Recent Judicial Decisions in Transfer Pricing

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Index of Judgments covered

Sr. No	Name of the Judgment
1	M/s. Vedanta Limited Vs. ACIT (Madras High Court) Writ Petition No.1729 of 2011
2	PCIT v/s M/s Aegis Limited (Bombay High Court) ITA No. 1248 of 2016
3	Almatis Alumnia (P) Ltd. v/s DCIT (Kolkata Tribunal) Appeal No. 726 and 2361 of 2017
4	Hero Moto Corp Vs. DCIT, Delhi [2020] 117 taxmann.com 101 (Delhi - Trib.)
5	Instrumentarium Corporation Limited v. ADIT [2016] 71 taxmann.com 193 (Kolkata - Trib.) (SB)
6	Mehsana District Co-Op Vs. DCIT (Gujarat High Court) Special Civil Application No. 19073 of 2017
7	PCIT vs. SG Asia Holdings (India) Pvt. Ltd. (Supreme Court) Civil Appeal No. 6144 of 2019
8	Soveresign Safeship Management Pvt Ltd Vs. ITO (Mumbai ITAT) ITA No. 2070/Mum/2016
9	Adani Enterprise Ltd vs Additional CIT [2019] 111 taxmann.com 196 (Ahmedabad - Trib.)
10	UCB India (P.) Ltd vs. DCIT [2019] 107 taxmann.com 244 (Mumbai)
11	Kaybee Private Ltd. (Mumbai ITAT) ITA No 2165/Mum/15
12	FedEx Express Transportation (Mumbai Tribunal) [2019] 108 taxmann.com 542 (Mumbai)
13	M/s Mitchell Drilling India Private Limited (Delhi Tribunal) ITA No. 5921/Del/2010
14	Times Global Broadcasting Company Limited Vs. UOI (Bombay HC) (103 taxmann.com 388)
15	Doshi Accounting Services (P) Ltd Vs. PCIT (Ahmedabad Tribunal) (113 taxmann.com 521)

M/s. Vedanta Limited Vs. ACIT (Madras High Court)
Writ Petition No.1729 of 2011

Facts of the case:

1) The issue pertains to AY 2007-08. The assessee's case was covered under the provisions of Chapter X of ITA and the AO forwarded a Draft assessment order dated 30.12.2010 u/s 144C(1).

2) The provisions of Section 144C were inserted by Finance Act (No. 2) of 2009 w.r.e.f 01.04.2009 which provided substantial right to file objections before the DRP and therefore, additional time limit was available for passing the assessment order.

3) The CBDT had issued an Explanatory Circular immediately after its insertion clarifying that the provision would be operative with effect from FY 01.04.2009 i.e., A.Y.2010-11 only.

4) Subsequently in 2013, CBDT has clarified that the earlier circular stating that the provisions of Section 144C are applicable only with effect from FY 2009-10 (A.Y.2010-11) was inadvertant and incorrect, and the correct position was that the provisions would be applicable to all proceedings pending as on 01.04.2009.

5) The assessee contended that the additional time limit for passing of assessment order under the provisions of section 144C were applicable from AY 2010-11 onwards and therefore, filed a Writ petition before Hon'ble Madras High Court to quash the time barred draft assessment order passed by the AO by incorrectly resorting to section 144C of ITA.

Issue for consideration:

Whether the provisions of Section 144 inserted by Finance Act (No. 2) of 2009 which not only brings about a mere procedural change, but also a substantive change, shall be applied prospectively or retrospectively?

M/s. Vedanta Limited Vs. ACIT (Madras High Court)
Writ Petition No.1729 of 2011

Decision of the High Court:

1) Explanatory memorandum to Finance Bill clearly states that new scheme of assessment u/s 144C shall be made applicable in relation to AY 2010-11 and all subsequent years.

2) It is settled position that law applicable to all the matters of assessment would be the law that is in force as on the first date of the relevant assessment year. Hon'ble Supreme Court in Karimtharuvi Tea Estate Ltd. v State of Kerala (60 ITR 262).

3) The procedure inserted is substantive, as it offers altogether a new scheme of assessment to specified class of assesse to carry out the assessment in a completely different forum.

4) Placed reliance upon its own decision in the case of Prasad Productions (P) Ltd. (179 ITR 147) wherein a settled position was established that where a Circular has explained a provision to be applicable qua a particular assessment year, the benefit of such Circular cannot be withdrawn at a later date, so as to deny the assessee the benefit extended earlier.

5) In view of above, in the current case, the DAO passed by the AO was barred by limitation.

PCIT v/s M/s Aegis Limited (Bombay High Court)
ITA No. 1248 of 2016

Facts of the case:

1) The assessee had subscribed to redeemable preferential shares of its AE which do not carry any dividend and had redeemed some of its shares at par.

2) The TPO held that the assessee has lent interest free loans in the garb of preference shares and accordingly, re-characterised the transaction and charged the interest on notional basis.

3) Hon'ble Tribunal deleted the addition

Issue for consideration:

Whether the assessee had lent money to the AE in the garb of preference shares which could lead to attraction of the TP provisions?

Decision of the High Court:

The High Court rejected the question of law stating:

1) TPO cannot disregard the apparent transaction without any material of exceptional circumstances which point out that the assessee has tried to conceal real transaction.

2) TPO cannot question the commercial expediency of the transaction entered into by the assessee.

Almatis Alumnia (P) Ltd. v/s DCIT (Kolkata Tribunal) Appeal No. 726 and 2361 of 2017

Facts of the case:

1) The assessee company was engaged in the manufacturing of alumina based refractory and ceramic raw materials for which company imported raw materials from its AEs.

2) The assessee benchmarked international transaction on entity level by applying TNMM as MAM and operating profit on sales as the profit level indicator (PLI). The assessee has taken itself as tested party in the TPSR and during the TP proceeding.

3) However before the DRP, assessee submitted that its foreign AE should be the tested party as it is least complex entity.

4) The department objected that the assessee cannot change its stand at a later stage for selection of tested party as per its wish and the Transfer Pricing regulation does not permit to change the tested party at a later stage because it leads to tax evasion.

Issue for consideration:

Whether foreign associated enterprise can be considered as a tested party being least complex of transacting entities and whether the assessee can change its stand in relation to selection of the tested party before the DRP or appellate court?

Almatis Alumnia (P) Ltd. v/s DCIT (Kolkata Tribunal)
Appeal No. 726 and 2361 of 2017

Decision of Tribunal:

1) Based on the FAR assumed by both the parties, ITAT concluded that assessee is engaged in operation that entails entrepreneurial function and related risks. The AE being a manufacturer of products as per orders received from assessee performed simpler functions and did not assumed any significant risks.

2) On the basis of FAR, ITAT has come to the conclusion that assessee company was more complex entity as compared to FAR assumed by the AE.

3) ITAT relied on the decision of Landis + Gyr Ltd. v. DCIT [ITA No. 37 (Kol) of 2012, dated 03-08-2016] & Ranbaxy Laboratories Ltd 167 Taxman 30 (Delhi) and also referred Indian Transfer Pricing guidelines issued by ICAI, transfer pricing guidelines issued by the OECD and the UN manual of transfer pricing, held that foreign AE can be taken as tested party.

4) With regard to change of assessee's stand before DRP, ITAT held that the TPO can substantiate why assessee cannot be considered as tested party or the assessee can substantiate why AE should be taken as the tested party, but merely because assesse himself had considered itself as tested party cannot preclude it from raising a different contention.

5) The ultimate aim of the TPO/DRP is to examine whether the price or the margin arising from an international transaction with a related party is at ALP or not. The determination of the ALP is the key factor for which the least complex tested party is to be selected.

Hero Moto Corp Vs. DCIT, Delhi
[2020] 117 taxmann.com 101 (Delhi - Trib.)

Facts of the case:

1) The assessee company was incorporated as a joint venture company between 'Munjal' group and HM Co. Japan (HMC) and on basis of technology provided by HMC, had been manufacturing and selling two wheelers in Indian Market since 1985.

2) During FY 2010-11, HMC decided to exit joint venture and thus, HMC transferred its entire shareholding of 26% in the assessee company to Indian promoters i.e. 'Munjal' Group.

3) At the time of transfer, the assessee also entered into a license agreement with HMC, whereby it gained rights to use technology, drawings and design (ownership rights or exclusive rights) with respect to manufacture and sale of 18 specific models (License A Products) of motorcycle for till perpetuity for a lumpsum consideration.

4) The assessee also entered into license agreement (License B Products) for right to manufacture 4 motorcycle model. Assessee was required to make payment on account of model fee and royalty to HMC. 94.64% of the revenue was derived from sale of License A products and 5.36% from sale of License B products.

5) The assessee had reported the said transaction in Form 3CEB for AY 2012-13 as an abundant caution but contented that in absence of any shareholding or participation in the management, capital or control of the applicant, HMC could not be regarded as an AE in terms of section 92A.

6) TPO held that as per clause (g) of section 92A(2), the business of the assessee was wholly dependent on the technology, drawings and design of HMC and therefore, made upward adjustment to assessee’s ALP.

Hero Moto Corp Vs. DCIT, Delhi
[2020] 117 taxmann.com 101 (Delhi - Trib.)

Issue under consideration:

Whether the transaction entered after HMC's exit from joint venture could be regarded as international transaction within the meaning of section 92B?

Decision of Tribunal:

1) By virtue of License A Agreement, the assessee gained ownership rights with respect to manufacture and sale of 18 models of motorcycle and during the relevant previous year 94.64% of the revenue was derived by the assessee from sale of products with respect to which rights are owned by the assessee. Therefore, the assessee is not depend on HMC for technology.

2) Since in the year under consideration, HMC does not have any shareholding or participation in the management, capital or control of the assessee company, it cannot be regarded as an "associated enterprise" in terms of Section 92A (1).

3) Thus, the transaction of payment of model fee and royalty to HMC during the relevant assessment year did not constitute an international transaction within the meaning of section 92B, and cannot attract the provisions of Chapter X of the ITA.

Instrumentarium Corporation Limited v. ADIT (Kolkata Tribunal) [2016] 71 taxmann.com 193 (Kolkata - Trib.) (SB)

Facts of the case:

1) The assessee company ('ICL-Finland') was incorporated in Finland. It was engaged in the business of manufacturing and selling medical equipment.

2) ICL-Finland had a WOS in India - Datex India, which acted as marketing arm for its products in India. On 26th August 2002, the assessee entered into an agreement, which was duly approved by RBI, to advance an interest free loan of Rs 36 crores to Datex-India.

3) The AO noted that Datex India is a loss making concern and it has huge accumulated business losses and unabsorbed depreciation. Therefore, AO concluded that non application of ALP interest would result in a real loss for the Indian tax revenue and determine the ALP interest income of the ICL-Finland @10.87% as per SBI PLR.

4) AO levied tax @ 10% (as per India Finland DTAA) on the adjustment amount and CIT(A) confirmed the action of the AO and upheld the adjustment

Issue under consideration:

Whether an ALP adjustment was required to be made in respect of interest free loan granted by ICL-Finland to WOS in India?

Instrumentarium Corporation Limited v. ADIT (Kolkata Tribunal) [2016] 71 taxmann.com 193 (Kolkata - Trib.) (SB)

Decision of Tribunal:

- The transactions is an international transactions between the AEs, hence the income arising from these transactions is required to be computed at ALP.

- With regard to assessee's argument that assessee's case is covered u/s 92(3), and provisions of this section shall not apply in a case where the computation of income u/s 92(1) has the effect of reducing the income chargeable to tax or increasing the loss. The ITAT held that as per section 92(3), the impact of profit or losses needs to be seen for the year under consideration and qua the taxpayer only and any transfer pricing adjustment made with respect to the income of the ICL-Finland would not be available as deduction in the hands of Datex India because there is no provision enabling deduction for ALP adjustments.

- There is no base erosion by the ALP adjustments in the hands of the non-resident company in respect of transactions with the Indian AEs. The base erosion could have, if at all, taken place at best in a situation in which the Indian AE was to actually allow the income to the non-resident company.

- If the transaction is accepted at ALP, Indian Tax Administration will lose the taxability of interest in the hands of the assessee at the rate of 10%, it will have nothing to lose in the hands of taxability of the Indian AE because admittedly the related Indian AE was incurring the loses.

Instrumentarium Corporation Limited v. ADIT (Kolkata Tribunal) [2016] 71 taxmann.com 193 (Kolkata - Trib.) (SB)

Decision of Tribunal:

- If the assessee was to be so certain of the tax benefit to the Indian revenue by this transaction structure by way of interest free loan to Indian AE, the transaction would not have been structured in this manner; after all the underlying motive in the activities of the assessee is to maximise gains for its shareholder rather than broaden the tax base of Indian revenue. Of course, even this tax shield of accumulated losses is wholly academic inasmuch as the deduction has not been claimed, nor can it be claimed at this stage

- As per Indian transfer pricing provisions, the use of ALP in computation of income arising from international transactions between the AEs, is mandatory. The only rider is that these provisions are not to be applied only in the event of the exclusion clause in section 92(3) being satisfied, but then, this exclusion clause does not come into play on the facts of these cases at all.

- The commercial expediency of a loan to subsidiary is irrelevant in ascertaining arm's length interest on such a loan. There is indeed no bar on anyone advancing an interest free loans to anyone but when such transactions are covered by the international transactions between the AE, section 92 mandates that the income from such transactions is to be computed on the basis of arm's length price.

- With regard to the assessee's argument that the loan being extended free of interest was in the nature of shareholder service, ITAT held that this plea is being taken up for the first time and the assessee has not even furnished basic evidences for the factual elements embedded in this proposition hence rejected this proposition. Accordingly, ITAT upheld the order of the TPO/CIT(A) and confirmed the addition.

- Accordingly, ITAT upheld the order of the TPO/CIT(A) and confirmed the addition

Mehsana District Co-Op Vs. DCIT (Gujarat High Court)
Special Civil Application No. 19073 of 2017

Facts of the case:

- M/s Mehsana District Co-operative ("the assessee) had entered into certain specified domestic transactions and was desirous of opting for safe harbour and accordingly filed an application in a prescribed format duly certified by the CA alongwith income tax return.
- The AO did not raise any objection to the assessee's application for safe harbour nor passed any order declaring that the assessee had not validly opted for safe harbour, which made the application for safe harbour deemed to be treated as valid.
- As per the normal assessment procedure, the last date for completing the assessment was 31.12.2016.
- During the fag end of period for framing the assessment, the AO made a reference to TPO despite the objections raised by the assessee that it's case does not fall under any of the criteria as per the CBDT Instruction No. 3 of 2016.
- The TPO completed the assessment without making any upward adjustments to the price of the specified domestic transactions.

Issue under consideration:

The assessee contented that above action of AO was solely with the purpose of taking benefit of extended time limit for framing assessment available on reference made to TPO, and therefore the order needs to be quashed.

Mehsana District Co-Op Vs. DCIT (Gujarat High Court)
Special Civil Application No. 19073 of 2017

Decision of High Court:

- Sub rule (7) and (8) of Rule 10THD of I.T Rules, 1962 makes it clear that AO has to pass the order within 3 months from the end of the month in which application in form 3CFFB is filed. Since AO neither declared the application invalid nor passed any order within the prescribed time, the option has to be treated as valid.

- CBDT's circular dated 10.03.2016 merely prescribes the circumstances under which the AO would make reference to the TPO. Nowhere does the circular provide that as soon as such circumstances exist, the AO would make a reference to the TPO, irrespective of the fact that the assessee had opted for safe harbour and such option was treated or deemed to be treated as validly exercised.

- Accordingly, High Court held that the reference made to the TPO was invalid and is liable to be quashed.

PCIT vs. SG Asia Holdings (India) Pvt. Ltd. (Supreme Court)
Civil Appeal No. 6144 of 2019

Facts of the case:

- During the year under consideration, the assessee had earned brokerage income from its Foreign AE. During the course of assessment, the Ld. AO asked the assessee to establish whether the rate charged by it to its foreign AE is at ALP.
- Thereafter, considering materials available on record the AO passed assessment order by making an upward adjustment u/s 92 of the Act, w.r.t ALP of brokerage income earned from Foreign AE, without making reference to the TPO. The CIT-(A) also upheld the assessment order passed by Ld. AO.
- On further appeal, Hon'ble Tribunal set aside the findings of lower authorities by relying on CBDT instruction no.3/2003 dated 20.05.2003 which stipulates that reference to TPO is mandatory. The ITAT also refused to restore the matter back to the file of AO on the ground that Tribunal is an appellate authority and therefore cannot interfere in administrative matter which are mandatory.
- The view so taken by the Tribunal was also affirmed by the Hon'ble High Court. Aggrieved, the department preferred appeal by special leave before Hon'ble Supreme Court.

Issue under consideration:

- Whether it is mandatory for AO to refer to TPO for determination of ALP in respect of international transaction entered into by assessee?
- Whether appellate authorities can allow a matter to be restored back to the file of Ld. AO even where administrative default is made by Ld. AO at the time of initial assessment proceedings?

PCIT vs. SG Asia Holdings (India) Pvt. Ltd. (Supreme Court)
Civil Appeal No. 6144 of 2019

Decision of Supreme Court :

- Rejected department's plea for literally construing the phrase "may" used u/s 92CA(1) as signifying that discretion was vested in the hands of AO and it is not mandatory to refer each case to TPO.
- Relied upon CBDT instruction no. 3/2003 dated 20.05.2003 and concluded that the effect of aforementioned circular is mandatory in nature and Ld.AO erred in breaching such mandate issued by CBDT.
- Supreme Court accepted department's alternate plea that Tribunal ought to have restored the matter back to the file of AO so that administrative lapse can be made good by making the necessary reference to TPO.
- Accordingly, Supreme Court has restored the matter to AO to decide matter afresh.

Soveresign Safeship Management Pvt Ltd Vs. ITO (Mumbai ITAT) ITA No. 2070/Mum/2016

Facts of the case:

- The assessee company is engaged in ship management and consulting services. Mr. R held 90% shares in the assessee company.
- During the year, the assessee provided services (on cost plus 5%) to P Ltd, UK and S Ltd, UK in which Mr. R had 20% shareholding in each company. In both these companies, Union Maritime Ltd, UK was holding balance 80% share. The assessee has also provided services to Union Maritime Ltd.
- The assessee has reported the transactions with the above 3 Co's in form 3CEB as it has entered transaction with its AE. However, before the TPO it was contended that entities are not AE within the meaning of section 92A r.w.s 92A (2) of the ACT.
- TPO concluded that the overall management and control of the assessee company still lies with the management of above 3 Co's and that Mr. R's (director of assessee company) role is limited to managing ships like an employee who does not have any say in the decision making process of the company. Accordingly, TOP held that those concerns become AEs within the meaning of section 92A(1)(a) of the Act.
- TPO also observed that since the assessee was working only for these 3 Co's hence concluded that the assessee company in India was formed to serve the mutual interest hence covered u/s 92A(2)(m) of the Act. "if there exists between the two enterprises, any relationship of mutual interest, as may be prescribed", the companies are Associated Enterprises
- However, DRP observed that P Ltd and S Ltd cumulatively had advanced loan to assessee which comes to 68.84% of the book values of the total assets of assessee company and therefore, it considered the two entities are AE's of the company as per section 92A(2)(c).

Soveresign Safeship Management Pvt Ltd Vs. ITO (Mumbai ITAT) ITA No. 2070/Mum/2016

Issue under consideration:

Whether the criteria of loans exceeding 51% of the book value of assets have to be applied independently to each lender or on aggregate basis?

Decision of Tribunal:

- Tribunal after referring to section 92A(2)(c) which provides that "a loan advanced by **one enterprise to the other enterprise** constitutes not less than 51% of the book value of the total assets of the other enterprise" and held that the language of section 92A(2)(c) of the Act is unambiguous and clear that in order to fall within the ambit of deeming fiction of becoming AEs, either of the company should have independently advanced loan to the assessee company more than 51% of book value of total assets of the assessee company.

- Since none of the company has advances loan of 51% of total assets of the assessee company hence both the entities are not AE as per section 92A(2)(c).

- ITAT Further held that the advances received were business advances for rendering ship management and consulting services and hence the same cannot be construed as loan advanced to the assessee company.

Adani Enterprise Ltd vs Additional Commissioner of Income Tax [2019] 111 taxmann.com 196 (Ahmedabad - Trib.)

Facts of the case:

- During the year, the assessee had entered into an international transaction of export of Maize to its foreign AE. The assessee benchmarked the aforesaid transaction using External CUP method as MAM.
- The comparable transaction as stated by assessee for applying CUP, inter alia included an independent quotation from a third party for a similar transaction.
- The Ld. TPO rejected assessee's independent quotation used for comparability analysis on the grounds that "**actual independent transaction**" can be taken as valid CUP input for benchmarking and not an "independent **quotation**" from third party with respect to similar transaction.
- CIT-(A) upheld the order of AO made in accordance with TPO's order. Aggrieved, the assessee was in appeal before Hon'ble Tribunal.

Issue under consideration:

Whether an independent third party quotation can be taken as a valid CUP for benchmarking an international transaction?

Adani Enterprise Ltd vs Additional Commissioner of Income Tax [2019] 111 taxmann.com 196 (Ahmedabad - Trib.)

Decision of Tribunal:

- An independent third party quotation on standalone basis cannot be used as a valid CUP input for benchmarking analysis without anything to show that it's contemporaneous nature and sufficient parity with actual transaction.
- Even if it is ought to be considered as a valid CUP input, there has to be material on records to establish its bonafide nature, lacking which the same cannot be acceptable.
- If no parity between "independent third party quotation" and "actual independent transactions" is establish, the same cannot be taken as valid CUP input for benchmarking analysis.

UCB India (P.) Ltd vs. DCIT
[2019] 107 taxmann.com 244 (Mumbai)

Facts of the case:

- The assessee is engaged in the business of manufacturing and sale of prescription drugs by importing pharma ingredients for manufacturing. It entered into international transaction of export of Finished Dosage Form (FDFs) ucerax and zyrtec with its overseas AE. The assessee has also sold similar products in India to uncontrolled parties.

- The assessee, in TPSR, benchmarked the said international transaction using TNMM (at segmental level) as the MAP using the PLI as Operating Profit (OP) /Operating Cost (OC).

- TPO observed that assessee's export to AE is only Rs. 5 crores whereas total export is Rs. 33 Crores, accordingly, the TPO observed that assessee by applying OP/OC at entity level was trying to camouflage the OP/OC of the small export to AE.

- The TPO after rejecting the TP analysis undertaken by the assessee, noted that the API used in the FDFs exported to its AEs was the same as used for the FDFs manufactured by the assessee and sold locally to the third parties in India. TPO also observed that the assessee was using same set of comparable for benchmarking of import activity and export activity and therefore, rejected TNMM.

- Accordingly, the TPO was of the view that the price of both the FDFs exported and the FDFs sold to the third parties in India could be compared under the CUP method. It was also observed that though the quality of the drugs was very high as compared to drugs sold in India, the price charged to AE was less than the price at which it was sold to distributor in India. Therefore, CUP was to be applied taking the price at which drugs were sold in India as ALP.

- The DRP upheld the CUP method, as adopted by the TPO and, however, directed the TPO to give appropriate discount for additional marketing expenses incurred by the assessee in its local sales.

UCB India (P.) Ltd vs. DCIT
[2019] 107 taxmann.com 244 (Mumbai)

Issue under consideration:

- Whether CUP method is MAP for sale of FDFs though it was followed in earlier assessment years?
- Whether export price can be compared with the local sales without considering the difference in FAR?

Decision of Tribunal:

- Tribunal agreed on the contentions of TPO that the assessee had tried to camouflage OP/OC of small export AE (5 crores) with the OP/OC of total export 33 crores. In the Audited Annual Accounts, there were no such segmental accounts for export to AE, other exports and local sale.

- The assessee had benchmarked the transaction of import of API and export of finished drug using the same set of comparable. Since both activities were not comparable, TNMM method was incorrectly adopted and liable to be rejected.

- CUP was readily available as the API used in the FDFs exported to its AEs was the same as used for the FDFs manufactured by the assessee and sold locally to the third parties in India and the FAR analysis of both sales were cogently rebutted by TPO.

- Based on examination of assessee and its personnel, it was found that the finished products exported to AE were of superior quality being compliant with FDA regulations but prices charges were comparatively lower, which fortifies the action of the TPO.

- Accordingly, Tribunal upheld the order of the DRP

Kaybee Private Ltd. (Mumbai ITAT)
ITA No 2165/Mum/15

Facts of the case:

- The Kaybee Pvt Ltd, assessee is an Indian company (KE-I) whose 99.99% shares are held by GK. GK was also a director of the Singapore based entity Kaybee Exim Pte Ltd. (KE-S) with whom the assessee company had certain business transactions.
- The AO was of the view that since GK participated in the management and control of both the enterprises, KE-S was an AE of KE-I as per section 92A(1) of the Act, and hence subject to transfer pricing provisions.
- Assessee pleaded that the Assessee & KE-S did not satisfy any of the specific conditions laid down u/s 92A(2) of the Act and thus, cannot be regarded as AE.
- However, the learned AO rejected the contention of the assessee and made TP adjustment stating that provisions of section 92A(1) and 92A(2) of the Act are to be read on standalone basis. This was also confirmed by CIT(A).
- In the assessee's own case, the ITAT had previously decided on this issue against the assessee, by relying on the decision of Diageo India Pvt. Ltd vs. DCIT[(2011) 47 SOT 252].

Issue under consideration:

Whether the provisions of section 92A(2) of the Act expand the scope of section 92A(1) of the Act so as to be read on a standalone basis ?

Kaybee Private Ltd. (Mumbai ITAT)
ITA No 2165/Mum/15

Decision of Tribunal:

- Mumbai ITAT stated that the crucial aspects relating to the legislative intent of amendment in section 92A(2) of the Act – insertion of words "*for the purpose of Section 92A(1)*" as well as the clarification by CBDT Circular No.8/2008, were not considered, while delivering the decision in the case of Diageo India, which renders the decision *per incurium*.

- ITAT relying on the decision of Hon'ble Supreme Court, in case of UCO Bank v. CIT[(1999) 37 ITR 889], stated that once a CBDT circular is issued, even if it deviates from the provision of the law or relaxes the rigor of law, it is binding on the department.

- ITAT rejected the revenue's contention for following the earlier decision in the assessee's own case by relying on the decision of Hon'ble Bombay High Court in the case of CIT v. Godavari Devi Saraf [1978] 113 ITR 589 which stated that the decision of a non-jurisdictional High Court is binding and no need to refer to larger bench in the absence of jurisdictional High Court.

- Hence, considering the decision of Hon'ble Gujarat High Court in the case of PCIT vs. Veer Gems, Mumbai ITAT held that section 92A(1) of the Act cannot be applied on standalone basis and has to be essentially considered in conjunction of section 92A(2) of the Act.

FedEx Express Transportation (Mumbai Tribunal) [2019] 108 taxmann.com 542 (Mumbai)

Facts of the case:

- The amalgamating company "A," filed a scheme of amalgamation which was approved by High Court, whereby, it amalgamated into company "B." Company B had duly intimated the AO and the TPO, in writing, about the amalgamation of company A with company B.
- Thereafter, the TPO passed the TP order in the name of the erstwhile company A. Further, the draft assessment order under section 143(3) r.w.s. 144C(1) of the Act was also passed by the AO in the name of the erstwhile company A.
- Company B filed its objections before the Dispute Resolution Panel (DRP), objecting to the validity of the draft assessment order passed in the name of company A, a non-existent entity.
- The DRP dismissed the objection as a procedural mistake and issued its directions in the name of company B, the existing entity.
- Pursuant to the directions of the DRP, AO passed the final assessment order u/s 143(3) r.w.s. 144C(13) of the Act in the name of company B, the amalgamated/ existing entity.

Issue under consideration:

- Whether the final assessment order can be held to be null and void ab initio when the TPO's order and the draft assessment order were issued in the name of a non-existent/ amalgamating entity, although the DRP Directions and the final assessment order were correctly passed in the name of the existing/ amalgamated entity?

FedEx Express Transportation (Mumbai Tribunal) [2019] 108 taxmann.com 542 (Mumbai)

Decision of Tribunal:

- As per section 144C of the Act, a draft assessment order can be proposed only in case of an "eligible assessee." An "eligible assessee", inter-alia, means a "person" in whose case a variation has been proposed by a TPO's order. Thus, the "eligible assessee" under section 144C of the Act has necessarily to be a "person."
- On the date of passing of the TP / Draft order, company A did not exist as an Indian company under the Companies Act, 1956, and consequently, there criteria of person was not met. The variation was proposed in the name of non-existent entity which cannot be an eligible assessee.
- The draft assessment order has legal connotations, as it lays the foundation of special rights to the assessee for opting for DRP. From the perspective of the Revenue Department, the draft assessment order proposed by the AO is in fact the final assessment of income/ loss of the taxpayer, which cannot be amended by the AO in future.
- It is a settled principle of law that if under the provisions of the Act, an authority is required to exercise power or to do an act in a particular manner, then it must be done in that manner alone and not in any other manner.
- Since the draft assessment order provides the jurisdiction to AO for conducting assessment of specified assesses, a mistake while complying with such requirements under section 144C cannot be termed as procedural error rectifiable u/s. 292B.
- Merely because the final order was passed in the name of correct entity cannot imply that section 170 has been complied with. The word "assessment" cannot be interpreted narrowly to mean only "completion" of assessment.

M/s Mitchell Drilling India Private Limited (Delhi Tribunal)
ITA No. 5921/Del/2010

Facts of the case:

- The assessee is engaged in the development of burgeoning CBM industry, directional drilling and innovative turnkey management projects within the Oil & Gas industry

- During the year, assessee had made payment for Purchase of components and accessories, Interest under Hire Purchase Agreement, Payment of installments of principal under hire purchase agreement and 'Repossession of Rig' revolved around the assessee purchasing a drilling Rig from Mitchell Drilling Operations Pty. Ltd. on hire purchase under an agreement executed on 1.4.2004.

- AO noticed that assessee was in possession of the Rig from 01.04.2004 to 30.06.2005 (1 year 3 months) and later it was repossessed by the seller. Referring to the Hire Purchase agreement, AO noticed that there was no clause of penal payment or any compensation in case of default in payment of hire purchase charges.

- Hence, AO concluded that hire purchase agreement was a sham transaction purposefully designed to avoid not charging/withholding any tax on rental of Rig and also by claiming depreciation on Rig, which was actually not owned by it.

- Hence addition was made u/s 40(a)(i) for non-deduction of TDS for payment to foreign parties, depreciation claimed on the rigs was disallowed and transfer pricing adjustments were made for the payments determining ALP as NIL.

M/s Mitchell Drilling India Private Limited (Delhi Tribunal)
ITA No. 5921/Del/2010

Issue under consideration:

- Whether the transfer pricing adjustments made by AO/TPO for sham transactions relating to Hire purchase transaction are sustainable as per provisions of section 92(F) of the Act?

Decision of Tribunal:

- Tribunal laid emphasis on definition of "International transaction" as defined u/s 92B. The term "transaction" is defined u/s 92F(v)- include an arrangement, understanding or action in concert. It shows that the ALP is always determined of an international transaction, which is genuine, but may be formal or in writing and whether or not intended to be enforceable by legal proceeding.

- Tribunal observed that if the transaction is not genuine, there can be no question of applying the transfer pricing provisions to it. In such an eventuality of a supposed genuine transaction turning out to be non-genuine, all the consequences which would have flowed for a real transaction are reversed.

Times Global Broadcasting Company Limited Vs. UOI (Bombay HC) (103 taxmann.com 388)

Facts of the case:

- The assessee is a WOS of BCCL, an entity of Times Group. During the year, assessee demerged one of its undertaking into BCCL as per the scheme of demerger sanctioned by Hon'ble Bombay HC.
- Pursuant to such scheme of demerger, assessee transferred all of its assets and liabilities at book value to BCCL.
- During relevant assessment year, the assessee, in form 3CEB, reported specified domestic transactions in respect of i) Payment of subscription fees earned from distribution services and (ii) Payment to key management Personnel
- During the course of assessment, the Ld. AO made a reference to TPO for determining ALP in respect of SDT **reported in form 3CEB**.
- The TPO together with transaction of payment of subscription fees reported in Form No. 3CEB, also desired to take within the ambit of transfer pricing study, the assessee's transactions of the adjustment of assets on demerger of its unit, which was not reported in Form No. 3CEB.
- Subsequently the TPO made an upward adjustment in respect of transactions which inter alia included SDT of payments towards the creditors during the demerger process which was not reported by the assessee in Form 3CEB.
- Aggrieved, the assessee filed a Writ Petition before Hon'ble HC.

Times Global Broadcasting Company Limited Vs. UOI (Bombay HC) (103 taxmann.com 388)

Issue under consideration:

- Whether TPO has jurisdiction to determine ALP in respect of those SDT in respect of which no reference was made to him?

Decision of High Court :

- With regard to department's contention that the writ petition is filed at a premature stage hence should not be entertained by the court, High Court held that if a jurisdictional error is pointed down or if it is established that an authority has acted down wholly without jurisdiction, the HC has power as conferred under Article 226 of Constitution, to strike down such powers.
- Absence of reporting a SDT in form 3CEB did not allow AO to notice such transaction while making a reference and therefore AO's reference to TPO was necessarily confined to transactions reported by assessee in form 3CEB.
- Provisions of section 92CA (2A)/(2B) gives the powers to TPO to apply provision of chapter X to **international transaction** not reported by the assessee in form 3CEB. Since scope u/s 92CA(2A)/(2B)) are only confined to "international transactions" only, specific non-inclusion of SDT within the ambit of deeming fiction under aforesaid transactions, would not empower TPO to examine SDT not referred to him.
- In respect of determination of ALP of a SDT, only enabling provision is section 92CA(1). Therefore, a TPO suo-motto exercising powers u/s 92CA(2A) which is confined only to an international transactions, for a SDT, would lead to disobeying his own jurisdiction.
- Accordingly, High Court quashed the order of TPO for adjustment made in respect on not-reported SDT.

Doshi Accounting Services (P) Ltd Vs. PCIT (Ahmedabad Tribunal) (113 taxmann.com 521)

Facts of the case:

- The assessee-company was engaged in the business of business process outsourcing (BPO). During the year, the assessee has provided certain services to its AE. The assessee provided these services from the unit which was an STPI unit eligible for exemption u/s 10A.
- The assessee benchmarked its transaction with AE by applying internal CUP method and claimed that its transactions with the AE were at arm length price. However, the TPO rejected the CUP method and adopted TNMM as most appropriate method.

DRP Proceedings:

- Before the DRP, assessee objected the rejection of CUP method and selection of TNM method as most appropriate method, comparable selected by the TPO and comparable rejected by the TPO.
- Before the DRP, the assessee also argued that since it was enjoying the benefit of deduction under section 10A, therefore, there was no reason to charge a lower price from the AE.
- Assesse also contended that the effective tax rate in the UK would be higher than the effective tax rate in India, which as a result of section 10A was 0 per cent. As such, there was no motive and incentive in shifting the profits from India to the UK, where the tax rate was higher.
- However, DRP after relying upon the order of Aztec software & technology services Ltd v. ACIT [2007] 162 Taxman 119 (Bang.) (SB) and ITAT Mumbai in case of Gharda chemicals Ltd v. DCIT [2010] 35 SOT 406 (Mumbai), rejected the contention of the assessee and upheld the order of the TPO.

Doshi Accounting Services (P) Ltd Vs. PCIT (Ahmedabad Tribunal) (113 taxmann.com 521)

Issue under consideration:

- Whether the provisions of Section 92 can be invoked in a situation in which income of the assessee is eligible for tax exemption and not actually chargeable to tax in India?

Decision of Tribunal :

- With regard to assessee's contention that intention of the legislature for inserting TP provision to be looked into, ITAT held that It is cardinal rule of interpretation that where the language used by the legislature is clear and unambiguous then plain and natural meaning of those words should be applied to the language and resort to any rule of interpretation to unfold intentions is permissible where the language is ambiguous.

- It is very clear that the purpose behind the provision of transfer pricing is to determine true profits/income as if such international transaction has been entered with an unrelated party or non-AE, irrespective of the fact that the income of the assessee was eligible for exemption.

- There is no express provision under the Act restricting the application of section 92C of the Act for determining the income at arm's length where such income is eligible for deduction u/s 10A of the Act. On the contrary, proviso to section 92C(4) prohibits the deduction u/s 10A of the Act on the income to the extent enhanced as an effect of a determination of ALP.

- The proviso to section 92C(4) itself clearly reflects the intent of lawmakers that the provisions of chapter X of the Act shall prevail in all the cases of international transactions falling under the umbrella of section 92 of the Act including the income-qualified for exemption under section 10A of the Act.

Doshi Accounting Services (P) Ltd Vs. PCIT (Ahmedabad Tribunal) (113 taxmann.com 521)

Without prejudice to above, Tribunal observed as under :

- If the purposive interpretation is to be applied while invoking the provisions of chapter X of the Act, the same interpretation should also be extended in the context of the provision of section 10A of the Act. It is because one cannot see the provision of chapter X in isolation as the issue on hand has direct nexus with the provision of section 10A of the Act .

- Spirit behind introducing section 10A was to bring foreign exchange in India. Granting exemption from Tax under section 10A of the Act was incidental and not the main object.

- Where transaction by the Indian AE does not correspond to an ALP, the same will adversely affect the inflow of foreign exchange in India. Perhaps this was the reason to insert the proviso in section 92C(4) of the Act.

- Accordingly, even if purposive interpretation is applied in respect to the provisions of chapter X along with provisions of section 10A of the Act, provision of chapter X is to be applied even though assessee is eligible for 10A deduction.

- In the result, question famed before the Special Bench was answered against the assessee.

THANK YOU