*   **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Order : 16.04.2019

Review Pet. 360/2018 in
\+ ITA 461/2017
M/s. MCKINSEY KNOWLEDGE CENTRE INDIA PVT. LTD.
..... Appellant
Versus
PR. COMMISSIONER OF INCOME TAX, DELHI-6
..... Respondent

Review Pet. 359/2018 in
\+ ITA 526/2017
M/s. MCKINSEY KNOWLEDGE CENTRE INDIA PVT. LTD.
..... Appellant
Versus
PR. COMMISSIONER OF INCOME TAX, DELHI-6
..... Respondent

Counsel for the petitioner:
Mr. Porus Kaka, Sr. Adv. with Mr. Divesh Chawla, Mr. Harpreet Singh Ajmani and Mr. Sheel Vardhan, Advs. for the appellant.

Counsel for the respondent:
Ms. Vibhooti Malhotra, Mr. Ruchir Bhatia and Mr. Sachin Yadav, Advs. for respondent.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA
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S. RAVINDRA BHAT, J.

1. The appellant preferred this review petition urging that the final judgment rendered under Section 260A of the Income Tax Act contains errors apparent on the face of the record.

2. The question of law framed by this Court was with respect to exclusion of relative comparables held to be relevant for the purpose of ALP determinations. The assessee was involved in IT enabled services

which the judgment noticed was broadly categorised into a) Research and Information Services Division and b) IT Support Services Division. It had challenged the ITAT's order of 15.12.2016 for AY 2011-12. The Revenue had challenged the ITAT's order for the same year, by which the assessee's appeal was partly allowed and the exclusion of 4 comparables were excluded from consideration. The other two questions which this Court answered were in favour of the assessee and against the Revenue in ITA 590/2017 and ITA 82/2018. No review is sought in respect of that part of the judgment.

3. The main grounds on which the assessee seeks review are firstly that the question of charging interest on delayed receipt of receivables is a separate international transaction under Explanation to Section 92B of the Act which was inapplicable as it was introduced for the period 2013-14 onwards. It is also pointed out that this question was never framed by the court in the earlier order and in fact on 07.02.2018 when the question was framed, the assessee was involved in knowledge management system. This Court had referred to the decision in *Pr. Commissioner of Income Tax v Kusum Health Care Pvt. Ltd.* (2017) 398 ITR 66 (Del).

4. The second ground urged is that the finding that the nature of services provided by the review petitioner are specialized and therefore the services provided akin to that of KPO is erroneous. On this aspect, it is submitted that for the previous year 2006-07, in ITA No. 217/2014, the court had by an order dated 27.03.2015 approved that the nature of the assessee's services were back-office operations akin to a BPO. It is furthermore urged that not all material brought on record was considered. The learned counsel pointed out that the services related to knowledge management system and infrastructure form part of the IT Support segment

which has been benchmarked separately. It is also urged that the judgment is erroneous inasmuch as it did not consider the effect of the decision in *Ameriprise India Pvt. Ltd. v Additional Commissioner of Income Tax* (2016) 66 Taxmann.com 246.

5. On the other hand, the court relied upon the Special Bench decision in *Maersk Global Centres (India) Pvt. Ltd. v Additional Commissioner of Income Tax* [2014] 161 TTJ 137. It is argued that the Special Bench decision was disagreed with by this Court in *Rampgreen Solutions Pvt. Ltd. v Commissioner of Income Tax* 2015 SCC OnLine Del 11310.

6. Learned counsel for the Revenue objected to the maintainability of the review petition firstly arguing that the assessee had approached the Supreme Court, which had rejected its petition. Counsel argued that in such circumstances, the decision in *Khoday Distilleries Ltd. (Now Known as Khoday India Limited) and Others v Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd., Kollegal (Under Liquidation) Represented by the Liquidator* 2019 SCC OnLine SC 308 is squarely applicable and compares maintainability of the present petition.

7. It is submitted on merits that the grounds urged for review are not tenable because this Court considered the merits of the submissions of both the parties and delivered a reasoned judgment.

8. On the first the question of maintainability, in *Khoday India Ltd (supra)*, the Supreme Court held as follows:

> *"40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being a defective presentation, (iii) the petitioner having no*

locus standi to file the petition, (iv) the conduct of the petitioner disentitling him to any indulgence by the court, (iv) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the Apex Court of the country and so on. The expression often employed by this Court while disposing of such petitions are — "heard and dismissed", "dismissed", "dismissed as barred by time" and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the petition. The Court may apply its mind to the merit worthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say "dismissed on merits". Such an order may be passed even ex parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. In our opinion neither doctrine of merger nor Article 141 *of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 CPC or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47 Rule 1 CPC act as guidelines) are not necessarily the same on which this Court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of a special leave petition does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject-matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting*

> *the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger."*

It is evident that the above observation is applicable in the present case, because the rejection of the special leave petition by a non-speaking order, did not preclude the maintainability of the present writ petition.

9. As far as the first argument by the review petitioner, i.e., the answer to the question of bringing to tax the interest amounts goes, this Court is of the opinion that the fact that the order of 07.02.2018 referred to *Kusum Health Care* had expressly remitted the matter for consideration to the ITAT supports the assessee's submission. All that the court had stated on 07.02.2018 was that the matter required re-examination by the ITAT in the light of the *Kusum Health Care (supra)*. For these reasons, the judgment to the extent it deals with adjustments made by the TPO, and regarding interest on delayed receipt of receivables, is a clear error. The court also furthermore notes the submissions made with respect to inapplicability to Explanation of Section 92B and its prospective operation. As the order of 07.02.2018 reserved by contentions, this Court does not propose to disturb

the effect of that matter. The matter will be considered by the ITAT on its own merits.

10. With respect to the main submission regarding the error on the question framed, i.e., exclusion of comparables and whether the assessee rendered services were akin to that of KPO rather than a BPO as was contended, here too the court is of the opinion that two clear errors have crept into the judgment. The reliance on *Maersk Global (supra)* was clearly an error in view of the submission that *Rampgreen (supra)* had disagreed with the view of the Special Bench. Furthermore, the court also overlooked the judgment dated 27.03.2015 in the assessee's case (ITA No.217/2014). Lastly, the Court also is of the opinion that the assessee's argument with respect to separate benchmarking of the knowledge management system, as part of the IT Support segment, is an aspect that requires examination.

11. In *Rampgreen (supra),* this Court's view was as follows:

> *"34. We have reservations as to the Tribunal's aforesaid view in Maersk Global Centres (India) Pvt. Ltd. (supra). As indicated above, the expression 'BPO' and 'KPO' are, plainly, understood in the sense that whereas, BPO does IT(TP)A No.85/B/16 not necessarily involve advanced skills and knowledge; KPO, on the other hand, would involve employment of advanced skills and knowledge for providing services. Thus, the expression `KPO' in common parlance is used to indicate an ITeS provider providing a completely different nature of service than any other BPO service provider. A KPO service provider would also be functionally different from other BPO service providers, inasmuch as the responsibilities undertaken, the activities performed, the quality of resources employed would be materially different. In the circumstances, we are unable to agree that broadly ITeS sector can be used for selecting comparables*

> *without making a conscious selection as to the quality and nature of the content of services. Rule 10B(2)(a) of the Income Tax Rules, 1962 mandates that the comparability of controlled and uncontrolled transactions be judged with reference to service/ product characteristics. This factor cannot be undermined by using a broad classification of ITeS which takes within its fold various types of services with completely different content and value. Thus, where the tested party is not a KPO service provider, an entity rendering KPO services cannot be considered as a comparable for the purposes of Transfer Pricing analysis."*

The judgment sought to be reviewed, clearly is at variance; the view in *Rampgreen (supra)* about the soundness of *Maersk Global (supra)* was doubted- as aspect that escaped the main judgment in this case.

12. For the above reasons, this Court is of the opinion that the main judgment contains errors apparent on the record. The review petition has to be and accordingly allowed; judgment dated 09.08.2018 is hereby recalled. The appeal is restored to original file of this Court and shall be heard on its merits.

13. ITA 461/2017 and 526/2017 shall be listed on 29.07.2019 for hearing.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

APRIL 16, 2019
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