IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH : 'H' NEW DELHI)
BEFORE SHRI A.D. JAIN , JUDICIAL MEMBER AND
SHRI K.D. RANJAN, ACCOUNTANT MEMBER

I.T.A. No.3991/Del./2010
(Assessment Year : 2006-07)

ITO, Ward 16(3), New Delhi.	**Vs.**	**Tianjin Tianshi India Pvt. Ltd., 10, Community Centre, Basant Lok, Vasant Vihar, New Delhi. (PAN/GIR No.AABCT5611J)**
(Appellant)		**(Respondent)**

Assessee by : Sh. B. Prathap, CA
Revenue by : Ms. Reena S. Puri, CIT(DR)

ORDER

PER A.D. JAIN, JM

This is department's appeal for AY 2006-07, against the order dated 29.6.2010 passed by the CIT(A). The following grounds have been taken:

> "The Ld.CIT(A) has erred on facts and in law by deleting addition of ₹2,78,76,273 on account of adjustment in Arm's Length Price Computation determined by TPO on the ground that, the transactions between the assessee company and its non-resident Associate Enterprises, had originated and had taken place inside India and were therefore not covered under the Transfer Pricing Provisions, ignoring that:
>
> i) The products sold to the assessee by the Non Resident Associate Enterprise were imported by it from its own head office in China besides from other related and unrelated parties.
>
> ii) The business activities of the branch office of the non-resident Associate Enterprises in India cannot be said to be entirely independent of the policies, decisions and influences of its head office in China."

2. The assessee company is a domestic company having residential status as resident. It is one of the group companies of TIENS, a Chinese group of companies. It is in the business of trading/distribution of food supplements and health care equipment. The concerned products are manufactured abroad, in China, or at other places, by a group concern of the

assessee, including Tianjin Tianshi Biological Development Company Ltd. ('TTBDC', for short). TTBDC has established a Permanent Establishment (PE) in India.

3. During the year, the assessee company made purchase transactions of ₹174972636 from the PE of TTBDC. The AO made a reference to the Transfer Pricing officer (TPO) for determination of Arm's Length Price u/s 92CA(3) of the I.T. Act in respect of these purchase transactions. The TPO, vide his order dated 01.04.2009, directed the AO to reduce ₹9137476 from the purchase prices paid to the Associate Enterprise (AE) in respect of the Health Equipment Segment and ₹18738797 from the price paid to the (AE), concerning the Food Supplements Segment. As such, the total purchases of the assessee were to be revised to ₹27876273, keeping in consideration, the Arm's Length Price.

4. The AO, vide order dated 22.05.2009, reduced the sum of ₹27876273 from the total purchase price of ₹174972636 paid by the assessee to the AE. While doing so, it was observed that since the contention of the assessee had already been considered by the TPO, the same was being rejected.

5. The CIT(A), by virtue of the impugned order, allowing the assessee's appeal, deleted the adjustment for computation of ALP as determined by the TPO and applied by the AO.

6. Aggrieved, the department is in appeal.

7. The Ld.DR has contended that the CIT(A) has erred in deleting the addition of ₹27876273 made on account of adjustment in computation of ALP determined by the TPO; that the CIT(A) has gone wrong in observing that the transactions between the assessee company and its Non Resident Associate Enterprise had originated and taken place within India and so, they were not covered under the Transfer Pricing provisions; that while doing so, the CIT(A) erred in ignoring that the products sold to the assessee by its AE were imported by it from its own Head Office in China and from other related parties; and that it has wrongly been ignored that the business activities of the PE of the AE in India cannot be said to be entirely independent of the

policies, decisions and influences of its Head Office in China. It has been argued that the PE is neither a "person" within the meaning of section 2(31) of the Act, nor a "resident company" under the provisions of section 6(3) of the Act; that it is a foreign company, admittedly taxed at differential rates. It has been pleaded that section 92F(iii) of the Act defines "Enterprise" to mean a person who is, or has been, or is proposed to be, engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or know-how, patents, rates, trade marks, licenses, franchises, enterprises. It has been argued that in the present case, the PE is not a resident. It has been stressed that in view of these specific provisions of Transfer Pricing, the CIT(A) has erred in deleting the addition correctly made by the AO; that the transactions under consideration being international transactions between Associated Enterprises [S.92B(i)] they were required to be at ALP. It has been argued that the CIT(A) has erred on observing that the provisions of Chapter X of the I.T. Act are not applicable to the transactions involved herein, as the transactions involved are not cross border transactions since both, the seller as well as the purchaser are subjected to Indian tax jurisdiction; that remarkably, the CIT(A) has himself observed existence of an AE and a foreign company in the status of non-resident to be the basic conditions requisite to invoke the provisions of transfer pricing; that still, the addition has been deleted, despite the applicability of the above specific provisions; that the CIT(A) has erred in observing that the legislative intent behind the enactment of section 92B, which defines "international transaction", is to see "profit motive"; that this is erroneous, the intention of the legislature is to be seen only where the there is an ambiguity in the provision as held in effect, "Instrumentarium , In re", 272 ITR 499 (AAR); that in the case at hand there was no requirement to go to the intention of the legislature behind the enactment of section 92B of the Act, since the provisions of the said section are amply clear and there is no ambiguity therein; that here, the PE is a part of the foreign enterprise; that the concerned transactions were with another Associated Enterprises; that so, the transfer pricing provisions are squarely attracted, irrespective of the fact that the entity making the sales to the assessee was subjected to taxes in India; that the CIT(A) has erred in placing reliance on "DCIT vs. Indo-

American Jewelry" a decision of the Mumbai Bench of the Tribunal; that as per the provisions of section 92(3), the provisions of section 92 shall not apply where the computation of income, or the determination of the allowance for any expense or interest, or the determination of any cost or expense allocated or apportioned, or contributed, as the effect of reducing the income chargeable to tax or increasing the loss, computed on the basis of entries made in the books of account in respect of the previous year in which the international transaction was entered into; that these provisions have not been taken into consideration by the CIT(A) while passing the impugned order; that in 'Instrumentatium Corporation, In re', 143 Taxman 01, (AAR – N. Delhi) (copy placed on record), the AO is enjoined to work out the arm's length price as per section 92(1) and 92(2), following the method given in section 92C of the Act; that it is only if the AO comes to the conclusion that the interest of revenue would be better served by not applying the sections 92(1) & 92(2) of the Act, that the AO will take recourse to section 92(3); that the order under appeal has been passed in oblivion of this settled position; and that therefore, order under appeal requires to be set aside and that of the AO needs to be revived, which be ordered to be done while allowing the appeal filed by the department.

8. The Ld.Counsel for the assessee, on the other hand, has placed strong reliance on the impugned order. It has been contended that since the purchase transactions in question were made by the assessee with an Associate Enterprise in India since these transactions have been subject to transfer pricing scrutiny for computation of arm's length price, the said purchase transactions have to be inferred to have been made at prices higher than arm's length prices; that the AE with which the purchase transactions have been made by the assessee, is the Indian branch office of TTBDC; that the said AE is a permanent establishment of TTBDC in India; that it is a full-fledged establishment functioning in India and maintaining separate books of account; that it is independently assessed to income tax in India, for profits attributable to its functioning in India; that it has a PAN and is assessed in the jurisdiction of the DDIT, International Taxation, Circle 2(2), New Delhi; that the AE imported goods from its head office at China and from various other AEs in China and in other countries, besides from certain other non related

parties abroad; that these imports were regular commercial transactions, having proper commercial invoices raised in the name of the AE in India; that import duty payments with regard to such imports were made in India; that the delivery was made in the name of the AE in India; that the absolute title to the goods passed in the name of the AE in India; that it was after such import that the AE sold the goods to the assessee company; that this sale, obviously, originated in India, having separate sale invoices; that such sales were the regular commercial transactions, attracting sales-tax, VAT and other regulations; that therefore, there was no cross border transaction involved in such sale; that further more, AE was put to independent transfer pricing scrutiny for the imports made by it from its head office at China and other AEs abroad; that the AE is assessed in India, in the status of a foreign company; that it is chargeable to income-tax in India at a higher rate of tax; that no shifting of profits outside India or erosion of taxes in India is involved, that there is even no motive to shift profits or to evade tax in India in the concerned transaction; that in a transaction between two entities happening wholly in India, there will be no way of transferring profit outside India or shifting profits outside India, as held in 'Philips Softwre Centre Pvt. Ltd.', 26 SOT 226(Bang.); that in the present case, the related party transactions are with an assessee who is a higher rate taxpayer in India; that that being so, transfer pricing provisions do not apply; that the requirement for the AO to compute the total income with the ALP determined by the TPO is only for procedural support and it obviates the need for the AO to make ALP computation; that the transfer pricing requires to curtail diversion of profits outside India and tax erosion in India, neither of which is the case herein; that as held by the ITAT, Mumbai Bench, in 'Dresdner Bank AG vs. ACIT', transfer pricing provision only provide that income from international transaction is to be computed at arm's length price and there is no introduction of any new income; that in the present case, there is no cross border transaction involved and so, the provisions of Chapter X of the I.T. Act do not get attracted; that the entity making the sales to the assessee is located in India through its PE and is subject to sales-tax/VAT and other taxes; that the invoices concerning the sales were duly furnished; that they establish that the sales were made subject to sales-tax/VAT; that the assessee did not make

any direct transactions with the head office of the AE at China; that the assessee has not been attributed with any motive to shift profits outside India or to evade taxes in India; and that in these facts and circumstances, there being no error whatsoever in the order of the CIT(A), the same be maintained by dismissing the appeal filed by the department.

9. We have heard the parties and have perused the material on record. The question here is as to whether CIT(A) has correctly held the provisions of Chapter X of the Income Tax Act, relating to transfer pricing, to be not applicable. Undisputedly, the facts are that the assessee is a domestic company, having status of "resident". It is one of the group companies of the China based TIENS group of companies. It trades/distributes food supplements and health care equipment manufactured in China and at other places, by group concerns. TTBDC, another group entity incorporated in China, has established a foreign branch office in India, having status of "non-resident". This is the Permanent Establishment of TTBDC in India. This PE of TTBDC, Associate Enterprise of the assessee company. The PE imports products from its head office in China and from other AEs in China and other places. These products are resold to the assessee company in India. The assessee company, in turn, sells these products in India through a network of franchises and distributors. On the purchases made by the PE from abroad, import duty is paid. The products come into India in the absolute title and name of the PE. The PE, being a foreign company, is taxed at higher rate than that charged from domestic company.

10. The assessee contends that the sale by the PE to the assessee originates from India under Indian Laws and Regulations and that such transactions do not fall within the ambit of transfer pricing, despite the existence of section 92B in the Income Tax Act.

11. The CIT(A), while holding in favour of the assessee, has held that since:

(i) There are no cross border transactions involved,

(ii) The entity making sales to the assessee is located in India through its PE and is subject to sales-tax/VAT,

These transactions cannot be called cross border transactions, both the seller and the assessee – purchaser being subject to Indian Tax jurisdiction.

12. It has further been held that the assessee did not make any transaction directly with the head office of the AE, with its own head office at China and other AEs abroad fall within the ambit of transfer pricing; that the PE has been put to independent transfer pricing scrutiny and, if any, TP adjustment was called for, the same should have been in the case of the PE and not that of the assessee company; and that the AO has not recorded any finding of any motive of the assessee to either shift profits outside India or to evade taxes in India, in the related party transactions.

13. Section 92B of the Act defines 'international transaction'. This section reads as follows:

> 92B (1)For the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or apportionment of, or any contribution to, any cost or expense incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises.

14. It is thus clear that an international transaction within the meaning of section 92B(1) involves two or more associated enterprises. Any or all of these associate enterprises need be non-resident. This is the primary condition attracting applicability of section 92B(1) of the Act. So, as in the present case, where a transaction is entered into by AEs being a resident and a non-resident, the transaction shall amount to an international transaction falling u/s 92B(1) of the Act. In other words, where either or both of the AEs are non-resident, would amount to an international transaction within the meaning of section 92B(1) of the Act. That being so, it does not matter that the transactions in question are not 'cross border transactions' as envisaged by CIT(A). The AE is a non-resident company. As such, the requirement of section 92B(1) is amply met and the transactions concerned are international transactions within the meaning of the said section. Therefore, the CIT(A) has erred in holding that Chapter X of the Act is not invokable.

15. The finding of the CIT(A) to the effect that no motive to shift the profits outside India or to evade taxes in India, in the related party transactions

which has been ascribed by the AO, is also not determinative. To reiterate, once the transactions fall under the category of international transactions within the meaning of section 92B(1) of the Act, the transfer pricing mechanism does get activated and it has rightly been set into motion in the present case. In this regard, section 92(1) of the Act provides as under:

> 92(1) Any income arising from an international transaction shall be computed having regard to the arm's length price.

The word implied in section 92(1) is 'shall' carries on a mandate for the taxing authority. Once there is an international transaction, the income arising therefrom has to be computed in accordance with section 92(1) of the Act.

16. It is pertinent to point out here that the quantification under the transfer pricing provisions, as has been done by the AO, determining the assessed income of the assessee at ₹19180579, by making an addition of ₹27876273, on account of arm's length price, had not been challenged by the assessee. The issue before us, to reiterate, is only whether the CIT(A) has correctly held the transfer pricing provisions to be not applicable hereto.

17. As such, neither of the case laws sought to be relied on by the assessee, are applicable.

18. In view of the above discussion, we hold that :

(i) the CIT(A) has erred in observing that since no cross border transaction is involved, the transfer pricing provisions are not attracted. Once the transactions involved are international transactions within the meaning of section 92B(1) of the Act, the Transfer Pricing Provisions have rightly been involved.

(ii) In view of the clear provisions of sections 92B(1) and section 92(1), there is no requirement to prove any motive to shift profits outside India or to evade taxes in India in the related party transactions and the CIT(A) has also erred in placing reliance on the fact that no such finding was recorded by the AO. 'DCIT vs. Indo-American Jewellery' (I.T.A. No.6194/Mum./2008 for assessment year 2004-05) has no application to the present case, as herein, the issue is as to whether the transfer pricing provisions have been rightly held

to be not applicable. This evidently was not the dispute in 'Indo-American Jewellery'(supra).

19. For the above discussion, the grievance of the department is found to be justified and accepted as such.

20. In the result, the appeal of the department is allowed.

Order pronounced in open court on 27/05/2011.

Sd/-	Sd/-
(K.D. RANJAN)	**(A.D. JAIN)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated, 27/05/2011.
SKB
Copy forwarded to: -

1. **Appellant**
2. **Respondent**
3. **CIT**
4. **CIT(A)-XX, New Delhi.**
5. **DR, ITAT**

Deputy Registrar,
ITAT, Delhi Benches