearing was concluded on 12th January, 2016, the judgment in New Skies Satellite (supra) was pronounced by Hon'ble Delhi High Court on 8th February, 2016. However, as that is not the decisive factor so far as our conclusions are concerned and it is only an additional factor in support of our conclusion, that does not matter really.

6. We are in considered agreement with the views of the coordinate bench. In view of these discussions, and bearing in mind entirety of the case, we deem it fit and proper to delete the impugned ALP adjustment of Rs.46,127. The assessee gets the relief accordingly.

7. In the result, the appeal is allowed. Pronounced in the open court today on the 31st day of March, 2016.

Sd/-
Pawan Singh
(Judicial Member)

Sd/-
Pramod Kumar
(Accountant Member)

Date: 31st day of March, 2016.

Copies to:

<i>(1)</i>	<i>The appellant</i>	<i>(2)</i>	<i>The respondent</i>
<i>(3)</i>	<i>Commissioner</i>	<i>(4)</i>	<i>CIT(A)</i>
<i>(5)</i>	<i>Departmental Representative</i>	<i>(6)</i>	<i>Guard File</i>

By order

*Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai*