



Transfer Pricing Cases can be taken up by High Court when it can be proved that a matter of fact gives rise to a question of law [Sec 92C of ITA'61 – Sec 165 of ITA'25]



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ALP determination is an art and not a science. Transfer Pricing exercise is a valuation exercise. The question thus arises whether a Transfer Pricing case can be referred to the High Court. The answer is that if the arm's length price is determined by the Tribunal dehors the guidelines stipulated under the Act and the Rules, more particularly Rules 10A to 10E of the Rules, the determination can be said to be perverse which is always subject to the scrutiny by the High Court in an appeal under Section 260A of the Act. However, the perversity has to be demonstrated and pleaded with material on record, as has been held in the case of *Vijay Kumar Talwar v. CIT*, (2011) 1 SCC 673 and *Sir Chunilal V. Mehta and Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd.*, reported in AIR 1962 SC 1314

In every writ under Article 226 of The Constitution of India, a question of law has to be framed. A finding of fact may give rise to a substantial question of law, in the event the findings are based on

- (i) no evidence; and/or
- (ii) while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration; or
- (iii) legal principles have not been applied in appreciating the evidence; or
- (iv) when the evidence has been misread.

The questions of law in TP Cases can be –

- (i) where the issue relates to whether at all a transaction falls within the definition of 'international transaction'
- (ii) whether two enterprises are 'associated enterprises' as per the definition under the IT Act.

However the following are matters of facts –

- (i) The question of comparability of two companies or selection of filters.
- (ii) View taken on the basis of the particular set of facts in one case as different from another case
- (iii) Benchmarking of controlled transactions with uncontrolled transactions

Hence it was held by The Apex Court in the case of SAP LABS INDIA PRIVATE LIMITED Vs INCOME TAX OFFICER, CIRCLE 6, BANGALORE [2023-VIL-11-SC-DT] that High Court's have to examine whether in each case while determining the arm's length price the guidelines laid down under the Act and the Rules, are followed or not and whether the findings recorded by the Tribunal while determining the arm's length price are perverse or not. To this extent the TP matters can be taken up in High Court. Counsel's and taxpayers may thus take up matters accordingly, even before the Tribunal Stage so that incase of adverse ITAT judgement, the matter of law can be taken up at the High Court Level. The Department too is taking note!

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