

Supreme Court Decision in the case of SAP Labs India Private Limited

*By Ashutosh Mahajan**

1. Recently, Hon'ble Supreme Court of India (SC) in the case of SAP Labs India Pvt. Ltd. (Civil Appeal Number 8463 of 2022, along with a bunch of other civil appeals totalling 142 in number) has held as under:
 - a) Any determination of Arm's Length Price (ALP) under Chapter X of the Income-tax Act (Act) de hors the relevant provisions of transfer pricing guidelines, can be considered as perverse and it may be considered as a substantial question of law as perversity itself can be said to be a substantial question of law. Therefore, there cannot be any absolute proposition of law that in all cases where the Tribunal has determined the ALP the same is final and cannot be the subject matter of scrutiny by the High Court (HC) in an appeal under section 260A of the Act.
 - b) When the determination of the ALP is challenged before the HC, it is always open for the HC to consider and examine whether the ALP has been determined while taking into consideration the relevant guidelines under the Act and the Rules.
 - c) Even the HC can also examine the question of comparability of two companies or selection of filters and examine whether the same is done judicially and on the basis of the relevant material/evidence on record. The HC can also examine whether the comparable transactions have been taken into consideration properly or not i.e. to the extent non-comparable transactions are considered as comparable transactions or not.
 - d) Therefore, the view taken by the Karnataka High Court in the case of Softbrands India (P.) Ltd. (406 ITR 513) that in the transfer pricing matters, the determination of ALP by the Tribunal is final and cannot be subject matter of scrutiny by HC u/s 260A of the Act, cannot be accepted.
 - e) Thus, in each case, the HC should examine whether the guidelines laid down in the Act and the Rules are followed while determining the ALP.
2. Orders passed by the HC dismissing the Revenue's appeals and the appeals preferred by assesseees were quashed by SC and set aside. All the matters were remitted back to the concerned HCs with a direction to decide and dispose of respective appeals afresh in the light of observations made in the judgement, and to examine in each and every case whether the guidelines laid down under the Act and Rules, are followed while determining the ALP by Tribunal or not and, whether the findings by Tribunal while determining the ALP are perverse or not?
3. It must be noted that in the cases under appeal, it was vehemently argued on behalf of the assessee that transfer pricing issues decided by the Tribunal are questions of fact and as perversity is neither pleaded nor argued nor demonstrated by placing material to that effect, no substantial question of law arises for consideration u/s 260A of the Act.

Further, in all cases, the HC has found that there is no perversity by Tribunal in determining ALP and therefore, no substantial question of law arises.

4. In our view, both Revenue and the assessee were on the same page on position that order of the Tribunal can be a subject matter of scrutiny by HC in an appeal u/s 260A of the Act in case finding of facts by the Tribunal are perverse.

However, the questions to be decided were i) whether HC should suo moto examine in each and every case that guidelines laid down under the Act, and the Rules have been followed by the Tribunal in determining the ALP? and ii) whether HC should suo moto examine the facts in all the cases to find out perversity even if not so pleaded & argued?

From the decision of the SC and the directions issued, it appears that SC has answered both the questions in affirmative and against the assessee.

5. Apart from the cases expressly covered in this judgment, the ratio of the judgement will also apply to all other cases pending in various HCs where appeals have been preferred to HC u/s 260A of the Act challenging the ALP.
6. It would be an interesting question to ask whether the ratio of this judgement will apply only to cases related to determination of ALP under transfer pricing laws or to other non-transfer pricing cases as well? Guidelines laid down under the Act and the Rules are not necessarily restricted to transfer pricing provisions, and questions of fact and/or law can always be raised under other non-transfer pricing provisions!
7. What would happen in cases of determination of ALP where questions of fact have become final in various Tribunals and Revenue has not preferred any appeal against it? Whether we will see Revenue rushing to HCs with appeals u/s 260A and asking condonation of delays in those cases?
8. In nutshell, with this decision, tax litigation is going to go up substantially especially in transfer pricing matters. Tax Payers may explore alternate mechanisms available like MAP and APA to sort out disputes, and potential disputes. With assessees winning transfer pricing disputes in Tribunals overwhelmingly, the judgement may appear harsh on the assessees, however, Hon'ble Supreme Court having weighed in favour of judicial supervision of Tribunal decisions, appears to have something to do with the subject as imperfect as 'determination of ALP' which is often called an art, rather than a science.

**Ashutosh Mahajan is the Managing Partner at TeamLogic LLP and views are personal.*