

**IN THE HIGH COURT OF JUDICATURE AT MADRAS
(Ordinary Original Civil Jurisdiction)**

IN APPEAL NO. _____ OF 2014

IN THE MATTER OF:
The Income-tax Act, 1961

And

IN THE MATTER OF:
Section 260A of the Income-tax Act, 1961

And

IN THE MATTER OF:
Order dated 24th October, 2014 by the
Income-tax Appellate Tribunal, Chennai,
for the assessment year 2009-10.

Commissioner of Income Tax ... Appellant

Versus

M/s. Global Appliances Inc. USA ... Respondent

MEMORANDUM OF APPEAL

The Appellant prefers this Appeal against the order dated 24th October, 2014 passed by the Income-tax Appellate Tribunal (hereinafter referred to as “**the Tribunal**”) for the assessment year 2009-10.

I. Statement of facts:

1. The Respondent, Global Appliances Inc.USA, is a company incorporated and registered in the United States.
2. The Respondent has a wholly owned subsidiary in India viz. **Global Appliances Pvt. Ltd.** (hereinafter referred to as “**GA Pvt. Ltd**”), which is a company registered under the Companies Act,1956 engaged in the business of manufacturing household appliances and has accumulated a huge net-worth. The Respondent is holding 10,00,00,000 shares in this company which were subscribed at the face value of Rs.10 each.
3. On 1st April, 2004, the Respondent incorporated another wholly-owned subsidiary company **Global Appliances Company UK** (hereinafter referred to as “**GA UK**”), in United Kingdom. On 15th May, 2004, GA UK further incorporated another step down wholly-owned subsidiary company **Global Appliances Mauritius Pvt. Ltd.** (hereinafter referred to as “**GA Mauritius**”), in Mauritius. On 1st June, 2004, GA Mauritius further incorporated another step down wholly-owned subsidiary in India viz. **Global Appliances & Services Pvt. Ltd.** (hereinafter referred to as “**GA & Services Pvt. Ltd**”). GA & Services Pvt. Ltd profitably carried on business for few years and accumulated net worth.

4. On 20th September, 2008, upon sanctioning of scheme of amalgamation by the High Court, GA & Services Pvt. Ltd. got amalgamated with GA Pvt. Ltd. forming Amalgamated Global Appliances Pvt. Ltd. (hereinafter referred to as “**Amalgamated GA Pvt. Ltd.**”)
5. GA Mauritius was holding 1,00,00,000 shares of GA & Services Pvt. Ltd. which it has subscribed at a face value of Rs.10 per share. In lieu of the shares so held by the GA Mauritius in GA & Services Pvt. Ltd., it was offered 15,00,00,000 shares of the amalgamated company, at a face value of Rs.10 each.
6. Thereafter, the shares of Amalgamated GA Pvt. Ltd. held by Global Appliances Mauritius were subsequently transferred to **Universal Appliances Public Limited Company** at a price of Rs.5,500 per share.
7. The Respondent filed its return of income in India for A.Y. 2009-10 on 30.11.2010. In such return, it declared a total income of Rs.150,78,50,000 on account of its income from the Permanent Establishment in India. The Respondent also had other international transactions with its Associated Enterprise.
8. During the course of the assessment, the Assessing Officer (**AO**) made a reference to the Transfer Pricing Officer (**TPO**) of the transactions referred in Form 3CEB for computation of arm’s length price of the international transaction as per section 92CA of the Income-tax Act, 1961 (or “**the Act**”).
9. The TPO vide its draft order proposed to make variations to the income of the Respondent. The TPO opined that the Respondent, while giving its consent to the amalgamation of GA Pvt. Ltd. with GA & Services Pvt. Ltd. to form Amalgamated GA Pvt. Ltd. has effectively transferred its voting

power to GA Mauritius without charging any consideration. This transfer of voting power is an international transaction warranting an adjustment as the appellant has not received any consideration from GA Mauritius and accordingly capital gains should also be charged to tax on such extinguishment of voting rights. The TPO, therefore, made an adjustment of Rs. 9,90,00,00,000 to the income of the Respondent.

10. The TPO further held that as the Respondent ought to have received the aforesaid amount from GA Mauritius, the same is to be treated as a loan given by the Respondent to GA Mauritius on which it should have also earned interest @ 10% p.a. Therefore, the TPO made a further upward adjustment on account of notional interest of Rs. 99,00,00,000.
11. The Respondent approached the Dispute Resolution Panel (DRP) u/s 144C of the Act which confirmed the variations proposed in the draft order by the TPO. Consequently, the assessment was completed on the same lines and additions were made to the income of the Respondent.
12. Being aggrieved by the said order, the Respondent filed Appeal before the Tribunal. The Tribunal allowed the appeal holding that:
 - Voting right is not an independent asset de-hors the shares that confer this right and hence capital gain cannot arise in the transaction under examination;
 - Voting right of the Respondent per-se has not reduced. Mere introduction of GA Mauritius as a new shareholder and a consequent reduction in the proportionate voting right held by Respondent in the company, does not effect in transfer of voting right in favor of GA Mauritius;

- Even in the case of independent parties no consideration would be paid by an incoming shareholder to existing shareholders, hence Arm's Length Price in such case should be NIL;
- Indian TP regulations seek to re-compute the income otherwise taxable and while in the present case in the absence of any consideration having been received by the Respondent there was no capital gains otherwise taxable. Further, section 47 grants exemption to gifts of capital assets and in the absence of a consideration the alleged transaction is essentially in the nature of gift;
- Article 9 of the Double Taxation Avoidance Agreement between India-USA applies only to 'profits' (dealt within Article 7, 8 and 14 of the Convention) and does not apply to 'gains' (dealt within Article 13). Indian TP regulations are comparatively unfavorable and hence not applicable in view of section 90(2);
- Section 93 cannot be invoked to tax the capital gains in the hands of the Respondent though such gain actually arose in the hands of GA Mauritius because:
 - The Respondent is a non-resident while this section applies only if the transferor is a resident;
 - The gains in the hands of GA Mauritius did not arise as a consequence of alleged transfer of voting right by the Respondent but on account of actual transfer of shares by GA Mauritius;
 - The Respondent did not get any right resulting in power to enjoy the capital gains arising in the hands of GA Mauritius.

II. Substantial questions of law:

The Appellant submits that the following substantial questions of law arise from the Order of the Tribunal:

(i) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that there was no transfer of a capital asset by the Respondent to GA Mauritius.

(ii) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that transfer pricing provisions of the Act were not applicable in the absence of any consideration.

(iii) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that Arm's Length Price to be NIL on the ground that no consideration can be expected if voting right stands diluted in favor of unrelated party.

(iv) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that Article 9 of India-US treaty prevents adjustment to capital gains.

(v) Whether, on the facts and in the circumstances of the case and in law, the Tribunal was right in holding that section 93 is not applicable.

III. Grounds of Appeal

That the Appellant seeks to challenge the impugned order passed by the Tribunal on the following grounds, inter- alia:-

- A. The amalgamation of GA Pvt. Ltd. and GA & Services Pvt. Ltd. to form Amalgamated GA Pvt. Ltd. and thereby resulting in the transfer of voting power of the Respondent assessee to GA Mauritius is an international transaction in terms of section 92B of the Act read with Explanation (i)(c) appended thereto.
- B. The 'voting right' held by the Respondent assessee is essentially an 'asset', the right of which accrued to the Respondent assessee, by virtue of holding the shares in GA Pvt. Ltd..
- C. The extinguishment of such 'voting rights' by the Respondent assessee would tantamount to 'transfer' in terms of section 2(47) of the Act and would give rise to resultant capital gains in the hands of the Respondent assessee in terms of section 45 of the Act.
- D. The transfer of voting rights by the Respondent assessee to GA Mauritius cannot be construed as a 'gift' so as to fall within the exclusionary provisions of section 47(iii) of the Act.
- E. The non-receipt of consideration by the Respondent assessee on account of transfer of voting rights would result in a loan extended by the

Respondent assessee to GA Mauritius and warrants a transfer pricing addition on account of notional interest @ 10%.

F. The term 'profits' as referred to in Article 9 of the India – US tax treaty would include in its ambit the 'gains' as referred to Article 13 and it would not restrict its application only to Article 7, 8 and 14 of the tax treaty.

G. Section 93 governs all such cases where income arises to a non-resident and therefore not taxable but would have been taxable had the asset resulting in such income not been transferred.

IV. The Appellant reserves the right to alter, modify or amend the grounds of appeal raised hereinabove.

V. The Appellant submits that the Appeal is filed within the time prescribed.

VI. The Appellant states that the Appellant is assessed to tax at Chennai. Thus, this Hon'ble Court has jurisdiction to try, entertain and dispose off the present appeal.

VII. The Appellant states that the Appellant has paid the court fees of Rs.10, 000.

VIII. The Appellant prays that:

- a. This Hon'ble Court may be pleased to admit the present appeal and after considering the aforesaid substantial questions of law to allow the appeal;

- b. This Hon'ble Court may be pleased to set aside the impugned order and direct the Tribunal to decide the appeal afresh after hearing both parties;
- c. For costs of and incidental to this appeal; and
- d. This Hon'ble Court may be pleased to grant such further and other relief as it may deem fit.

Note: The Appeal has been admitted on all the questions and has been fixed for final hearing.