

**INCOME TAX APPELLATE TRIBUNAL  
MUMBAI 'J' BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President)  
and Sandeep S Karhail(Judicial Member)]**

ITA Nos. 125 and 126/Mum/2021  
Assessment Years: 2008-09 and 2010-11

**Deputy Commissioner of Income  
Circle 3 (3)(1), Mumbai. .... Appellant**

**Vs.**

**Reliance Industrial Holdings Pvt Ltd ..... Respondent**  
84, Mittal Court, 224 Nariman Point  
Mumbai 400 021 [PAN: AADCR5883J]

CO Nos 141 and 142/ Mum 2021  
Arising out of ITA Nos. 125 and 126/Mum/2021  
Assessment Years: 2008-09 and 2010-11

**Reliance Industrial Holdings Pvt Ltd .....Cross objector**  
84, Mittal Court, 224 Nariman Point  
Mumbai 400 021 [PAN: AADCR5883J]

**Vs.**

**Deputy Commissioner of Income  
Circle 3 (3)(1), Mumbai. .... Respondent**

**Appearances:**

**Vatsalaa Jha and Chetam MKacha** for the appellant  
**Madhur Agarwal along with Nimesh Vora and Moksha Mehta** for the respondent

Date of concluding the hearing : September 30, 2022  
Date of pronouncement the order : October 31, 2022

**O R D E R**

**Per Pramod Kumar, VP:-**

1. These two sets of appeals and cross-objections pertain to the same assessee, involve some common and interconnected issues, and were heard together. As a matter of convenience, therefore, both the appeals as also both the cross-objections are being disposed of by this consolidated order.

2. As these are the cases of reopened assessments, it is reopening of the assessment which is the foundational aspect of the matter. Grievance against the reasons for reopening the assessment, which is not adjudicated by the learned CIT(A), has been raised by the assessee

in the cross-objections. We, therefore, deem it appropriate to deal with this aspect of the matter first and then, if necessary, deal with the relief granted by the learned CIT(A) on other grounds.

3. The material facts of both cases are common, and the reasons recorded for reopening the assessment are also exactly the same. The reopening was done on the basis of inputs from the investigation wing about the outstanding put options, in respect of which the assessee company is said to have given the guarantee to the ICICI Bank Singapore. The Assessing Office, while recording the reasons for reopening the assessment, formed the view that the assessee and Biomatrix Marketing Pvt Ltd (Biomatrix, in short), on whose behalf the guarantee was said to be given by the assessee, are associated enterprises. The reasons for coming to this conclusion as recorded in the reasons for reopening the assessment, are as follows:

**The relationship between the assessee company (which has provided Bank guarantee to ICICI Bank, Singapore for sanctioning loan to M/s. Biometrix) and M/s. Biomatrix was examined. The books of the assessee company reveal that one Sandeep Tandon (Since deceased), who was a Director in the assessee company, was 91% shareholder in M/s. Biomatrix at the time of this deal. As per para 10 of the Notes and Accounts of the Audit Report of the financial year 2008-09 of the assessee, Mr. Sandeep Tandon has been shown as the "Key Managerial Person". It is relevant here to quote section 92A(2)(j) of the IT. Act, 1961, relating to the provision of Transfer Pricing which is as under:-**

*"92A(2) for the purpose of sub-section (1) two enterprises shall be deemed to be associated enterprises if, at any time during the previous year.*

*(j) "Where one enterprise is controlled by an individual, the other enterprise is also controlled by such individual or his relative or jointly by such individual and relative of such individual;"*

**In the instance case, as is evident M/s. Sandeep Tandon was a person controlling the affairs of both assessee company and M/s. Biomatrix Ltd. Thus assessee company and M/s. Biomatrix Ltd become Associates Enterprises, within the ambit of section 92A(2)(j).**

4. It was in this backdrop that the assessment was reopened, and the assessment was finally made, after an ALP adjustment in respect of the corporate guarantee extended by the assessee to ICICI Bank Singapore in respect of Biomatrix. Aggrieved, assessee carried the matter in appeal before the CIT(A), and even though the assessee succeeded on other grounds, there was no adjudication on the correctness of the reasons for reopening the assessment- an aspect, given the relief given to the assessee anyway, was implicitly treated as infructuous. The assessee is not satisfied and is in cross-objection before us.

5. When the matter came up for hearing before us, and we noticed the above-extracted reasons for holding that the assessee and Biomatrix, we put it to the learned Departmental Representative as to how, in the absence of any shareholdings in a company, how can a person be treated as 'controlling' an assessee just because he is a director in the said company,

learned Departmental Representative pointed out that in the annual report of the assessee company, late Sandeep Tandon was described as 'key managerial person' of the assessee company and as late Sandeep Tandon was also owned 91% shareholding in Biomatrix, the assessee company and Biomatrix were treated as associated enterprises. A lot of emphasis was placed on the assessee being stated to be a 'key managerial person' in the annual accounts, as is noted in the extracts from reasons for reopening the assessment. Learned counsel for the assessee, on the other hand, pointed out that the reasons for reopening of assessment must be examined on standalone basis, as is the mandate of Hon'ble jurisdictional High Court in the case of **Hindustan Lever Ltd Vs R B Wadkar [(2004) 268 ITR 332 (Bom)]**, and as the only reason given in the said reasons is the assessee being stated to be 'key managerial person' and 'director' of the assessee company, these reasons, in the absence of any shareholdings in the assessee company, cannot be reason enough to concluded that the assessee and Biomatrix were associated enterprises. Learned counsel for the assessee also took us through the definition of associated enterprises in section 92A(2), and submitted that the mention of expression 'control' in Section 92A(2)(j) cannot be viewed in isolation of connotations of expression 'control' in other clauses of Section 92A(2). It was submitted that merely because a person is described as a key managerial person in annual accounts of a company, he cannot be said to be controlling the said company- and that is the only reason given in the reasons recorded for reopening the assessment to come to the conclusion that the assessee and Biomatrix were AEs. It is further stated that while examining the validity of reopening the assessment, we cannot travel beyond the reasons recorded for reopening the assessment, and that the reasons for holding the relationship between the assessee and Biomatrix being in the nature of associated enterprises, which is a foundational requirement for the ALP adjustment and the income escaping the assessment, are clearly incorrect as they rest on the premises that late Sandeep Tandon, who owned 91% equity of Biomatrix, controlled the assessee company just because he was director of the assessee company and was stated to be 'key managerial person' in annual accounts of the assessee company. The control test envisaged in Section 92A(2)(j) must rest on controlling at least 26% of the voting power in the company, as prescribed in Section 92A(2)(b), or on a tangible basis of control, rather than a simple statement of being a 'key managerial person' or being a director. We were thus urged to hold that the reasons recorded by the Assessing Officer were inadequate and insufficient to come to the conclusion that the income had escaped the assessment, and, therefore, the very assumption of jurisdiction is invalid in law for this reason as well. Learned counsel also addressed the scope of what constitutes an associated enterprise under section 92A, and made an effort to demonstrate how the Assessing Officer has failed to make out a case for the assessee and Biomatrix being associated enterprises. Learned Departmental Representative once again submitted that the expression 'control' is not defined under Section 92A(2)(j) and directorship in a company and being its key managerial person clearly shows that *prima facie* that person has controlled the company. She also relied upon the stand of the Assessing Officer. We were thus urged to confirm the stand of the Assessing Officer on this point, and decline to interfere in the matter.

6. We have heard the rival contentions, perused the material on record, and duly considered facts of the case in the light of the applicable legal position.

7. In our considered view, in the cases of the reopened assessments first and foremost one has to see the reasons recorded for reopening the assessment, as these are the reasons which give jurisdiction to the Assessing Officer for initiating, and proceedings with, the

reassessment. The reasons so recorded must meet judicial scrutiny. Unless this bridge is crossed, there is no occasion to deal with anything else pertaining to the whole process of reassessment. It is well settled in law that reasons, as recorded for reopening the reassessment, are to be examined on a standalone basis. Nothing can be added to the reasons so recorded, nor anything can be deleted from the reasons so recorded. Hon'ble Bombay High Court, in the case of **Hindustan Lever Ltd. v. R.B. Wadkar [(2004) 268 ITR 332 (Bom)]**, has, inter alia, observed that **".....It is needless to mention that the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn on the basis of reasons not recorded. It is for the AO to disclose and open his mind through the reasons recorded by him. He has to speak through the reasons."** Their Lordships added that **"The reasons recorded should be self-explanatory and should not keep the assessee guessing for reasons. Reasons provide link between conclusion and the evidence...."**, and that **"The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced."** Therefore, the reasons are to be examined only on the basis of the reasons as recorded. The next important point is that even though reasons, as recorded, may not necessarily prove escapement of income at the stage of recording the reasons, such reasons must point out to an income escaping assessment and not merely need for an inquiry which may result in detection of an income escaping assessment.

8. Let us in this light revert to the reasons recorded for reopening the assessment. The only basis for the assessee company, being treated as an associated enterprise of Biomatrix- of which 91% equity was held by Sandeep Tandon, was that **"The books of the assessee company reveal that one Sandeep Tandon (Since deceased), who was a Director in the assessee company, was 91% shareholder in M/s. Biomatrix at the time of this deal. As per para 10 of the Notes and Accounts of the Audit Report of the financial year 2008-09 of the assessee, Mr. Sandeep Tandon has been shown as the "Key Managerial Person". .....In the instance case, as is evident Sandeep Tandon was a person controlling the affairs of both the assessee company ..... Thus assessee company and M/s. Biomatrix Ltd become Associates Enterprises, within the ambit of section 92A(2)(j)".** The question then arises whether just because someone is described as a key managerial person in the annual accounts and is a director of the company, can it be said that that said, **"enterprise is controlled by an individual"** as is the necessary precondition for invoking Section 92A(2)(j). The answer is emphatically in negative. It is not even the case of the Assessing Officer, and that is the actual position, that Sandeep Tandon had any shareholdings in the assessee company, and it is an admitted position that he was just a director of the company. Being a director in a company or even being stated to be a key managerial person does not, in our humble understanding, imply that the company in question is controlled by the director. While on this aspect, it is important to bear in mind the fact that in order to be said to be in control of another company, as stated in section 92A(2)(b) and (f), either such person should hold more than 26% of the voting power of the company or such person appoints more than half of the directors or members of the governing board or one or more of the executive directors or members of the governing board. Clearly, the connotations of 'control' in the scheme of Section 92A(2) are far more cogent than visualized by a simplistic notion of 'key managerial person'. When a person appointing less than half of the board of directors cannot

be said to be in control of a company, it is futile to even suggest that a person can be said to be in control of a company merely because he is a director of the company, or he is described as a 'key managerial person' of the said company in its own choice of words in the annual accounts. Nothing recorded in the reasons for reopening even remotely suggests that this person had more than 26% voting rights, or even significant voting rights, in the company, that person had right to nominate less than half the board of directors, or one or more executive directors or the members of the governing body, or that there was anything cogent to signify control over the company. There is no material or substantive indication to the effect that the assessee company "**is controlled by an individual**", i.e. Sandeep Tandon, as is the necessary precondition for invoking Section 92A(2)(j). Unless the Assessing Officer was to give reasons for holding that the assessee company was controlled by this person, Section 92A(2)(j) could not have been invoked- and, as we have analyzed earlier as well, mere directorship of the assessee company or that person being described as 'key managerial person' in the annual accounts of the company, can not, by itself, be reason enough to come to this conclusion. It also well-settled in law, to quote the words of the Hon'ble jurisdictional High Court in Hindustan Lever's case (*supra*), that "**The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or making an oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced**". Viewed thus, the reasons recorded by the Assessing Officer do not lead to the conclusion that the assessee and Biomatrix were associated enterprises, and, therefore, it could not be said that any income, on account of ALP adjustment, had escaped assessment.

8. In view of these discussions, as also bearing in mind the entirety of the case, we hold that the reasons for reopening the assessment were unsustainable in law. The impugned reassessment proceedings must stand quashed for this short reason alone. As we have quashed the reassessment proceedings for this short reason, we see no need to deal with other issues raised in the appeal, or in the cross-objections, or on merits. Those aspects of the matter are, as of now, academic and infructuous.

9. In the result, both the cross-objection are allowed, and both the appeals are dismissed as infructuous. Pronounced in the open court today on the 31<sup>st</sup> day of October, 2022.

Sd/-  
**Sandeep S Karhail**  
(Judicial Member)

**Mumbai, dated the 31<sup>st</sup> day of October, 2022.**

Copies to:

|     |                      |     |                       |
|-----|----------------------|-----|-----------------------|
| (1) | <i>The Applicant</i> | (2) | <i>The respondent</i> |
| (3) | <i>CIT</i>           | (4) | <i>CIT(A)</i>         |
| (5) | <i>DR</i>            | (6) | <i>Guard File</i>     |

Sd/-  
**Pramod Kumar**  
(Vice President)

*By order*

*Assistant Registrar  
Income Tax Appellate Tribunal  
Mumbai benches, Mumbai*