

## No TP adjustments on share purchase at high premium as it doesn't amount to revenue receipt: Bombay HC

**Summary – The High Court of Bombay in a recent case of PMP Auto Components (P.) Ltd., (the Assessee) held that where shares which had been purchased by assessee from its 100 per cent subsidiary AE at high premium were on capital account, revenue cannot bring difference between investment and fair market value of shares to tax**

### Facts

- The respondent-assessee had filed its return of income showing some international transactions. On reference, the Transfer Pricing Officer (TPO) made addition of Rs. 2.59 crores to income of the assessee on account of adjustment of excess money paid to its AE which was its 100 per cent subsidiary in respect of acquiring its shares, the face value of which was Rs. 8.19 lakhs while investment amount was Rs. 2.67 crores.
- On appeal, the DRP upheld the addition made by the Assessing Officer.
- On appeal, the Tribunal allowed same holding that no income arose on account of purchase of shares as it was on capital account.
- On the revenue's appeal before the High Court:

### Held

- There is no dispute that the transaction of purchase of shares by the respondent of its subsidiary company *i.e.*, AE at a price much higher than its fair market value would be international transaction as defined in section 92(B). The only issue as considered by the impugned order of the Tribunal is whether Chapter X would at all be applicable in case of any investment made on capital account. This on the premise that the transaction of purchase of equity share capital would not give rise to any income. The similar issue was covered in *Vodafone India Services (P.) Ltd. v. Union of India* [2014] 368 ITR 1/50 taxmann.com 300/[2015] 228 Taxman 25 (Bom.) and it was observed that Chapter X is machinery provision to arrive at the arm's length price of transaction between associated enterprises. However, before the provisions can be kicked in, it is necessary that income must arise under the substantive provisions found in the Act *viz.*, under the heads of salaries or income from house property or profits and gains in business or profession or capital gains and/or income from other sources. Section 92 requires income to arise from an international transaction while determining the ALP. Therefore, the *sina qua non* is that income must first arise on account of the international transaction.
- In this case also, the shares which have been purchased by the respondent assessee are on capital account. The revenue is seeking to bring the difference between the actual investment of Rs. 2.67 crores and fair market value of the shares (investment) at Rs. 8.13 lakhs *i.e.* 2.58 crores to tax. This

without being able to specify under which substantive provision would income arise. Therefore, the issue arising here stands concluded by the decision of this Court in *Vodafone India Services (P.) Ltd. (supra)*. The distinction which is sought to be made by the revenue on the basis of this being an inbound investment and not an outbound investment as in the case of *Vodafone India Services (P.) Ltd. (supra)* is a distinction of no significance. On principle, if it is held that Chapter X is machinery provision and can only be invoked to bring to tax any income arising from an international transaction, then, it is necessary for the revenue to show that income as defined in the Act does arise from the international transaction. The distinction between inbound and outbound investment is a distinction which does not take the case of revenue any further, as the Legislature has made no such distinction while providing for determination of any income on adjustments to arrive at ALP arising from an international transaction.

- The further submission on behalf of the revenue that in future the respondent may sell these shares at a loss as they have purchased the same at much higher price than its fair market value. Thus gives rise to reduction of its tax liability in future. This submission is in the realm of speculation. At this stage, it is hypothetical. The issue has to be examined on the basis of law and facts as existing before the authorities in the subject assessment year. No provision of the Act has been shown, which would allow the revenue to tax a potential income in the present facts.
- The definition of Income as provided under section 2(24) was amended to include sub-clause (xvi) therein. It provided as income, any consideration received for issue of shares, if it exceeds the fair market value, as falling under clause (viib) of sub-section (2) of section 56. The amendment/insertion of section 56(2)(viib) was with effect from 1-8-2013.
- However, as this provision was made effective only with effect from 1-4-2013, and it is not even the case of revenue before the authorities, that the said provision would apply for the subject assessment year 2010-11. In the above view, there is no occasion to examine the above amendments in the context of this case. This would be done appropriately in a case arising after the amendment.
- In the above view, the view taken by the Tribunal being concluded by the decision of this Court in *Vodafone India Services (P.) Ltd. (supra)*, the question as proposed does not give rise to any substantial question, thus, not entertained.