R

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 25th DAY OF JUNE 2018

PRESENT

THE HON'BLE Dr.JUSTICE VINEET KOTHARI

AND

THE HON'BLE Mrs.JUSTICE S.SUJATHA

I.T.A.No.536/2015
C/W
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Between:

1. Pr. Commissioner of Income Tax
C.R. Buildings, Queens Road
Bangalore-560001.

2. Assistant Commissioner of Income Tax
Circle-12(3), Bangalore.

...Appellants

(By Mr. E.I. Sanmathi, Advocate)

And:

M/s. Softbrands India P. Ltd.,
Prestige Obelisk, Level-9
Kasturba Road
Bangalore-560001
PAN:AAFCS9041K.

...Respondent

(By Mr. Chythanya K.K. Advocate)

This I.T.A. is filed under Section 260-A of Income Tax Act 1961, praying to 1. Decide the foregoing question of law and/or such other questions of law as may be formulated by the Hon'ble Court as deemed fit and set aside the appellate order dated 10/4/2015 passed by the ITAT, 'A' Bench, Bangalore, in appeal proceedings No.IT(TP)A No.589/Bang/2012 for Assessment year 2006-2007, as sought for in this appeal; and to grant such other relief as deemed fit, in the interest of justice.

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No.590/Bang/2012 for Assessment year 2006-2007, as sought for in this appeal; and to grant such other relief as deemed fit, in the interest of justice.

These I.T.As having been heard and reserved on **21-06-2018,** coming on for Pronouncement of Judgment, this day, ***Dr Vineet Kothari, J***, delivered the following:

J U D G M E N T

Mr. E.I. Sanmathi &
Mr. K.V. Aravind, Advs. for Appellants - Revenue
Mr. Chythanya K.K. Mr.A. Shankar &
Mr. T. Suryanarayana, Advs. for Respondent - Assessees

Introduction:

1. The Revenue - Income Tax Department has filed these two appeals under **Section 260-A of the Income Tax Act, 1961** (hereinafter referred to as the **'Act'** for short) against the Respondent - Assessee - **M/s. Softbrands India Private Limited, Bangalore,** purportedly raising certain substantial questions of law arising from the orders of the **Income Tax Appellate Tribunal, Bangalore Bench 'A' Bangalore,** both dated **10/04/2015** in **IT(TP)A No.589/Bang/2012/(AY**

2006-07) and IT(TP)A No.590/Bang/2012/ (AY 2006-07).

2. These two appeals from the host of such appeals filed mostly by Income Tax Department and some of them even by the Assessees are essentially in the realm of International Taxation on such international transactions between Indian Companies and their Associate Enterprises in Foreign Countries.

Preamble:

3. The Indian Income Tax Act, 1961 contains **Special Provisions relating to Avoidance of Tax** in **Chapter X** of the Act comprising of **Sections 92 to 94-B** with regard to assessment to be done for computation of income from international transactions on the principles of **'Arm's Length Price' (ALP)** and the relevant Rules for computation of such income under the aforesaid provisions of **Chapter X** are enacted in the

form of **Rule 10-A to 10-E** in the **Income Tax Rules, 1962.**

Perspective of International Trade and Transactions:

4. With the ever increasing international Trade and transactions, particularly, in the Software Industries and Bangalore, being the Silicon Valley of India where many big, small and medium size Software Industries have their Offices and Units in this Software Industry, and Bengaluru is a hub of this Service Industry and essentially the Indian Companies have business linkages with large Companies spread worldwide particularly in the Western Hemisphere of the Globe.

5. The implementation of the Tax laws in this field in a smooth, clear and quick manner is of utmost importance to build an image of an efficient Tax

Administration both at Departmental level and in Judicial Courts so that the economic activity in such borderless trade thrives and enures to the benefit of the Indian economy at large and Software Industry in particular.

6. While the special provisions have been made for computation of **'Arm's Length Price'** to arrive at a fair assessment of income taxable in the hands of the Indian Resident Companies and these special provisions also provide for an elaborate and in-depth analysis of huge data of the comparable cases of other similarly situated Companies to arrive at a fair **'Arm's Length Price'** and for that, Special Cells and designated Authorities have been created under the Income Tax Act, 1961, but still retaining the normal provisions for assessments of appeals in the Indian Income Tax Act about the remedial Forums or the appeal mechanisms and the Income Tax Appellate Tribunal constituted

under **Section 253 of the Act** continues to be the final fact finding body under the Act even with regard to the assessments of the international transactions under the Special **Chapter X** as aforesaid and the appeal to the Constitutional Courts as provided in **Section 260-A** to High Court and **Section 261** to the Hon'ble Supreme Court are applicable to these special assessments under **Chapter X** as well.

Suggested Substantial Questions of Law by the Revenue:

7. In this perspective, we are called upon to decide the purported substantial questions of law arising from the order of the Income Tax Appellate Tribunal.

8. We quote below the suggested substantial questions of law under International Taxation issue in

the present appeals as framed by the Revenue for our consideration.

> *(1) "Whether on the facts and in the circumstances of the case the Tribunal is right in law* ***rejecting comparables*** *namely, Kals Information systems Ltd, Tata Elxsi Ltd. M/s. Accel Information Systems Ltd, M/s. Bodhtree Consulting* ***by following its earlier order*** *and without appreciating that the reasonings of* ***TPO/AO for adopting the said comparables*** *which have been brought out in the TPO's order and without appreciating that TPO has chosen the same* ***after application of mind and materials on record"?***
>
> *(2) "Whether the Tribunal was justified in* ***fixing the RPT at 15% of total revenue and deleting Geomatric Software Ltd (Seg) and Megasoft Ltd as comparables*** *without going into specific facts in the case of taxpayer and without adducing the basis for arriving 15% cut off RPT Filter, the case of taxpayer"?*

Rival Contentions:

9. The learned counsels appearing for the Respondent Assessee even though they were appearing in the other similar appeals and the learned standing counsels on the side of the Revenue have addressed the arguments, firstly on the question whether the questions as suggested and quoted above really come up to the level of definition of '**substantial questions of law'** as elaborately discussed by a series of judgments from the Apex Court in the light of the provisions of **Section 260-A** providing for an appeal to the High Court are in *pari- materia* with **Sections 100 and 103** of the Code of Civil Procedure, 1908 which provides for Second Appeal to the High Court on substantial questions of law against the Decrees passed by the Subordinate Courts.

10. The learned counsels addressed their arguments on the said preliminary question as to whether these questions as raised are at all substantial questions of law or not and we have heard both the sides learned counsels at length and with the able assistance rendered by them with the help of various case laws cited at the bar which we would be discussing hereinafter, we intend to first decide whether these type of questions at all can be entertained and whether the High Court should enter into these appeals to go into the merits and factual aspects of the case for answering the alleged substantial questions of law which if necessary, the Court has the power to reframe also under **Section 260-A(4)** of the Act.

Aspects to be considered:

11. Before we advert to the arguments raised by the learned counsels on both the sides and the relevant

case laws, we would dilate upon the following relevant aspects of the matter.

[I] The analysis of the provisions relating to the Transfer Pricing/ determination of the **'Arm's Length Price'**;

[II] The Scheme of procedure of assessment and appeals to the Tribunal and High Court/Supreme Court.

[III] The scope of interference by High Court under **Section 260-A** of the Act in these type of cases.

Findings of the Tribunal:

12. We find it appropriate to quote some portions of the Order passed by the learned Tribunal to indicate how in the present case the Income Tax Appellate

Tribunal has dealt with the issues of comparables raised before it in this regard.

> *"11. We have perused the orders and considered the rival contentions. It is not disputed that after the exclusions directed by the CIT (A)* ***what were left as comparable companies selected by the TPO were KALS Info Systems Ltd., Bodhtree Consulting Ltd., and Synphosys Business Solutions Ltd., Admittedly, assessee was a software development company and not a software product company.*** *With regard to Kals-Info Systems Ltd., and Bodhtree Consulting Ltd., Mumbai Bench of the Tribunal in the case of Nethawk Network India Ltd., v. ITO (ITA No.7633/Mumb/2012; dt 06-11-2014), had held as under:*
>
> ***"Kals Information Systems Limited (Seg.)***
>
> *26. In this regard, Sri Lohia, Ld. Counsel for the assessee argues that* ***this company is also engaged in development***

of software and software products and no segmental details are available.

27. On the other hand, the case of the Revenue is that the ***revenues on account of software development is 2.05 Crs and there is no breakup for the same to know the revenue's for software services and the software products.*** *Ld DR brought our attention to the details under the head – inventories and mentioned that Work in Progress is NIL for the period ending March, 2008; but the fact is that there are no segment details relating to software products out of the segmental information under the head "application in software".* ***Considering all the information available in public domain, we are of the opinion that this case cannot be considered as a good comparable.*** *As such, the fact that the company is producing the* ***ERP software products called Shine,*** *the internationally proven ERP software and other software products called Docuflo (Document*

Management Software) etc are brought revenue to the assessee in the year under consideration. Therefore, considering the absence of data as well as the unfavourable FAR analysis to the TPO, this case cannot be considered as comparable. We direct the AO to exclude the same from the list of comparables.

Bodhtree Consulting Limited

21. On this comparable, case of the assessee is that the company is not a good comparable in view of the software products produced by the company. ***As such, no segmental data is adequately available too.***

22. On the other hand, Ld DR filed a copy of the financial statement and argued vehemently stating that this company is not engaged in the software products. In this regard, Ld DR relied on the note no.3, relating to the relating to the revenue recommendation

in Schedule 12, note no.5 relating to the segmental information etc. ***to mention that the company is engaged in the software development only.*** *However, the assessee argued vehemently stating that this company is engaged in the software based products. Further, Ld Counsel mentioned that the said company was already examined and* ***was held as product based company by the TPO in the TP study of other case and the TPO cannot take different stand in this case.*** *In this regard, we have perused the para 29 of the order of the Tribunal in the case of M/s. Wills Processing Services (I) P Ltd (supra) wherein it was mentioned that the TPO described this company is engaged in the business of software products, not the software development services. Relevant portions from the said para 29 of the order of the Tribunal is reproduced here under.*

29.1 The ld Sr. Counsel for the assessee has submitted that this company is engaged in the software

products. He has referred the ***TPO order and submitted that in the profile of the comparables selected by the TPO itself has mentioned the business of the assessee is in software products.*** *The ld AR has referred the objections raised by the assessee before the TPO at page 286 of the paper book and submitted that the assessee brought this fact that this company is engaged in providing open and end to end web solutions, software consultancy, design and development of software, using the latest technologies.* ***Further, the company has identified only one segment i.e. software development. Therefore, the ld AR has submitted that this company is functionally not comparable*** *with the assessee and consequently should be excluded from the comparables.*

29.2 On the other hand, the ld DR has filed the information collected u/s 133(6) of the IT Act and submitted that as per this information, this company has revenue from ITES activity to the extent of Rs.2,94,85,528/-. Therefore, this company is a good comparable having functional similarity.

29.3 …. ……

30. We have considered the rival submissions as well as the relevant material on record. ***The details filed by the ld DR before us has been obtained by the TPO at Hyderabad and not by the TPO of the assessee in the present case.*** *It is stated in the letter dated 5.2.2010 written by the Chartered Accountant of Bodhtree Consulting Ltd to the TPO Hyderabad that the company is providing data cleaning services to*

clients for whom it had developed the software application……

23. ***Considering the above, we are of the opinion that Bodhtree Consulting Limited is not engaged in the software development services and there is no segmental data comparable. Therefore, the FAR analysis goes against the TPO/AO.***

Hon'ble Mumbai Bench of the Tribunal had held that Bodhtree Consulting Ltd., was engaged in web services integration, data client services, data management services and e-paper solutions, which were completely different from software development services. M/s. Kals Info Systems was held to be into production of ERP software products. We are, therefore, of the opinion that KALS Info Systems and Bodhtree Consulting Ltd., have to be excluded from the comparables.

13. ***With regard to application of RPT filter, we find that 15% outer limit***

was held to be proper one by this Tribunal in the case of 24/7 Customers.com P. Ltd., (supra), *this Tribunal had held as under at para 13.0 of its order, which read as under:*

In respect of the ground raised at S.No.1 regarding acceptance of comparable companies having related party transactions as proposed by the TPO, the learned counsel for the assessee argued that the transfer pricing regulations do not stipulate any minimum limit of related party transactions which form the threshold for exclusion as a comparable. In this regard, the learned counsel for the assessee objected to the TPO's setting a limit of 25 percent on related party transactions. He ***objected to the inclusion of comparable being related party transactions in excess of 15 percent of sales/revenue.*** *In support of this proposition, the learned*

counsel for the assessee placed reliance on the decision of the Hon'ble Bench of the ITAT, Delhi in the case of Sony India (P) Ltd. reported in 2008-TIOL-439-ITAT-Delhi dt. 23.12.2008. The learned counsel for the assessee drew our attention to para 115.3 of the order wherein the Tribunal has held that –

*"…… **We are further of the view that an entity can be taken as uncontrolled if its related party transactions do not exceed 10 to 15 percent of total revenue.** Within the above limit, transactions cannot be held to be significant to influence the profitability of the comparables. For the purpose of comparison what is to be judged is the impact of the related party transactions vis-à-vis sales and not profit since profit of an enterprise is influenced by large number of other factors.*

Respectfully following the decision of the Tribunal in the case of Sony India (P) Ltd (supra), the Assessing Officer/ TPO are directed to excluded after due verification those comparables from the list with related party transactions or controlled transactions in excess of 15 percent of total revenues for the financial year 2003-04.

By application of the above ***filter, the following companies do come into the list of comparables that could be considered:***

Sl.No	Company name
1	iGate Global Solutions Ltd (Seg)
2	Infosys Ltd
3	Mindtree Consulting ltd
4	Persistent Systems Ltd
5	R Systems International Ltd
6	Sasken Communication Ltd (seg)
7	Tata Elxsi Ltd (Seg)
8	R.S. Software (India) Ltd
9	Accel Transmatics Ltd (seg)
10	Lanco Global Solutions Ltd
11	Flextronics Software Systems Ltd

As can be seen from the table reproduced at para 4 above, ***each of these companies had RPT of less than 15%.*** *However, out of these, iGate Global Solutions Ltd., (seg), Infosys Ltd., Mindtree Consulting Ltd., Persistent Systems Ltd., Sasken Communication Ltd., (seg) and Flextronics Software Systems Ltd.,* ***had turnover in excess of Rs.200 crores*** *as mentioned by CIT(A) in his order itself. It is pertinent to note that Revenue in its appeals has not taken any grievance against application* ***of turnover filter of Rs.200 crores.*** *This being the case, what are left out of the comparables which are coming back to the list of comparables due to application of 15% RPT filter, are only R Systems International Ltd., Tata Elxsi Ltd., Accel Transmatics Ltd, R.S. Software (India) Ltd and Lanco Global Solutions Ltd. Out of these,* ***Tata Elxsi and Accel Transmatics Ltd., (seg) have been held to be functionally different to a soft-ware development company*** *in the decision in the case of Yahoo Software Development (India)*

P. Ltd., (supra), wherein relying on the coordinate bench decision in the case of Agile Software Enterprises P Ltd., (supra), it was held as under:

"(e) Accel Transmatic Ltd.

.....

.....

.....

14. Thus according to us M/s. R Systems International Ltd., R.S. Software India Ltd., Lanco Global Solutions Ltd and Synphosys Business Solutions ***are proper comparables that could be considered.*** *Directions to the ld. Assessing Officer/TPO with regard to the* ***comparable companies that are to be considered is given at para 22 hereunder, after considering the Revenue's appeal.***

15. In the result, grounds raised by assessee on the transfer pricing issues are decided partly in its favour.

16. Since we are deciding on the ***comparables that are to-be considered other aspects with regard to the transfer pricing raised by assessee are left open with freedom*** *to the assessee to raise such issues in a proceeding where these are relevant."*

Analysis of the Tribunal's Order:

13. What we find from the aforesaid detailed reproduction from the order of the learned Tribunal, is that while undertaking the exercise of arriving at the **'Arm's Length Price'** which is essentially a matter of estimate of the fair value which the Indian Company has paid or has received from the Associate Enterprise (Foreign Company), the said exercise to be undertaken by the Transfer Pricing Officer is based on the facts and figures relating to comparable cases of other Entities,

whose relevant data are available in public domain and as per the provisions of the Act and Rules, not only the Assessee Company is required to furnish its own Transfer Pricing Analysis and chosen comparables which may or may not be agreed by the Revenue Authorities or Transfer Pricing Officer and they would introduce some more comparables rejecting the comparables given by the Assessee Company applying certain filters like the Related Party Transaction (RPT) Filters, Turnover Filters, Export Earnings Filters, Employee Cost Filters, etc. to bring them within the comparable range of the cases of such comparables and generally there would be a tug of war between the Assessee and the Revenue in this arena. While the Assessee Company would choose the comparables, whose operating profit margins are less or only little more than the assessee, but the Revenue would bring in the comparables with higher profit margins. The

Transfer Pricing Officer may want to compare the case of the Assessee Company with such other comparables whose Operating Margins are higher or even much higher than the one declared by the Assessee Company so as to make Transfer Pricing Adjustments in the declared income of the Assessee Company, to determine and fetch more revenue or tax from such Assessee Companies.

14. From the quoted portion of the Tribunal's order, it is apparent that individual cases of such comparables have been considered, analyzed and discussed by the Tribunal and while some comparables are found to be appropriate and really comparable to the facts of the Assessee, some were not. The dispute may also be between the two parties as to whether the correct Filters have been properly applied or not or whether the most appropriate method of determination of '**Arm's Length Price'** as prescribed under the Rules

has been adopted or not and several other such factors for arriving at the **'Arm's Length Price'** to make fair and reasonable Transfer Pricing Adjustments in the hands of the Assessee.

***Prima Facie* Opinion:**

15. We are of the considered opinion that this entire exercise of making Transfer Pricing Adjustments on the basis of the comparables is nothing but a matter of estimate of a broad and fair guess-work of the Authorities based on relevant material brought before the Authorities including the Appellate Tribunal, but nonetheless the Tribunal being the final fact finding body remains so for this Special **Chapter X** also and therefore, unless this Court is satisfied that a substantial question of law is arising from the order of the Tribunal, the appeal under **Section 260-A** cannot be entertained at the instance by either the Revenue or

the Assessee and the exercise of fact finding or **'Arm's Length Price'** determination or '**Transfer Pricing Adjustments**' should be allowed to become final with a quietus at the hands of the final fact finding body, i.e. the Tribunal.

Comparative Analysis of Section 260-A of Income Tax Act, 1961 and Sections 100 & 103 of the Code of Civil Procedure:

16. We would analyze the provisions of **Section 260-A** of the Act in a little more detail but we are of the firm opinion that the entry into the High Court under **Section 260-A** of the Act is locked with the words **"Substantial questions of law"** and the key to open that lock to maintain such appeal can only be the perversity of the findings of the Tribunal in these type of cases and the perversity in the findings not only averred by the appellant before this Court but, established on

the basis of cogent material which was available before the Authorities below including the Tribunal and the findings arrived at by the Tribunal can be so held to be perverse within the well settled parameters for determining the same as perverse. It is not allowed to either of the parties, i.e. the Assessee or the Revenue to invoke the jurisdiction of this Court under **Section 260-A** of the Act merely because the Tribunal comes to reverse or modify the findings given by the lower Authority, viz. **Transfer Pricing Officer (TPO)** or **Dispute Resolution Panel (DRP)** which comprises of three Commissioners and the Revenue or the assessee may feel dissatisfied, because of the reversal or modification of such findings by the Tribunal resulting in leaving out of certain comparables or adding on of certain comparables for determining the **'Arm's Length Price'** in the hands of the Assessee Company.

17. Unless such perversity in the findings of the Tribunal is established we are of the opinion that the appeals under **Section 260-A** of the Act cannot and should not be entertained at the instance of either of the parties and the present cases before us, we find that the Tribunal has given cogent reasons and detailed findings upon discussing each case of comparable corporate properly and therefore, we find ourselves unable to call such findings of the Tribunal perverse in any manner so as to require our interference under **Section 260-A** of the Act.

18. We now take up the analysis of **Section 260-A** of the Act which we have already said is in *pari materia* with Sections 100 and 103 of the Civil Procedure Code.

19. The said provisions are quoted below for ready reference and comparison.

Section 260-A of the **Income Tax Act, 1961** reads as under:

"260A - Appeal to High Court:

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal [before the date of establishment of the National Tax Tribunal], if the High Court is ***satisfied that the case involves a substantial question of law.***

(2) [The [Principal Chief Commissioner or] Chief Commissioner or the [Principal Commissioner or] Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be-]

(a) filed within one hundred and twenty days from the date on which the order appealed against is [received by the assessee or the [Principal Chief Commissioner or] Chief

Commissioner or [Principal Commissioner or] Commissioner];

(b) [*******]

(c) in the form of a memorandum or appeal precisely stating therein the substantial question of law involved.

[(2A) The High Court may admit an appeal after the expiry of the period of one hundred and twenty days referred to in Clause (a) of sub-section (2), if it is satisfied that there was sufficient cause for not filing the same within that period.]

(3) ***Where the High Court is satisfied*** *that a substantial question of law is involved in any case,* ***it shall formulate that question****.*

(4) The appeal ***shall be heard only on the question so formulated,*** *and the respondents shall, at the hearing of the*

appeal, be allowed to argue that the case does not involve such question:

Provided that *nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear,* ***for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.***

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon ***containing the grounds on which such decision is founded*** *and may award such cost as it deems fit.*

(6) The High Court ***may determine any issue which*** *-*

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal,

by reason of a decision on such question of law as is referred to in sub-section (1).

[(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this Section.]

Sections 100 and 103 of the **Code of Civil Procedure, 1908** read thus:

"Section 100 - Second Appeal.

(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, ***if the High Court is satisfied that the case involves a substantial question of law.***

(2) An appeal may lie under this section from an appellate decree passed ex-parte.

(3) In an appeal under this section, the memorandum ***of appeal shall precisely state the substantial question of law involved in the appeal.***

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, ***it shall formulate the question.***

(5) The appeal ***shall be heard on the question so formulated*** *and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:*

Provided that *nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question."*

Section 103 - Power of High Court to determine issues of fact –

In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal, -

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts ***by reason of a decision on such question of law as is referred to in section 100."***

What is a Substantial Question of Law?

20. From a bare comparison of the provisions quoted above and as discussed in various judgments of the Constitutional Courts, which we will refer in brief herein below, it is clear that the Scheme of both **Section 260-A** in Income Tax Act, 1961 and **Section 100** r/w. **Section 103** of the Code of Civil Procedure are in *pari materia* and in same terms.

21. The existence of a substantial question of law is *sine qua non* for maintaining an appeal before the

High Court. While the appeal to High Court under **Section 260-A** of the Act may be a First appeal in the sense from the order of final fact finding by the Tribunal under the Income Tax Act, whereas the Second Appeal on substantial question of law before High Court under **Section 100** would lie against the Judgment and Decree of the first Appellate Court disposing of an appeal against the Judgment and Decree of a Trial Court, but nonetheless it is the third round of consideration at the level of the High Court, where the facts and law both have been screened, discussed and analyzed by the Authorities or the Courts below and therefore the tenor and color of the words **"substantial question of law"** in both these enactments remains the same.

22. The High Court has power to not only formulate the substantial questions of law and rather it has the duty to do so and can also frame additional substantial questions of law at a later stage, if such a

substantial question of law is involved in the appeal before it under these provisions and the appeal should be heard and decided only on such substantial questions of law after allowing the parties to address their arguments on the same. The extended power given to the High Courts to decide even an issue under **Sub-section (6)** of **Section 260-A** of the Income Tax Act, which is in *pari materia* with Section 103 of the Civil Procedure Code and which says that the High Courts may determine any issue which (a)has not been determined by the Tribunal or (b) has been wrongly determined by the Tribunal, can be so determined by the High Court, only if the High Court comes to the conclusion that **'by reason of the decision on substantial question of law rendered by it',** such a determination of issue of fact also would be necessary and incidental to the answer given by it to the substantial question of law arising and formulated by it.

23. The argument raised by the learned counsel for the Respondent Assessee before us by making a disjuncted reading of Clause (a) and Clause (b) of Sub-Section (6) of Section 260-A of the Income Tax Act, 1961 to submit that the High Court can touch upon the issues of facts also in an appeal under this provision bereft of substantial question of law, is a misconceived argument.

24. In our opinion, both the Clause (a) and Clause (b) of Sub-Section (6) of Section 260-A of the Act are circumscribed by the words **'by reason of the decision on such question of law as is referred to in Sub-section (1)'.** Therefore, even if an issue which has not been determined by the Tribunal, which was required to be so determined in terms of the answer to the substantial question of law given by the High Court, such an issue not determined by the Tribunal could also be decided by the High Court with reference to

Clause (a) and more so, if such an issue has been wrongly decided according to the answer given by the High Court to such a substantial question of law, then also the High Court can set it right to fall in line with the answer given by the High Court to such a substantial question of law raised before it and determined by it in terms of **Clause (b)** thereof.

25. **Sub-section (6) of Section 260-A** of the Act, therefore, does not give any extended power, beyond the parameters of the substantial question of law to the High Court to disturb the findings of fact given by the Tribunal below.

26. **Sub-section (7)** inserted in **Section 260-A** of the Act by the **Finance Act of 1999** with effect from **01/06/1999** after a period of about 8 months of substituting the new provisions of Section 260-A to the Act as they now stand by **Finance Act of 1998**, with

effect from **01/10/1998** was only to clarify and support that the parameters of Sections 100 & 103 of the Civil Procedure Code and other provisions of Civil Procedure Code relating to appeals of High Court shall apply to the appeals under Section 260-A of the Income Tax Act also.

27. The insertion of Sub-section (7) in Section 260-A of the Act does not give any new or extended powers to the High Court and the pre-existing provisions from Sub-section (1) to Sub-section (6) in Section 260-A of the Act already had all the trappings of Sections 100 and 103 of the Civil Procedure Code.

Case Laws on Substantial Question of Law:

28. In the leading and the first and foremost case on the interpretation of **Section 100** of the Code of Civil Procedure Code, the Constitution Bench of the Hon'ble Supreme Court in the case of **Sir Chunilal V. Mehta and Sons Limited Vs. Century Spinning and**

Manufacturing Co. Limited AIR 1962 SC 1314, held in **para.6** as under:

> *"6. We are in general agreement with the view taken by the Madras High Court and we think that while the view taken by the Bombay High Court is rather narrow the one taken by the former High Court of Nagpur is too wide. The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether if directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council, or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea*

raised is palpably absurd the question would not be a substantial question of law."

29. In the case of **Santosh Hazari Vs. Purushottam Tiwari (Deceased) by LRs., [2001] 3 SCC 179,** another Three Judges' Bench of the Honble Supreme Court explained the meaning of the substantial questions of law in paras.11 and 12 in the following manner.

"11. Even under the old Section 100 of the Code (pre-1976 amendment), a pure finding of fact was not open to challenge before the High Court in second appeal. However the Law Commission noticed a plethora of conflicting judgments. It noted that in dealing with second appeals, the courts were devising and successfully adopting several concepts such as, a mixed question of fact and law, a legal inference to be drawn from facts proved, and even the point that the case has not been properly approached by the courts below. This was creating confusion in the minds of

the public as to the legitimate scope of second appeal under Section 100 and had burdened the High courts with an unnecessarily large number of second appeals. Section 100 was, therefore, suggested to be amended so as to provide that the right of second appeal should be confined to cases where a question of law is involved and such question of law is a substantial one. (See Statement of Objects and Reasons.) The Select Committee to which the Amendment Bill was referred felt that the scope of second appeals should be restricted so that litigations may not drag on for a long period. Reasons, of course, are not required to be stated for formulating any question of law under sub-section (4) of Section 100 of the Code; though such reasons are to be recorded under proviso to sub-section (5) while exercising power to hear on any other substantial question of law, other than the one formulated under sub-section (4).

12. The phrase "substantial question of law", as occurring in the amended Section 100 is not defined in the Code. The word

substantial, as qualifying "question of law", means – of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with – technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words "of general importance" as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta v. T. Ram Ditta", the phrase "substantial question of law" as it was employed in the last clause of the then existing Section 110 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was

involved in the case as between the parties. In Sir Chunilal V. Mehta & Sons Ltd. v. Century Spg. And Mfg. Co. Ltd. the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju."

30. In the case of **Hero Vinoth (Minor) Vs. Seshammal [2006]5 SCC 545,** the Two Judges' Bench of the Hon'ble Supreme Court following the earlier precedents, summarises the principles in the following manner.

The relevant portion of the said judgment at para.24 is quoted below for ready reference:

"24. The principles relating to Section 100 CPC relevant for this case may be summarized thus:

(i) An inference of fact from the recitals or contents of a document is a question of fact.

But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principles of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and involves a debatable legal issue. A substantial question of law will also arise in a contrary situation; where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter,

either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

31. In the case of **Vijay Kumar Talwar Vs. Commissioner of Income Tax, Delhi, [2011] 1 SCC 673,** comparing the provisions of **Section 260-A** of the Act with **Section 100** of the Civil Procedure Code, the Hon'ble Supreme Court held that in the absence of demonstrated perversity in the findings of the Tribunal, the Court cannot interfere and a finding of fact may give rise to a substantial question of law, only if it is perverse.

Paragraphs 23 and 25 of the said judgment is quoted below for ready reference:-

> *"23. A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in*

appreciating the evidence, or when the evidence has been misread. (See Madan Lal v. Gopi Narendra Gopal Vidyarthi V. Rajat Vidyarthi, Commr. of Customs v. Vijay Dasharath Patel, Metroark Ltd. v. CCE and W.B. Electricity Regulatory Commission v. CESC Ltd.).

25. We are of the opinion that on a conspectus of the factual scenario, noted above, the conclusion of the Tribunal to the effect that the assessee has failed to prove the source of the cash credits cannot be said to be perverse, giving rise to a substantial question of law. The Tribunal being a final fact-finding authority, in the absence of demonstrated perversity in its finding, interference therewith by this Court is not warranted."

Scheme of Assessment of the Transfer Pricing Cases:

32. Let us briefly now discuss the Scheme of assessment under **Chapter X** relating to Transfer

Pricing cases of International Taxation under these provisions in income arising from international transactions which shall be computed having regard to the **'Arm's Length Price**' **(Sec.92).**

33. **Section 92-A** defines an '**Associate Enterprise**' viz., the Company which participates directly or indirectly, or through one or more intermediaries, in its Management or control or Capital of the other Enterprise by holding more than 26% of the share holding in such other Enterprises and satisfy the other criterias as stated in **Section 92-A** of the Act.

34. The word '**International Transaction'** is defined in **Section 92-B of** the Act.

35. The most important provision concerning us in this batch of cases is **Section 92-C** of the Act which provides for '**Computation of Arm's Length Price'** and

the said provision stipulates that the '**Arm's Length Price'** in relation to the international transactions shall be determined by following any of these methods enumerated in **Section 92-C** of the Act which is considered to be the '**Most Appropriate Method'** by the Authorities under the Act. The methods provided are:

Clause (a): Comparable Uncontrolled Principles Method **(CUP)**;

Clause (b): Resale Price Method **(RP)**

Clause (c): Cost Plus Method **(CP)**

Clause (d): Profit Split Method **(PS)**

Clause (e): Transactional Net Margin Method **(TNMM)**; and

Clause (f): such other Method as may be prescribed by the Board.

36. It appears from the true facts of the various cases before us and the arguments of the learned counsels that the **TNNM Method** appears to be the

most popular and widely adopted Method for determining the '**Arm's length price'** in which the Operating Profit Margin of comparable Companies are considered by the Authorities and applied to the cases of the Assessees to determined the **'Arm's Length Price'** and make Transfer Pricing Adjustments.

Rules 10-A, 10-AB, 10-B, 10-C & 10-CA of the **Income Tax Rules, 1962** prescribe the manner for working out '**Arms Length Price**' under aforesaid prescribed Methods.

37. **Section 92-CA** of the Act envisages that the Assessing Authority, if he considers necessary or expedient so to do, he can with the previous approval of the Principal Commissioner, refer the computation of **'Arm's Length Price'** to **Transfer Pricing Officer (TPO),** another Departmental Authority only, who is supposed to have special knowledge and training for

computing the '**Arm's Length Price'** in the international transactions. The Report of the Transfer Pricing Officer is binding on the Assessing Authority as per **Section 92–CA (4)** of the Act, but where the Assessee raises an objection against the Draft Assessment Order of the Assessing Authority based on such Report of the Transfer Pricing Officer, the Assessee Company within 30 days can either accept the said Draft Order or file its objections before the Dispute Resolution Panel **(DRP)** and the Assessing Officer as per **Section 144-C** of the Act. The said Dispute Resolution Panel comprises of a Collegium of three Principal Commissioners or Commissioners of Income Tax constituted by the Board as defined in **Section 144-C (15)** of the Act and it has to comply with the principles of natural justice by giving an opportunity of hearing to the Assessees. The order passed by the Assessing Authority in pursuance of the directions of the Dispute

Resolution Panel (DRP) is directly appealable to the Income Tax Tribunal under **Section 253 (1) (d)** of the Act. **Section 254** of the Act empowers the Appellate Tribunal to pass such orders on the appeals **'as it thinks fit'** after giving an opportunity of hearing to both the parties.

38. From the aforesaid Scheme of assessment with regard to international transactions, it is clear that the process of determination of **'Arm's Length Price'** has to be undertaken by the Expert Wing of the Income Tax Department which is manned by **Transfer Pricing Officer (TPO)** and at the higher level by a Collegium of three Commissioners in the form of **Dispute Resolution Panel (DRP)** whose orders on questions of facts are appealable before the highest fact finding body, viz., the Appellate Tribunal.

39. The process of determination of '**Arm's Length Price'** as observed above, necessarily takes into account the comparable cases of other similarly situated or nearly similarly situated Corporate Entities whose data are in public domain or on the Data Bases like Prowess and Capital Line Data Base etc.

No Substantial Question of Law Arises in these Cases:

40. The dispute essentially before us is the pairing and matching such comparables with the Transfer Pricing Analysis of the profit margins given by the Assessee himself during the course of determination of such **'Arm's Length Price'**.

41. The shades of arguments raised by both the sides before us in these appeals and most of which have been filed by the Revenue are that either the wrong

Filters have been applied or Filters have been wrongly applied, particularly *qua* Turnover Filter giving a far too wide or narrower range of comparables or even though comparable Entities were functionally different entities from the Entities in the list of Departmental comparables, as against the comparables sought to be provided by the assessees but the Revenue Department generally insists on their inclusion to get high profit ratio leading to higher Transfer Pricing adjustments, whereas the assessee would like to keep the comparables in a narrower range to justify its Transfer Pricing Analysis and profits declared.

42. In sum and substance, we find that such an exercise having been undertaken by the Authorities below may have resulted not only in high pitched Transfer Pricing Adjustments in the declared profits of the Assessee, but a flood of such appeals go before the Tribunal itself where finally the inclusion or exclusion

of comparables has been determined by the Tribunal on due analysis giving its own reasons.

43. The contention raised before us that in view of some different views taken by the Tribunal by different Benches at different places, the present appeals under **Section 260-A** of the Act deserve to be entertained and admitted by this Court for laying down certain Guidelines about the Filters or Most Appropriate Method to be adopted for determination of the **'Arm's length price**', does not, in our considered opinion falls within the parameters of the substantial question of law. None of the sides was able to point out any perversity in the Orders of the Appellate Tribunal in this regard.

44. This Court cannot be expected to undertake the exercise of comparison of the comparables itself which is essentially a fact finding exercise. Neither the

sufficient Data nor factual informations nor any technical expertise is available with this Court to undertake any such fact finding exercise in the said appeals under Section 260-A of the Act. This Court is only concerned with the question of law and that too a substantial one, which has a well defined connotations as explained above and findings of facts arrived at by the Tribunal in these type of assessments like any other type of assessments in other regular assessment provisions of the Act, viz. Sections 143, 147 etc. are final and are binding on this Court. While dealing with these appeals under **Section 260-A** of the Act, we cannot disturb those findings of fact under **Section 260-A** of the Act, unless such findings are *ex-facie* perverse and unsustainable and exhibit a total non-application of mind by the Tribunal to the relevant facts of the case and evidence before the Tribunal.

45. Otherwise if the High Court takes the path of making such a comparative analysis and pronounces upon the questions as to which Filter is good and which comparable is really comparable case or not, it will drag the High Courts into a whirlpool of such Data analysis defeating the very purpose and purport of the provisions of **Section 260-A** of the Act. Therefore what we observed above appears to us to be the sustainable view that the key to the lock for entering into the jurisdiction of High Court under **Section 260-A** of the Act is the existence of a substantial question of law involved in the matter. The key of *ex-facie* perversity of the findings of the Tribunal duly established with the relevant evidence and facts. Unless it is so, no other key or for that matter, even the in-consistent view taken by the Tribunal in different cases depending upon the relevant facts available before it cannot lead to the formation of a substantial question of law in any particular case to

determine the aspects of determination of '**Arm's Length Price**' as is sought to be raised before us.

Need for giving Primacy to the Tribunal in the area of fact finding:

46. Undoubtedly, the Income Tax Tribunal is the final and highest fact finding body under the Act. It is manned by Expert Members (Judicial Members are selected from District Judges or Advocates and Accountant Members selected from practicing Chartered Accountants or persons of CIT level in the Department). Therefore this quasi-judicial forum is expected and as some of the nicely articulated Judgments and Orders from the Tribunal would indicate, the Orders passed by the Tribunal should normally put an end and quietus to the findings of facts and factual aspects of assessment. The lower Revenue

Authorities cannot be allowed to make it their prestige issue, if their stand is not upheld by the Tribunal and agitate against their Orders before the higher Courts by resort to **Section 260-A** or **Section 261** of the Act merely because they are dissatisfied with the findings of facts by the Tribunal.

47. In the case before us now, the pick of comparables, short-listing of them, applying of filters, etc., are all fact finding exercises and therefore the final Orders passed by the Tribunal are binding on the lower Authorities of the Department as well as High Court.

48. The Tribunal of course is expected to act fairly, reasonably and rationally and should scrupulously avoid perversity in their Orders. It should reflect due application of mind when they assign reasons for returning the particular findings.

49. For instance, while dealing with comparables or Filters, if un-equals like Software Giant **Infosys or Wipro** are compared to a newly established small size Company engaged in Software service, it would obviously be wrong and perverse. The very word **"comparable"** means that the Group of Entities should be in a homogeneous Group. They should not be wildly dissimilar or unlike or poles apart. Such wild comparisons may result in the best judgment assessment going haywire and directionless wild, which may land up the findings of the Tribunal in the realm of perversity attracting interference under **Section 260-A** of the Act.

Some Precedents from the High Courts holding Similar View:

50. Here, we would like to refer to some of the judgments of the different High Courts where the High

Courts have refused to entertain such appeals under Section 260-A of the Act in these type of cases.

A. The Division Bench of **Madras High Court** in the case of **Commissioner of Income Tax, Chennai Vs. Same Deutz-Fahr India (P) Ltd. [2018] 253 Taxman 32 (Madras)** decided on **05/12/2017,** after discussing the Supreme Court decisions laying down the parameters of Section 260-A of the Act and Section 100 of Civil Procedure Code held that right of appeal under Section 260-A of the Act is not automatic and it is limited right of appeal restricted only to cases which involve substantial questions of law and it is not open to the High Court to sit in appeal over the factual findings arrived at by the Tribunal.

51. The Court held that whether the case of **M/s. HMT Limited** was comparable case with the case of assessee before it or not was the factual issue, it held

that the learned Tribunal has factually assessed the similarities between **M/s. HMT Limited** and the Respondent Assessee and the same does not warrant any interference under Section 260-A of the Act.

The relevant factual background of the case and law pronounced by the Courts are quoted below.

> *"9. The respondent assessee adopted Transactional Net Margin Method (TNMM) as the appropriate method to determine the ALP of its international transactions of purchase of raw materials and components.* ***The assessee identified five comparables*** *and it made adjustment on account of idle capacity on comparables in order to arrive at ALP of its purchase transaction. The respondent assessee arrived at weighted average.*
>
> *10.* ***The TPO found that M/s. HMT Limited needed to be included in the comparables.*** *However, the TPO found that*

the turnover of M/s. HMT Limited was more than twice the turnover of the assessee company and, thus, could not be considered as a comparable.

11…

12…

13. The learned Tribunal observed that during the transfer pricing proceedings, the TPO had selected M/s. HMT Limited as one of the comparables on functional similarity, but while determining the ALP, he had not included M/s. HMT limited as a comparable. The learned Tribunal held:

> *"7.3 We heard the rival submissions and perused the material placed on record.*
>
> *M/s. HMT Ltd., is in the segment of manufacturing of tractors and power tillers.* ***The functionality of the M/s. HMT Ltd., and the assessee are more or less in similar.*** *The Ld. AR of the assessee submitted that all*

the functions of M/s. HMT Ltd., and M/s. VST Tillers are one and the same. ***The TPO has rejected M/s. HMT Ltd., as comparable merely because of the turnover.*** *The turnover of the M/s. HMT Ltd., for the AY 2005-06 was* ***Rs.248.00 Cr. as against the assessee's company turnover of Rs.120.00 Cr. It is impossible to find out comparable with all similarities inclusive of turnover.*** *Even M/s. VST Tiller selected by TPO was with Rs.130.00 Cr.* ***The turnover filter with turnover 3-5 times is acceptable for selecting the comparable as per the decisions of the tribunals.*** *In the Appellant's case, the TPO has adopted the turnover filter and the M/s. HMT Ltd., being functionally similar and the turnover was only two times of Appellant, we are of the considered opinion that the TPO should include M/s. HMT Ltd., as*

comparable. The case laws relied upon by the assessee also supports arguments of the assessee. Bo the assessee and TPO adopted TNMM as most appropriate method which would neutralize the differences such as turnover, etc. Therefore, we direct the TPO to include M/s. HMT Ltd., as comparable and re-work the comparable margin. This ground of appeal is allowed".

14. The appeal is to the limited extent that the TPO has been directed to include M/s. HMT Limited as a comparable and re-work the comparable margin.

15 to 23……

24. In M. Janardhana Rao v. Jt. CIT [2005] 273 ITR 50/142 Taxman 722 (SC), the Hon'ble Supreme Court held that the ***principles contemplated under Section 100 of the Code of Civil Procedure would apply to Section 260-A of the IT Act too.***

25. Right of appeal is not automatic. Right of appeal is conferred by statute. When ***statute confers a limited right of appeal restricted only to cases which involve substantial questions of law, it is not open to this Court to sit in appeal over the factual findings*** *arrived at by the Appellate Tribunal.*

26. In the instant case, whether M/s. HMT Limited ***can be a comparable or not is a factual issue.*** *The learned Tribunal has factually assessed the similarities between M/s. HMT Limited and the respondent assessee and the same, in our considered opinion,* ***does not warrant interference of this Court under Section 260-A of the Income Tax Act, 1961."***

B. Similarly, the Division Bench of **Delhi High Court** in the case of **Principal, Commissioner of Income Tax-9 Vs. WSP Consultants India (P) Limited** in the judgment dated **03/11/2017, [2017] 253**

Taxman 58 (Delhi)] held that the learned Income Tax Appellate Tribunal was justified in upholding the contention of the assessees that inclusion of three comparables i.e. M/s. Ashok Leyland Projects Services Limited, Kitco Limited and Mitcon Consultancy and Engineering Services Limited was not correct, the Court held that the reasons given by the Tribunal were justified and any inclusion or exclusion of comparables *per se* cannot be treated as a question of law unless it is demonstrated to the Court that the Tribunal or any other lower Authority took into account the irrelevant consideration or excluded the relevant entries in the **'Arm's Length Price'** determination.

The relevant paragraphs 9 to 11 of the said judgment is quoted below for ready reference:

> *"9. This Court is of the opinion that the rationale that Ashok Leyland was deriving major part of its revenue from wind energy*

segment and that there was an extraordinary event of merger and likewise M/s. Kitco Ltd. deriving income from government entity and Mitcon Consultancy & Engineering Services Ltd, is deriving less than 75% revenue from consultancy services, is a reasonable basis for their exclusion.

10. Any inclusion or exclusion of comparables per se cannot be treated as a question of law unless it is demonstrated to the Court that the Tribunal or any other lower authority took into account irrelevant consideration or excluded relevant factors in the ALP determination that impact significantly.

11. In the present case, we find no such error. Consequently, the appeal is without merits and is, therefore, dismissed."

C. The Division Bench of **Bombay High Court** in the case of **Commissioner of Income Tax-II, Pune Vs.**

PTC Software (I)(P) Ltd. [2017] 395 ITR 176 (Bombay) again reiterated similar position with reference to various comparables with regard to one of the comparables, **M/s. KALS Information Solutions Limited** whose case was in the appeals before us as well, held that that if there is a functionality difference between the two comparables and the Tribunal was justified in excluding the same on the challenge being raised by the assessee and such findings of Tribunal are findings of fact which do not give rise to any substantial question of law.

The relevant portion of the aforesaid judgment is quoted below for ready reference.

> *"Re-Question (ii)*
> *(a) M/s. KALS Information Solutions Ltd. (KALS Ltd.) and Helios & Matheson Information Technology Ltd. (Helios & Matheson Ltd.) were included by the TPO in his comparability analysis. The grievance of*

the respondent assessee before the Tribunal was that both are functionally different from the respondent assessee and, therefore, could not be used as comparables. The respondent assessee pointed out that KALS Ltd and Helios & Matheson Ltd. are engaged in the business of selling of software products while the respondent assessee renders software services to its holding company.

(b) The Tribunal in the impugned order records that for the preceding assessment year i.e. A.Y. 2006-07, the TPO had found that ***KALS Ltd. and Helios & Matheson Ltd. were functionally not comparable with the respondent assessee.*** *In the subject assessment year also, on the basis of Annual Report, it was noted that the KALS was engaged in selling of software products which is different from the activity undertaken by the respondent assessee, namely, rendering of software service to its holding company. Further, the impugned order also records that no attempt was even made by the Revenue before it to bring on record any change in the*

nature of activities carried out by KALS Ltd. and Helios & Matheson Ltd. in the subject assessment year, making them functionally comparable to the respondent assessee. In the aforesaid facts, the Tribunal rendered a finding of fact that KALS Ltd. and Helios & Matheson Ltd. are not comparable with the respondent assessee.

Even before us, no submissions were advanced justifying the order of the Assessing Officer that the services rendered by KALS Ltd. and Helios & Matheson Ltd. are comparable for the subject assessment year with that of the respondent assessee.

In the above view, as the findings of the Tribunal being one of the fact which has not been shown to be perverse, ***the question as proposed does not give rise to any substantial question of law.*** *Thus, not entertained."*

52. There are several such judgments from different High Courts which were cited at the bar, but there is no need to multiply them here, as in essence the ratio of all these judgments is similar with the view which we have taken above, viz. that unless a perversity in the findings of fact in this regard is established before the High Court, no substantial question of law arises for consideration under Section 260-A of the Act.

Need to give an early quietus and to the findings of fact by the Tribunal in the realm of International Taxation.

53. The huge quantum of borderless Trade and International Transactions earning lot of Foreign Exchange and revenues for India through international Corporates and Trade with them has a big interface with the Dispute Resolution of such cases in the Tax Administration Department as well as the Judiciary.

54. The procedure of assessment under **Chapter X** relating to international transactions as indicated above is already a lengthy one and involves multiple Authorities of the Department. A huge, cumbersome and tenacious exercise of Transfer Pricing Analysis has to be undertaken by the Corporate Entities who have to comply with the various provisions of the Act and Rules with a huge Data Bank and in the first instance they have to satisfy that the profits or the income from transactions declared by them is at '**Arm's length'** which analysis is invariably put to test and inquiry by the Authorities of the Department and through the process of **Transfer Pricing Officer (TPO)** and **Dispute Resolution Panel (DRP)** and the **Tribunal** at various stages, the assessee has a cumbersome task of compliance and it has to satisfy the Authorities that what has been declared by them is true and fair disclosure and much of the Transfer Pricing

Adjustments is not required but the Tax Authorities have their own view on the other side and the effort on the part of the Tax Revenue Authorities is always to extract more and more revenue. This process of making huge Transfer Pricing Adjustments results in multi-layer litigation at multiple Fora. After the lengthy process of the same, the matter reaches the Tribunal which also takes its own time to decide such appeals. In the course of this dispute resolution, much has already been lost in the form of time, man-hours and money, besides giving an adverse picture of the sluggish Dispute Resolution process through these channels. If appeals under **Section 260-A** of the Act were to be lightly entertained by High Court against the findings of the Tribunal, without putting it to a strict scrutiny of the existence of the substantial questions of law, it is likely to open the flood-gates for this litigation to spill over on the dockets of the High Courts and up to the

Supreme Court, where such further delay may further cause serious damage to the demand of expeditious judicial dispensation in such cases.

Conclusion:

55. A substantial quantum of international trade and transactions depends upon the fair and quick judicial dispensation in such cases. Had it been a case of substantial question of interpretation of provisions of Double Taxation Avoidance Treaties (DTAA), interpretation of provisions of the Income Tax Act or Overriding Effect of the Treaties over the Domestic Legislations or the questions like Treaty Shopping, Base Erosion and Profit Shifting (BEPS), Transfer of Shares in Tax Havens (like in the case of Vodafone etc.), if based on relevant facts, such substantial questions of law could be raised before the High Court under **Section 260-A** of the Act, the Courts could have

embarked upon such exercise of framing and answering such substantial question of law. On the other hand, the appeals of the present tenor as to whether the comparables have been rightly picked up or not, Filters for arriving at the correct list of comparables have been rightly applied or not, do not in our considered opinion, give rise to any substantial question of law.

56. We are therefore of the considered opinion that the present appeals filed by the Revenue do not give rise to any substantial question of law and the suggested substantial questions of law do not meet the requirements of **Section 260-A** of the Act and thus the appeals filed by the Revenue are found to be devoid of merit and the same are liable to be dismissed.

57. We make it clear that the same yardsticks and parameters will have to be applied, even if such appeals are filed by the Assessees, because, there may

be cases where the Tribunal giving its own reasons and findings has found certain comparables to be good comparables to arrive at an **'Arm's Length Price**' in the case of the assessees with which the assessees may not be satisfied and have filed such appeals before this Court. Therefore we clarify that mere dissatisfaction with the findings of facts arrived at by the learned Tribunal is not at all a sufficient reason to invoke **Section 260-A** of the Act before this Court.

58. The appeals filed by the Revenue are therefore dismissed with no order as to costs.

Sd/-
JUDGE

Sd/-
JUDGE

BMV*