आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

IN THE INCOME TAX APPELLATE TRIBUNAL INDORE BENCH, INDORE

BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER AND SHRI MANISH BORAD, ACCOUNTANT MEMBER

ITA No.486/Ind/2018
Assessment Year: 2014-15

Swastik Coal Corporation Pvt. Ltd. 21/3, Ratlam Kothi Indore	**बनाम**/ Vs.	Pr. CIT-2 Indore
(Appellant)		(Revenue)
P.A. No.AABCJ3196N		

Appellant by	Shri Girish Agrawal & Shri Vijay Bansal, A.Rs
Respondent by	Smt. Ashima Gupta, D.R.
Date of Hearing:	**13.06.2019**
Date of Pronouncement:	**26.07.2019**

आदेश / O R D E R

PER KUL BHARAT, J.M:

This appeal by the assessee is directed against order of the Ld. Pr. Commissioner of Income Tax-2, Indore dated

22.3.2018 pertaining to the assessment year 2014-15. The assessee has raised following grounds of appeal:

1. *"In the facts and in the circumstances of the case, Ld. Pr. CIT-2, Indore erred in invoking the provisions of section 263 of the Act and passing the order therein by holding that order passed by Ld. Assessing Officer under section 143(3) of the Act is erroneous and prejudicial to the interest of the revenue, which is illegal, bad in law and devoid of any merit.*
2. *In the facts and in the circumstances of the case, Ld. Pr. CIT-2, Indore erred in invoking the proceedings under section 263 by holding that Ld. Assessing Officer did not refer the case to Transfer Pricing Officer (TPO) to verify whether the specified domestic transactions were at arm's length price or not.*
3. *In the facts and in the circumstances of the case, Ld. Pr. CIT-2, Indore erred in observing for the purpose of passing order under section 263 of the Act the assessment order has been passed without making necessary enquiries and investigations.*
4. *In the facts and in the circumstances of the case, Ld. Pr. CIT-2, Indore erred in setting aside the order to the file of Ld. Assessing Officer with a direction to the Ld. Assessing Officer to refer the large specified domestic transactions mentioned in Form 3CEB to the TPO and pass a fresh assessment order though limiting it to the issue of large specified domestic transactions only.*
5. *The appellant craves leave to add, amend, alter or otherwise raise any other ground of appeal."*

2. Briefly stated facts are that the assessment u/s 143(3) of the Income Tax Act, 1961 (hereinafter called as 'the Act') was framed vide order dated 29.9.2016 assessing the total income at Rs.17,47,35,360/-. Subsequently, the Ld. Pr. CIT from the records observed that the assessee had made

specific domestic transactions as it had made purchases from the parties covered u/s 40A(2)(b) of the Act. It was observed that the A.O. did not refer the case to the Transfer Pricing Officer to verify whether the transactions were at Arm's Length Price or not. Hence, the Ld. Pr. CIT after examining the records was of the view that the assessment order was erroneous in so far as it was prejudicial to the interest of the revenue. The Ld. Pr. CIT therefore, issued a show cause notice u/s 263 of the Act calling upon the assessee as to why the assessment order should not be revised. In response to the same, the assessee filed a detailed submission, which was not found acceptable by the Ld. Pr. CIT. Therefore, the Ld. Pr. CIT set aside the assessment order and directed the A.O. to make fresh assessment order in accordance with law.

3. Aggrieved by this, the assessee is in present appeal before this Tribunal. Ld. Counsel for the assessee

reiterated the submissions as made in the written submissions. The submissions of the assessee are as under:

*"**Submission:***

A. Provisions of section 263 can be invoked only when the twin conditions are satisfied i.e. order should be both erroneous and prejudicial to the interest of the Revenue.

1. *Provisions of section 263 reads –*
   *"(1) The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is **erroneous in so far as it is prejudicial to the interests of the revenue**....."*
2. *In the instant case, Ld. Pr. CIT -2, Indore directed Ld. AO to refer the **large specified domestic transactions** carried out by the assessee company with its associated concerns **mentioned in Form 3CEB** to TPO after following proper procedure and pass the fresh assessment order after getting the issue examined.*

3. *The Specified Domestic Transactions carried out by assessee company with parties covered u/s 40A(2)(b) are –*
   a. ***ARKA Carbon Fuels Private Limited:** Major transaction has been carried out with this associate enterprise. This company has been subject to assessment by jurisdictional transfer pricing officer at Ahmedabad. Form 3CEB was submitted. Ld. TPO was satisfied with the transactions undertaken by ARKA Carbon Fules Private Limited. A **"no adjustment required in arm's length price"** order was passed. **[PB 44-46]***

   b. ***Shree Ganpatlal Onkarlal Agrawal and Company:** It is a partnership firm. On reference to the return filed for the impugned*

year it is evident that it is taxable at maximum rate of 30%. There is no tax arbitrage. ***[PB 22-24]***

c. ***Vishnu Prasad Bindal:*** *Assessee is an individual. On reference to the return filed for the impugned year it is evident that he is taxable at maximum rate of 30%. There is no tax arbitrage.* ***[PB 25-28]***

d. ***Narayan Bindal:*** *Assessee is an individual taxable at maximum rate of 30%. There is no tax arbitrage.*

e. ***Hitesh Bindal:*** *Assessee is an individual. On reference to the return filed for the impugned year it is evident that he is taxable at maximum rate of 30%. There is no tax arbitrage.* ***[PB 29-32]***

f. ***Geeta Devi Bindal:*** *Assessee is an individual. On reference to the return filed for the impugned year it is evident that she is taxable at maximum rate of 30%. There is no tax arbitrage.* ***[PB 33-36]***

g. ***Arpita Bindal:*** *Assessee is an individual taxable at maximum rate of 30%. There is no tax arbitrage.*

4. *The transaction entered with* ***ARKA Carbon Fuels Private Limited*** *has already been assessed and* ***no upward adjustment has been made by Ld. TPO****. For the transactions entered with all the other parties also there is no loss of revenue to the Department as all have been taxed at the maximum rate of 30%. There is no tax arbitrage.*

5. *One of the twin conditions for invoking the provisions of section 263 i.e.* ***prejudicial to the interest of Revenue is not satisfied****. Thus, provisions of section 263 cannot be invoked. Order passed by Ld. Pr. CIT -2, Indore u/s 263 has no legal sanctity.*

6. *It is a well settled law that to invoke the provisions of section 263 both the conditions that the order must be erroneous and prejudicial to the interest of Revenue must be satisfied. Reliance is placed on the following judicial precedents –*

a. ***Hon'ble Jurisdictional High Court of Madhya Pradesh*** *in the case of* ***H.H. Maharaja Raja Pawer Dewas – [1983] 15 Taxman 363*** *– order pronounced on 13.11.1981 – Para 10 – "However, the first argument, viz., that an assessment order without compliance with the procedure laid down in section 144B is erroneous but not prejudicial to the interests of the revenue conferring revisional jurisdiction on the Commissioner under section 263(1), has force.* ***Under section 263(1) two pre-requisites must be present before the Commissioner can exercise the revisional jurisdiction conferred on him. First is that the order passed by the ITO must be erroneous. Second is that the error must be such that it is prejudicial to the interests of the revenue. If the order is erroneous but it is not prejudicial to the interests of the revenue, the Commissioner can not exercise the revisional jurisdiction under section 263(1)……There cannot be any prejudice to the revenue on account of the ITO's failure to follow the procedure prescribed under section 144B, and unless the prejudice to the interests of the revenue is shown, the jurisdiction under section 263(1) cannot be exercised by the Commissioner, even though the order is erroneous.*** *The argument that such an order may possibly be challenged in appeal by the assessee, and for this reason it is prejudicial to the interests of the revenue, has no merit.* ***Section 263(1) clearly contemplates that the order of assessment itself should be prejudicial to the interests of the revenue and this prejudice has to be proved by reference to the assessment order only. It cannot be argued that there is some possibility of the assessment order being challenged or revised in appeal and, therefore, on account of this contingency, the order becomes prejudicial to the interests of the revenue." [emphasis supplied]***

b. ***Hon'ble Apex Court*** *in the case of* ***Malabar Industrial Co. Ltd. – [2000] 243 ITR 83*** *– order pronounced on 10.02.2000 – HEAD NOTE – "Section 263 of the Income-tax Act, 1961 - Revision - Of orders prejudicial to interests of revenue - Assessment year 1983-84 - Whether in order to invoke section 263 Assessing Officer's order must be erroneous and also prejudicial to revenue and if one of them is absent, i.e.,* ***if order of Income-tax Officer is erroneous but is not***

prejudicial to revenue or if it is not erroneous but is prejudicial to revenue, recourse cannot be had to section 263(1) - Held, yes - *Whether if due to an erroneous order of ITO, revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to interests of revenue - Held, yes - Assessee-company entered into agreement for sale of estate of rubber plantation - As purchaser could not pay instalments as scheduled in agreement, extension of time for payment of instalments was given on condition of vendee paying damages for loss of agricultural income and assessee passed resolution to that effect - Assessee showed this receipt as agricultural income - Resolution passed by assessee was not placed before Assessing Officer - Assessing Officer accepted entry in statement of account filed by assessee and accepted same - Commissioner under section 263 held that said amount was not connected with agricultural activities and was liable to be taxed under head 'Income from other sources' - Whether, where Assessing Officer had accepted entry in statement of account filed by assessee, in absence of any supporting material without making any enquiry, exercise of jurisdiction by Commissioner under section 263(1) was justified - Held, yes*

c. ***Hon'ble Gujarat High Court*** *in the case of* ***Smt. Minalben S. Parikh – [1995] 215 ITR 81*** *– order pronounced on 17.10.1994 – Para 12 – "From the aforesaid, it can well be said that the well-settled principle in* ***considering the question as to whether an order is prejudicial to the interests of the revenue or not is to address oneself to the question whether the legitimate revenue due to the exchequer has been realised or not or can be realised or not if his orders under consideration are allowed to stand. For arriving at this conclusion, it becomes necessary and relevant to consider whether the income in respect of which tax is to be realised, has been subjected to tax or not or if it is subjected to tax, whether it has been subjected to tax at a rate at which it could yield the maximum revenue in accordance with law or not. If income in question has been taxed and legitimate revenue due in respect of that income had been realised, though as a result of erroneous order having been made in that respect, in our opinion, the Commissioner cannot exercise***

powers for revising the order under section 263 merely on the basis that the order under consideration is erroneous. *If the material in that regard is available on the record of the assessee concerned, the Commissioner cannot exercise his powers by ignoring that material which links the income concerned with the tax realization made thereon. The two questions are inter-linked and the authority exercising powers under section 263 is under an obligation to consider the entire material about the existence of income and the tax which is realizable in accordance with law and further what tax has in fact been realised under the alleged assessment orders.[emphasis supplied]*

d. ***Hon'ble Karnataka High Court*** *in the case of* ***V. G. Krishnamurthy – [1985] 20 Taxman 65*** *– order pronounced on 19.03.1984 – Para 10 –* ***"Section 263 can be invoked by the Commissioner only when he prima facie finds that the order made by the ITO was erroneous and was prejudicial to the interests of the revenue. Both these factors must simultaneously exist. An order that is erroneous must also have resulted in loss of revenue or prejudicial to the interests of the revenue. Unless both these factors co-exist or exist simultaneously, the Commissioner cannot invoke or resort to section 263.*** *It cannot be exercised to correct every conceivable error committed by an ITO.* ***Before the suo moto power of revision can be exercised, the Commissioner must at least prima facie find both the requirements of section 263, namely, that the order sought to be revised is prima facieerroneous and prejudicial to the interests of the revenue. If one of the other factor was absent, the Commissioner cannot exercise the suo moto power of revision under section 263."*** *[emphasis supplied]*

7. *In the instant case though the assessment order at best may be considered erroneous but it is not prejudicial to the interest of the Revenue. Since the twin conditions are not satisfied the impugned order is ought to be quashed.*

B. ***<u>Omission of a provision from the Income Tax Act, 1961.</u>***

8. ***Provisions of Section 92BA*** *read –*

"For the purposes of this section and sections 92, 92C, 92D and 92E, "specified domestic transaction" in case of an assessee means any of the following transactions, not being an international transaction, namely: -

(i) Omitted by the Finance Act, 2017, w.e.f. 01-04-2017.

(Prior to the omission clause read as 'any expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of sub-section (2) of section 40A)......"

In the instant case, assessee company had entered into Specified Domestic Transaction only. No international transactions were entered into. Assessee company was governed by provisions of Section 92BA(i) only.

9. *Provisions of section 92BA(i) has been omitted w.e.f. 01.04.2017. It is settled principle that where a* ***<u>provision is omitted</u>*** *it should be deemed to have never been part of the statute at any point of time. Effect of* ***<u>omission</u>*** *is different from* ***<u>repeal</u>****.*

Reliance is placed on the decision of ***Hon'ble Apex Court*** *in the case of* ***General Finance Co. – [2002] 124 Taxman 432*** *– order pronounced on 04.09.2002 – HEAD NOTE – "Section 276DD of the Income-tax Act, 1961, read with article 227 of the Constitution of India - Offence and prosecution - Failure to comply with provisions of section 269SS - Assessment year 1986-87 - Appellant received deposits from certain persons in year 1985 in violation of provisions of section 269SS - Department initiated proceedings against assessee by filing a complaint under section 276DD on 31-3-1989 - Appellant sought quashing of prosecution proceedings contending that prosecution could not be continued nor could punishment be imposed under section 276DD after it was omitted on and from 1-4-1989 and that section 6 of General Clauses Act, 1897 was inapplicable -* ***<u>Whether principle underlying section 6 of General Clauses Act as saving right to initiate proceedings for liabilities incurred during currency of Act would not apply to</u>***

omission of a provision in an Act but only to repeal, omission being different from repeal - Held, yes - Whether since section 276DD stood omitted from Act but not repealed, a prosecution could not have been launched or continued by invoking section 6 of General Clauses Act after said omission and, therefore, proceedings against appellant had to be quashed *- Held, yes"*

10. *Reliance is also placed on the decision of* ***Hon'ble Bangalore Bench of ITAT*** *in the case of* ***Texport Overseas Private Limited – IT(TP)A No. 1722/Bang/2017*** *– order pronounced on 22.12.2017 – Para 9 – "From the aforesaid judgments, it has become abundantly clear that* ***once a particular provision of section is omitted from the statute, it shall be deemed to be omitted from its inception unless and until there is some saving clause or provision to make it clear that action taken or proceeding initiated under that provision or section would continue and would not be left on account of omission.****". [emphasis supplied]*

Considering the above facts, circumstances of the case, submissions made, documents on record and judicial precedence, appeal of the assessee be allowed."

4. Ld. D.R. opposed the submissions and supported the order of the Ld. Pr. CIT. Ld. CIT (DR) submitted that ex-facie the assessing officer did not comply with the requirement of law. Ld. CIT(DR) drew our attention to the assessment order to buttress the contention that the assessment has been framed in a casual and mechanical manner without making enquiries. The income declared by the assessee was accepted in a mechanical manner.

Ld. CIT(DR) further submitted that there is no whisper in the order that the A.O. has made any effort to find out about the arm's length price and the transactions between the assessee and the persons covered u/s 40A(2)(b) of the Act. Ld. CIT(DR) further submitted that non-adherence to the mandate of law would certainly make the order of the A.O. erroneous and also prejudicial to the interest of the revenue.

5. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. The basis of exercising of revisionary jurisdiction u/s 263 of the Act as per Ld. Pr. CIT is that transfer pricing related issues were not examined by the A.O. since the transaction carried out by the assessee are covered under specific domestic transactions. The contention of the assessee is that Ld. Pr. CIT ought not to have invoked the provisions of section 263

of the Act as in the present case, major transactions were carried out with M/s. ARKA Carbon Fules Pvt. Ltd. (Associate Enterprise). This company had already been assessed and transfer pricing officer (in short 'TPO') passed an order of no adjustment required in the arm's length price. Therefore, no prejudice is caused to the revenue. It is vehemently argued on behalf of the assessee that no evasion of tax at all happened as all the persons covered u/s 40A(2)(b) of the Act with whom transactions were executed are subjected to the highest rate of tax. It is further contended that law is well settled for invoking the provisions of section 263 of the Act, two ingredients are required to be satisfied i.e. order should be erroneous and so far as it is prejudicial to the interest of the revenue. There is no ambiguity so far law is concerned, it has been held in catena of judgements that what are the conditions when the assessment order can be termed as erroneous

and also prejudicial to the interest of the justice. The word 'erroneous and prejudicial' has been exhaustively examined by the Hon'ble Supreme Court in the case of CIT Vs. Malabar Industrial Co. Ltd. (2000) 243 ITR 83. The Hon'ble Court has held as under:

> *"A bare reading of this provision makes it clear that the prerequisite to exercise of jurisdiction by the Commissioner suo moto under it, is that the order of the Income-tax Officer is erroneous insofar as it is prejudicial to the interests of the revenue. The Commissioner has to be satisfied of twin conditions, namely, (i). the order of the Assessing Officer sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the revenue. If one of them is absent -- if the order of the Income-tax Officer is erroneous but is not prejudicial to the revenue or if it is not erroneous but is prejudicial to the revenue-- recourse cannot be had to Section 263(1) of the Act.*
>
> *There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.*
>
> *The phrase "prejudicial to the interests of the revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The High Court of Calcutta in Dawjee Dadabhoy & Co. Vs. S.P. Jain and Another [31 ITR 872], the High Court of Karnataka in Commissioner of Income-tax, Mysore Vs. T. Narayana Pai [98 ITR 422], the High Court of Bombay in Commissioner of Income-tax Vs. Gabriel India Ltd. [203 ITR 108] and the High Court of Gujarat in Commissioner of Income-tax Vs. Smt. Minalben S. Parikh [215 ITR 81] treated loss of tax as prejudicial to the interests of the revenue.*

Mr. Abaraham relied on the judgment of the Division Bench of the High Court of Madras in Venkatakrishna Rice Company Vs. Commissioner of Income-tax [163 ITR 129] interpreting prejudicial to the interests of the revenue. The High Court held, In this context, it must be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the Order passed by the Income-tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue Administration. In our view this interpretation is too narrow to merit acceptance. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income-tax Officer, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue. The phrase prejudicial to the interests of the revenue has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the Income-tax Officer is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue. Rampyari Devi Saraogi Vs. Commissioner of Income-tax [67 ITR 84] and in Smt. Tara Devi Aggarwal Vs. Commissioner of Income-tax, West Bengal [88 ITR 323] (SC).”

6. If we apply the ratio held down by the Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd. (supra) on the facts of the present case there would not be any infirmity into the order of Ld. CIT(A) in holding that assessment order is erroneous if it is found that the A.O.

has not followed the mandate of law. It is also to be examined what prejudice would be caused if such mandate of law was not followed by the A.O. There is no dispute with regard to the fact that transaction in question fall under the category of 'specified domestic transaction'. In terms of section 40A(2)(b) of the Act it has to be examined whether such transactions are within the arm's length price (in short 'ALP'). The moot question is whether the A.O. is authorised by law to examine and compute arm's length price related to 'specified domestic transactions'. Let us examine the law on this point. The Ld. Pr. CIT is of the view that the A.O. is under obligation to refer the issue to the Transfer pricing officer (in short 'TPO') for computing the ALP. In the absence of the ALP computed by the TPO, the A.O. could not have adjudicated the issue. There is no ambiguity so far provision of law are concerned where there is specified transaction, the A.O. is under statutory

obligation under proviso to section 92CA(1) of the Act and Rule framed there under, the issue was required to be referred to the TPO. Now the question would arise whether the A.O. is duty bound to accept the adjustment, if any made by the TPO or otherwise he has some discretion under law whether to accept or not the adjustment proposed by the TPO. The Ld. Pr. CIT has referred the CBDT instructions No.3 of 2016 dated 10.3.2016 and explanation No.2 to section 263 of the Act to answer this question. There is also another aspect of the matter that the transaction of sale and purchase has two limbs namely sale and purchase. The sale of one party would be purchase of another or vice versa. The underlined fact remains in such transaction is that it is between the two related or associated parties. Hence, the transaction is not free. It is under some influence or control. If the transaction is not attached with any other motive or is not

used as a device to avoid taxability of profit or gain, then there would have been no need to find out the arm's length price of such transaction. But where it is used as a tool to avoid the taxability, then certainly in depth examination of the ALP would be needed. If in a given case sale is found to be within the ALP determined by the TPO, under such situation whether still there would be need to examine the ALP of purchases? This question has to be decided on the basis of the factual aspect of the matter. We find no finding on this issue. We are of the view that this aspect in the present case should have been examined. It is contended by the Ld. Counsel for the assessee that assessee had entered into 'specified domestic transactions' but not in international transactions. Thus, the transaction would be governed by the provisions of section 92BA(1) of the Act. It is further pointed out that the provisions of section 92BA(1) of the Act has been omitted

w.e.f. 1.4.2017. It is vehemently argued that the impact of omission of this provision would be that it has to be construed that such provision was never on the statute book. He contended that it is a settled principle that where provision is omitted, it should be deemed to have never been part of the statute at any point of time. The reliance is placed on the decision of the Hon'ble Apex Court rendered in the case of General Finance Company Vs. ACIT (2002) 124 Taxman 432 (SC). There is merit into this contention as the Hon'ble Apex court has referred to the Judgements by the Hon'ble constitutional bench of the Supreme Court rendered in the case of Kolhapur Cane Sugar Works Limited Vs. UOI (2000) (2) SCC 536. The Hon'ble Apex court in General Finance Company Vs. ACIT (supra) after considering the submissions of the Ld. Counsel for the revenue in that case held as under:

"8. Though we find the submissions of the learned counsel to be forceful, we are constrained to follow the two decisions of the Constitution Benches of this Court in Rayala Corpn. (P) Ltd.'s case (supra) and Kolhapur Canesugar Works Ltd.'s case (supra). This view has held that field for over three decades and reiterated even as late as two years ago. Non-compliance with section 269SS attracted prosecution as well as penalty. Omission of the provision regarding prosecution will not affect the levy of penalty. The advantage arising out of application of the ratio of the two decisions resulting in prosecution in cases of non-compliance with section 269SS is only transactional affecting a few cases arising prior to 1.4.1989. Such cases may be few and far between. Hence, we find this is not an appropriate case for reference to the larger Bench.

9. Net result of this discussion is that the view taken by the High Court is not consistent with what has been stated by this Court in the two decisions aforesaid and the principle underlying section was saving the right to initiate proceedings for liabilities incurred during the currency of the Act will not apply to omission of a provision in an Act but only to repeal, omission being different from repeal as held in the aforesaid decisions. In the Act, section 276DD stood omitted from the Act but not repealed and, hence, a prosecution could not have been launched or continued by invoking section 6 after its omission."

7. This submission was also made before the Ld. Pr. CIT by the assessee. However, the Ld. CIT rejected the submissions by observing as under:-

The assessee, in its submission, has submitted that the AO took a conscious decision for not referring the case to the TPO. The order was not erroneous as well as prejudicial to the interest of revenue. It has further been submitted that all the parties with whom the transaction have been carried out by the assessee were assessed to tax at maximum rate at therefore, there was no loss to the revenue.

It has also been submitted by the assessee that the transactions of the party, with whom the specified domestic transaction was carried out, have been examined by the TPO in case of that party. Accordingly, this case need not be examined separately for the same transaction with that party as no adjustment was recommended by the TPO in that case. It has also been submitted by the assessee that the provisions of section 92BA(i) have been omitted by Finance Act 2017 and in the case of Taxport Overseas P. Ltd (IT(TD)A NO-1722/Bang/2017) it has been held that this clause was never been on the statute. Accordingly, he has requested that 263 order should not be passed.

Having carefully considered the contentions of the assessee, I am of the considered opinion that the contentions are not plausible. The argument that the 3CEB report in the case of the party with whom domestic transactions have been done has already been examined by the TPO and no adjustments were recommended is not acceptable as the frame of reference in which the examinations of armslength price is to be done is different for both the parties. The criteria for examine the armslength would be different for buyer and seller for the same product as the profitability or any other criteria which is to be employed for evaluating the ALP would be different depending on the facts and circumstances of each case. Method for comparison may vary on case to case basis.

Regarding the contentions that the definition of specified domestic transaction in section 92BA has been amended and clause (i) has been deleted is also cannot be accepted as the provision has been amended with affect from 01.04.2017 whereas the issued involved case for AY 2014-15. Regarding the decision of ITAT Bench of Banglore, the same is not binding as the issue has not reached finality. Therefore, on this ground the proceedings cannot be dropped.

8. We find that the above view of the Ld. Pr. CIT is not correct. In view of the aforesaid discussion, moreover, the coordinate bench has also examined the issue in the case of Texport Overseas Pvt. Ltd. in IT(TP)A No.1722/Bang/2017. Admittedly, in this case, the order has been revised purely on the basis that the assessing officer has not referred to determine the arm's length price to the TPO. Since the provision itself stood omitted at the time when the order was passed by the Ld. Pr. CIT, under these undisputed facts in the light of the Judgement of the Hon'ble Supreme Court rendered in the case of General Finance Company (supra) as well as the order of the coordinate bench rendered in the case of Texport Overseas Pvt. Ltd. (supra), the impugned order cannot be sustained, hence is hereby quashed. The order impugned is thus quashed and the grounds raised in the appeal are allowed.

9. In the result, the appeal filed by the assessee in ITA No.486/Ind/2018 for the A.Y. 2014-15 is allowed.

Order was pronounced in the open court on 26.07.2019.

Sd/-	Sd/-
(MANISH BORAD)	(KUL BHARAT)
ACCOUNTANT MEMBER	JUDICIALMEMBER

Indore; दिनांक Dated : 26/07/2019

VG/SPS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard file.

By order

Assistant Registrar, Indore