<u>आयकर अपीलीय अधिकरण, पणजी न्यायपीठ, पणजी</u>

IN THE INCOME TAX APPELLATE TRIBUNAL PANAJI, BENCH PANAJI

श्री ललित कुमार, न्यायिक सदस्य **एवं** डॉ मीठा लाल मीना, **लेखा सदस्य** के समक्ष ।

BEFORE SHRI LALIET KUMAR, JM AND DR. MITHA LAL MEENA, AM

ITA No.388/PAN/2017

(AY : 2013-2014)

M/s Scorpio Iron Limited, 505 A, 5th Floor, Dempo Trade Centre, 11, EDC Complex, Patto Plaza, Panaji-403001 PAN No.AAHCS 8190 H	Vs	ÌTO Ward-1(4), Panaji, Goa
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

AND

ITA No.389/PAN/2017

(AY : 2013-2014)

Shree Ambey Forging Pvt. Ltd. 505A, 5th Floor, Dempo Trade Centre, 11, EDC Complex, Patto Plaza, Panaji-403001 PAN No.AAFCS 3404 C	Vs	ÌTO Ward-1(4), Panaji, Goa
(अपीलार्थी **/Appellant**)	..	(प्रत्यर्थी / **Respondent**)

निर्धारिती **की ओर से** /Assessee by	:	Shri Shrinivas Nayak, CA
राजस्व **की ओर से** /Revenue by	:	Shri Sourabh Nayak, Sr. DR

सुनवाई की तारीख **/ Date of Hearing**	:	06/10/2021
घोषणा की तारीख**/Date of Pronouncement**	:	07/10/2021

<u>आदेश / O R D E R</u>

<u>Per Bench</u> :

These two appeals have been filed by the assessee on the following grounds :-

1) *The order of the learned AO is bad in law and is void-ab-initio.*
2) *The Assessment Order passed by the AO u/s 143(3) r.w.s 92CA & r.w.s 144(C) of the Income Tax Act'1961 is without jurisdiction, misconceived and without following the principles of natural justice.*
3) *The Id. AO has erred in making adjustment / addition of Rs.9,73,68,545/- based on the order of the AO-TP u/s 92CA of the Income Tax Act'1961, in spite of the fact that the assesse or their AE has not taken any benefit or exemption / deduction under the Income Tax Act.*
4) *The Id AO(TP) and Dispute Resolution Panel-2, Bangalore, has willfully ignored that the assesee is into the business of wholesale trading.*

5) *The Id AO(TP) and Dispute Resolution Panel-2, Bangalore, has ignored that the provisions of transfer pricing are not applicable to the assesse as the total purchases / expenses incurred with the AE transactions are less than 5.00 crores threshold limit as applicable under the Income Tax Act'1961.*

6) *The Id. AO(TP) and Dispute Resolution Panel-2, Bangalore, has erred in ignoring the fact that assesee or their AE's has not carried out any International Transactions which require adjustment u/s 92CA, nor the assesee has availed any tax benefit under the Act.*

7) ***The*** *Id AO(TP) and Dispute Resolution Panel-2, Bangalore, has totally failed to nstify the benefit taken by the assesse or the group concerns of the assesse, AO-* ***TP*** *has also ignored the fact that all the AE's are in losses.*

8) *The Id. AO-TP and Dispute Resolution Panel-2, Bangalore, has erred in ignoring the fact that any adjustment / additions in the case of the assessee made u/s 92CA of IT Act, 1961 is revenue neutral as all the AE's are filing their respective income tax returns and have not availed any exemption / deduction tinder the Income Tax Act'1961.*

9) *The Id. AO-TP and Dispute Resolution Panel-2, Bangalore, has ignored the fact that the assessee business is in losses and all the assets and properties of the assesse and all the AE have been attached by the bank.*

10) *The Id. AO-TP has erred in considering the departmental guidelines regarding no requirement of ascertaining the arm's length price in present case as there is no income tax benefit availed by the assesse nor their associate concerns.*

11) *The Id. AO(TP) and Dispute Resolution Panel-2, Bangalore, has erred in rejecting the Comparable Uncontrolled Price method adopted by the assessee, under the transfer pricing provision.*

12) *The Id AO-TP has erred in concluding that there is huge difference in rates of third party prices as compared to the rates of the assessee to AE, without going into details that the most of the difference are on account of freight charges, bulk discounts, time of delivery, inventory holding and quality parameters.*

13) *The Id. AO(TP) has erred in applying Transactional Net Margin Method instead of Comparable Uncontrolled Price Method without any substantial justification.*

14) *The Id. AO(TP) has erred in applying the TNMM of companies which are no were similar to the business of the assesse w.r.t. type of business, turnover, assets base, business size, geographical area, sector in which the assesse operates, etc.*

15) *The AO-TP has wilfully considered the comparable of manufacturing concerns, whereas the assesse is purely into trading and does not have any manufacturing unit any tax benefit under the Act.*

2. At the outset, ld. AR of the assessee has submitted that the assessee has raised the additional legal ground to the following effect :-

1*)* *The order passed by the ld Assessing Officer based on the TP adjustment u/s.92A(i) of the Income Tax Act, 1961, which was omitted by the Finance Act, 2017 w.e.f.01.04.2017 is bad in law and void-ab-initio'.*

3. Further, ld. AR submitted that the additional ground, being legal in nature, deserves to be deleted.

4. Ld.DR has fairly submitted that the department has no objection for admitting the additional ground raised by the assessee. In the light of the above said facts and considering the judgment of the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd., (1998) **229 ITR 383** (SC), the additional ground raised by the assessee being legal in nature is admitted.

5. Ld. AR had submitted that the issue of repeal of domestic transfer pricing adjustment has been considering by the Hon'ble Karnataka High Court in the matter of PCIT v. Texport Overseas Pvt. Ltd. 271 Taxman 170(Karn.)(HC).

6. Similarly, the ld.AR had also drew our attention to the order passed by the Delhi Bench of the Tribunal in the case of M/s ETT Ltd. Vs. CIT, ITA No. 3341/Del/2018, order dated 26.03.2019.

7. On merit, it was submitted that the assessee in the case of M/s Scorpio Iron Ltd. ITA No.388/PAN/2017 has been fastened with the liability on account of selling the material to its sister concern, namely, Shree Ambey Forging Pvt..(assessee in ITA No.389/PAN/2017). Similarly, in the case of Shree Ambey Forging Pvt. Ltd. (ITA No.389/PAN/2017), the additions were made in the hands of M/s Shree Ambey Forging Pvt. Ltd. on account of the excess amount paid to M/s Scorpio Iron Ltd It was

submitted that the addition cannot be sustained not only on account of legal ground but also on account of the merit also.

8. Per Contra, ld. DR relied upon the order passed by the lower authorities.

9. We have heard rival contentions of the parties and perused the material on record. The Hon'ble Karnataka High Court in the case of Texport Overseas Pvt. Ltd (supra) while examining the addition made under repealed section 92BA of the Act has held as under :-

> ***2.*** *We have heard the arguments of Sri. Jeevan J. Neeralagi and Sri. E.I. Sanmathi, learned Advocates appearing for revenue in respective appeals and Sri. Sharath, learned counsel appearing on behalf of Sri. Chythanya K.K. for respondent/assessee.*
> ***3.*** *It is the contention of learned Advocates appearing for revenue that tribunal was not justified in arriving at a conclusion that Clause (i) of section 92BA of the Act, which had been omitted w.e.f. 01.04.2017 would be applicable retrospectively by presuming the retrospectivity, particularly when the statue itself explicitly stated it to be prospective in nature. As such they have sought for formulating substantial questions of law and have sought for answering the same in favour of revenue and against the assessee.*
> ***4.*** *Sri. E.I. Sanmathi, learned counsel appearing for revenue/appellant in ITA No.170/2019 would contend that even the disallowance made by the AO under section 14A r/w section 8(2)(iii) of Income Tax Rules for a sum of Rs. 14,88,870/- by holding that there was no exempted income and as such disallowance could not have been made even though said provision was rightly invoked by AO, and as such setting aside the disallowance is erroneous. Hence, he prays for substantial question of law as formulated in the appeal memorandum (ITA 170/2019) be formulated, adjudicated and answered in favour of assessee.*
> ***5.*** *Having heard learned Advocates appearing for parties and on perusal of records in general and order passed by tribunal in particular it is clearly noticeable that Clause (i) of section 92BA of the Act came to be omitted w.e.f. 01.04.2019 by Finance Act, 2014. As to whether omission would save the acts is an issue which is no more res intigra in the light of authoritative pronouncement of Hon'ble Apex Court in the matter of Kolhapur Canesugar Works Ltd. v. Union of India AIR 2000 SC 811 whereunder Apex Court has examined the effect of repeal of a statute vis-a-vis deletion/addition of a provision in an enactment and its effect thereof. The import of*

section 6 of General Clauses Act has also been examined and it came to be held:

"37. The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute-book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions of section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceedings shall not continue but fresh proceedings for the same purpose may be initiated under the new provision."

6. *In fact, Co-ordinate Bench under similar circumstances had examined the effect of omission of sub-section (9) to Section 10B of the Act w.e.f. 01.04.2004 by Finance Act, 2003 and held that there was no saving clause or provision introduced by way of amendment by omitting sub-section (9) of section 10B. In the matter of General Finance Co. v. ACIT, which judgment has also been taken note of by the tribunal while repelling the contention raised by revenue with regard to retrospectivity of section 92BA(i) of the Act. Thus, when clause (i) of Section 92BA having been omitted by the Finance Act, 2017, with effect from 01.07.2017 from the Statute the resultant effect is that it had never been passed and to be considered as a law never been existed. Hence, decision taken by the Assessing Officer under the effect of section 92BI and reference made to the order of Transfer Pricing Officer-TPO under section 92CA could be invalid and bad in law.*

7. *It is for this precise reason, tribunal has rightly held that order passed by the TPO and DRP is unsustainable in the eyes of law. The said finding is based on the authoritative principles enunciated by the Hon'ble Supreme Court in Kolhapur Canesugar Works Ltd. referred to herein supra which has been followed by Co-ordinate Bench of this Court in the matter of M/s. GE Thermometrias India Private Ltd., stated supra. As such we are of the considered view that first substantial question of law raised in the appeal by the revenue in respective appeal memorandum could not arise for consideration particularly when the said issue being no more res integra.*

8. *Insofar as question No. 2 is concerned, we find from the order of the Tribunal that issue relating to the deletion of disallowance made by the Assessing Officer has been remitted back to the Assessing Officer which finding is based on factual aspects which would not call for interference by us, that too, by formulating substantial question of law. The Assessing Officer has to undertake the*

exercise of factual determination. As such, without expressing any opinion on merits with regard to question No. 2 formulated by the revenue in the respective appeals, we proceed to pass the following:
ORDER
(i)Both the appeals i.e., ITA No. 392/2018 and ITA No.170/2019 are dismissed.
(ii)Order dated 22.12.2017 passed by the Income Tax Appellate Tribunal, Bangalore in Taxport Overseas (P.) Ltd. (supra) is affirmed.

10. The above said view was followed by the Delhi Bench of the Tribunal in the case of M/s ETT Ltd. Vs. CIT, ITA No. 3341/Del/2018, order dated 26.03.2019, wherein the Tribunal has held as under :-

21. We have heard the rival submissions and perused the relevant findings given in the impugned order and materials referred to before us at the time of hearing. It is trite position of law that, Ld. PCIT or CIT may assume revisionary jurisdiction u/s 263 only if he considers that any order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of revenue. Both the conditions should be fulfilled simultaneously and are not mutually exclusively to each other, that is, the assessment order though may be prejudicial to the interest of revenue but is not erroneous or vice-a- versa, then CIT or PCIT cannot cancel the assessment. Another settled position of law is that, if the Assessing Officer after due diligence and enquiry has reached to a conclusion and has formed a particular opinion, then also Ld. PCIT or CIT cannot exercise powers u/s 263 to form a different opinion or take a divergent view. These principles are well settled by the judgments of Hon'ble Supreme Court in the case of Malabar Industrial Company Limited vs. CIT (2000) 243 ITR 83; and CIT vs. Max India Limited (2007) 295 ITR 282 and reiterated by various courts. Now, in the light of the settled principles we have to see, whether the Ld. CIT was correct in law and in facts in cancelling the assessment order on the points raised by him in impugned order. As discussed above the issues raised by the Ld. CIT for canceling the assessment order and passing a fresh assessment are as under: -

i. The Assessing Officer has not conducted substantial enquiry or investigation while allowing the claim of deduction of Rs.161,37,41,713/- u/s 80 IA, as he has failed to conduct enquiry of exact amount of profit earned on sale of Industrial park and subsequently allowability of deduction u/s 80 IA.

ii. Assessing Officer has failed to examine that assessee has shown specified domestic transaction of Rs. 208,47,12,830/- with its subsidiary, Noida Towers Limited and the transaction was at higher price than the prevailing circle rate.

iii. Assessing Officer has failed to conduct requisite enquiry / investigation to determine the arm's length price of the transaction by not making reference to the TPO, which he was supposed to make as per the CBDT guidelines.

iv. Assessing Officer has also filed to examine applicability or otherwise of section 80 IA (8).

v. Assessing Officer has not conducted requisite enquiry / investigation on exempt income earned by assessee and applicability provision of section 14A r/w Rule 8D.

22. Now we have to examine, whether on the facts and material available on record, the Assessing Officer has conducted requisite enquiry/ investigation on the points raised in the impugned order or not. We have already discussed the facts and background of the case, however, in a succinct manner we would like to briefly reiterate the relevant facts. The assessee had constructed and developed an IT park at Noida for which it was duly granted exemptions in terms of section 80 IA with Ministry of Commerce and Industry; and under the Industrial Park Scheme 2002, it was duly notified that industrial park developed by the assessee was eligible 100% exemption u/s 80 IA. It was never in dispute any of the major conditions laid down under the notification issued by the Government of India was ever violated. Such proposed conditions and actual fulfillment by the assessee as borne out from the submissions made before AO and CIT were as under: -

I. Proposed condition: 90% of the allocable area is earmarked for industrial use. The proposed industrial activities were defined in the notification itself.

Actual: 90.01% of the total area was for allowed for industrial use.

II. Proposed condition: Investment required was minimum of Rs.43 crores.

Actual: Rs. 46.13 crores were invested by the assessee company which is evident from the balance sheet.

III. Proposed Condition: Commencement of IT Park shall be made on or before April 2005.

Actual: It was much before April 2005.

IV. Proposed Condition: Under taking shall provide all infrastructure facility for common use such as roads, water supply and sewerage, generation and distribution of power, air conditioning etc. Actual: The company was providing all these facilities at the IT Park which are verifiable from the balance sheet & profit & loss account of the company.

V. Proposed Condition: Minimum number of industrial units shall not be less than four.

Actual: Ten

23. It is further not in dispute that the initial assessment year for the claim made u/s 80IA was A.Y. 2008-09 and up till A.Y.2013-14, assessee was not only found to be eligible for deduction u/s 80 IA, but also exemption was given by the respective Assessing Officers mostly under scrutiny u/s 143 (3) after detailed examination and verification. The status of all the assessment has already been incorporated above. From the perusal of the records filed during the course of assessment proceedings, it is seen that, Ld. Assessing Officer from time to time has raised several queries to examine the claim/ deduction u/s 80 IA, which is evident from the fact that assessee had placed copy of audit report in Form No. 10 CCB in support of deduction u/s 80 IA alongwith past assessment history and orders for the earlier assessment years, wherein this issue has been discussed and allowed by the respective Assessing Officers. A detailed justification for deduction claimed u/s 80 IA which gives the entire history and background alongwith all the notification and approval granted by various governmental authorities. All these documents were placed before the Assessing Officer in response to queries raised by him. With regard to sale of undertaking to subsidiary of the assessee namely, M/s. Noida Towers Private Limited, assessee has filed the 'business transfer agreement' entered for sale of undertaking dated 12.03.2012 alongwith the 'Valuation Report' of the Govt. Approved Valuer dated 10.03.2012, wherein the valuation of the property has been done as per the prevailing market rate and the value of the entire property was determined at Rs. 205 crores, and the said valuation report contains drawings, pictures, comparative sale instances and various schedules to arrive at the market rate. Not only that, before the Assessing Officer the assessee has also filed detailed report of the Accountant regarding the 'related party transaction' undertaken by the assessee with its subsidiary in Form No. 3 CEB alongwith the transfer pricing document wherein, the entire details of the specified domestic transaction and the manner in which arms length price has been determined has been provided. Thus, entire transfer pricing document was filed to justify arm's length price of the sale of industrial park alongwith Approved Valuer's Report determining the market value of the property under transfer. After calling for all these evidences and examining the entire facts brought on record, the Ld. Assessing Officer has examined the allowability of claim u/s 80 IA and in fact has made part disallowance on such deduction. Hence, it cannot be held that Assessing Officer has not conducted any enquiry or investigated the issue which he was required to do so before allowing the claim of deduction u/s 80 IA or has allowed without examining the assessee's transaction with its subsidiary, Noida Towers Private Limited.

24. One of the key allegations of the Ld. CIT is that, Assessing Officer should have made a reference to the TPO as per the CBDT Instruction no. 3/2003. First of all, it would be relevant to see, whether there was any such instruction issued by the CBDT to the Assessing Officer for making any reference to the TPO for specified domestic transaction. From the perusal of the said Instruction no. 3/2003, which has been placed by the learned counsel before us, it is seen that guidelines for reference to the TPO has been made only in respect of determination of Arm's Length Price in relation to the international transaction u/s.92B. There is no whisper about specified domestic transaction; for the reason that, there was no concept of specified domestic transaction under the Income Tax Act when said instruction was issued on 20.05.2003. The specified domestic transaction for the purpose of determination of ALP has been brought in the statute only by Finance Act, 2012. Hence, we agree with the learned counsel that holding the assessment order erroneous for the reason that, Assessing Officer should have made a reference to the TPO in accordance with CBDT Instruction no. 3/2003 is wholly misconceived and misinterpretation. Once, there was no CBDT instruction or guidelines for reference to the issue involving specified domestic instruction to the TPO at the time of passing the assessment order, then where is the question of any non-compliance of CBDT Instruction by the Assessing Officer.

Till the passing of the assessment order on 10.08.2015, only CBDT Instruction No.3/2003 dated 20.05.2003 was applicable. Further, another instruction was issued by the CBDT being Instruction No.15/2015 dated 16.10.2015, superseding the old Instruction No. 3/2003 (which too was after the passing of the assessment order), there also the guidelines were only with respect to international transaction u/s 92B and not specified domestic transaction. In fact, in paragraph 7 with regard to the applicability of the said instruction, CBDT has made following remarks: -

The above guidance is applicable only to transfer pricing provisions in respect of international transactions. Similar guidance in respect of transfer pricing provisions pertaining to specified domestic transactions are under consideration of the CBDT. Till such time the guidance pertaining to specified domestic transactions is not issued, paragraph 3.5 of this Instruction shall apply to the effect that where a case has been selected for scrutiny on non-TP parameters and the case also involves specified domestic transactions with AEs, the case shall not be referred to the TPO irrespective of the value of the specified domestic transaction or aggregate value of all specified domestic transactions. The only exception to this would be a case selected for scrutiny on non-TP parameters where the AO comes to know that the taxpayer has entered into specified domestic transaction or transactions but the taxpayer has either not filed the Accountant's report under section 92E of the Act or has not disclosed the said specified domestic transaction or transactions in the Accountant's report filed. In such exceptional situations, the AO may refer the matter to the TPO after providing an opportunity of being heard to the taxpayer.

Thus, even after the completion of the assessment, there was no such guideline or instruction by the CBDT pertaining to specified domestic transaction. This clarification by the CBDT makes it abundantly clear that till the passing of the assessment order there was no such guideline or instruction to the Assessing Officer for making any reference to the TPO for specified domestic transaction. Once, that is so, we fail to understand as to where was the violation or contravention of any CBDT instruction by the Assessing Officer. Hence, it would be incorrect to ascribe any dereliction on the part of the Assessing Officer that he has failed to conduct requisite inquiry to find out the Arm's Length Price for the transaction, by failing to make reference to the TPO that he was supposed to make as per the CBDT guidelines. The observation of the ld. CIT for holding the assessment order to be prejudicial to the interest of the revenue, for the reason that the Assessing Officer has not followed the CBDT Instruction No.3/2003 cannot be sustained at all.

25. As regard the CBDT Instruction No.3/2016 dated 10.03.2016, first of all, this instruction was not applicable at all at the time of passing of the assessment order, because earlier, as stated above CBDT in its Instruction of 2015, itself has clarified there was no such guidelines for making a reference to the TPO was specified domestic transaction. The contention of the Ld. CIT-DR that such an instruction should be read into retrospectively, i.e., prior to the issue of such instruction, cannot be upheld for the reason that, the Assessing Officer at the time of passing the assessment has to see the instructions available at the relevant time and he cannot visualize that in future some kind of guideline or instruction would come on the basis of which he has make the assessment. If such a plea is accepted then in wake of each and every subsequent instruction, all the assessment orders can be held to be erroneous and prejudicial to the interest of the revenue, which cannot be permitted under law and equity.

26. Otherwise also, even under the CBDT guidelines issued vide Instruction No.3/2016 dated 10.03.2016, which has been harped upon by the Ld. CIT DR, will not change the complexion of the case. For sake of ready reference, the relevant guidelines are reproduced hereunder: -

3.1 "The power to determine the Arm's Length Price (ALP) in an international transaction or specified domestic transaction is contained in sub-section (3) of Section 92C. However, Section 92CA provides that where the Assessing Officer (AO) considers it necessary or expedient so to do, he may refer the computation of ALP in relation to an international transaction or specified domestic transaction to the TPO. For proper administration of the Income-tax Act, the Board has decided that the AO shall henceforth make a reference to the TPO only under the circumstances laid out in this Instruction.

3.2 All cases selected for scrutiny, either under the Computer Assisted Scrutiny Selection [CASS] system or under the compulsory manual selection system (in accordance with the CBDT's annual instructions in this regard - for example, Instruction No. 6/2014 for selection in F.Y 2014-15 and Instruction No. 8/2015 for selection in F.Y 2015-16), on the basis of transfer pricing risk parameters [in respect of international transactions or specified domestic transactions or both] have to be referred to the TPO by the AO, after obtaining the approval of the jurisdictional Principal Commissioner of Income-tax (PCIT) or Commissioner of Income-tax (CIT). The fact that a case has been selected for scrutiny on a TP risk parameter becomes clear from a perusal of the reasons for which a particular case has been selected and the same are invariably available with the jurisdictional AO. Thus, if the reason or one of the reasons for selection of a case for scrutiny is a TP risk parameter, then the case has to be mandatorily referred to the TPO by the AO, after obtaining the approval of the jurisdictional PCIT or CIT. 3.3 Cases selected for scrutiny on non-transfer pricing risk parameters but also having international transactions or specified domestic transactions, shall be referred to TPOs only in the following circumstances:

(a) where the AO comes to know that the taxpayer has entered into international transactions or specified domestic transactions or both but the taxpayer has either not filed the Accountant's report under Section 92E at all or has not disclosed the said transactions in the Accountant's report filed;

(b) where there has been a transfer pricing adjustment of Rs. 10 Crore or more in an earlier assessment year and such adjustment has been upheld by the judicial authorities or is pending in appeal; and

(c) where search and seizure or survey operations have been carried out under the provisions of the Income-tax Act and findings regarding transfer pricing issues in respect of international transactions or specified domestic transactions or both have been recorded by the Investigation Wing or the AO. 3.4 For cases to be referred by the AO to the TPO in accordance with paragraphs 3.2 and 3.3 above, in respect of transactions having the following situations, the AO must, as a jurisdictional requirement, record his satisfaction that there is an income or a potential of an income arising and/or being affected on determination of the ALP of an international transaction or specified domestic transaction before seeking approval of the PCIT or CIT to refer the matter to the TPO for determination of the ALP:

• where the taxpayer has not filed the Accountant's report under Section 92E of the Act but the international transactions or specified domestic transactions undertaken by it come to the notice of the AO;

• *where the taxpayer has not declared one or more international transaction or specified domestic*

transaction in the Accountant's report filed under Section 92E of the Act and the said transaction or transactions come to the notice of the AO; and • where the taxpayer has declared the international transactions or specified domestic transactions in the Accountant's report filed under Section 92E of the Act but has made certain qualifying remarks to the effect that the said transactions are not international transactions or specified domestic transactions or they do not impact the income of the taxpayer.

In the above three situations, the AO must provide an opportunity of being heard to the taxpayer before recording his satisfaction or otherwise. In case no objection is raised by the taxpayer to the applicability of Chapter X [Sections 92 to 92F] of the Act to these three situations, then AO should refer the international transaction or specified domestic transaction to the TPO for determining the ALP after obtaining the approval of the PCIT or CIT. However, where the applicability of Chapter X [Sections 92 to 92F] to these three situations is objected to by the taxpayer, the AO must consider the taxpayer's objections and pass a speaking order so as to comply with the principles of natural justice. If the AO decides in the said order that the transaction in question needs to be referred to the TPO, he should make a reference after obtaining the approval of the PCIT or CIT.

3.5 In addition to the cases to be referred as per paragraphs 3.2 and 3.3, a case involving a transfer pricing adjustment in an earlier assessment year that has been fully or partially set-aside by the ITAT, High Court or Supreme Court on the issue of the said adjustment shall invariably be referred to the TPO for determination of the ALP."

[Emphasis added is ours]

27. From the bare reading of the aforesaid guidelines it is seen that the Assessing Officer can make reference to the TPO only under the situation and circumstances laid down in the said instruction. Thus, the key determination factors for making a reference by the Assessing Officer to the TPO for the determination of the ALP of international or specified domestic transaction have been provided in para 3.2 and 3.3. It lays down that in all the cases which are selected for scrutiny on the basis of transfer pricing risk parameters have to be referred to the TPO; and in cases where though not selected under scrutiny on transfer pricing risks but if any of the circumstances mentioned therein are found by the AO, then also same has to be referred to TPO. But under both the conditions the AO as jurisdictional requirement must record his satisfaction and seek approval in respect of transactions having the following conditions, which are: -

¬ firstly, where the taxpayer has not filed audit report u/s 92 E and such transaction comes to the notice of the Assessing Officer;

¬ secondly, taxpayer has not declared the said transaction in the accountant's report u/s 92 E;

¬ thirdly, by the taxpayer declared the transaction in the report but there are qualifying remarks by the accountant that they do not impact the income of the taxpayer; and ¬ lastly, if transfer pricing adjustments have been made in the earlier assessment years which has been fully or partially set aside by the courts.

It is only under the circumstances mentioned in the CBDT guidelines, the Assessing Officer can make a reference to the TPO and not otherwise. If such conditions are found to exist then only, Assessing Officer after providing opportunity to the assessee and after recording satisfaction can refer the matter to the TPO for determining the LP after obtaining the approval of PCIT or CIT.

28. In this case the assessee has filed the Accountant's Report u/s 92 E and the requisite audit Form No.3 CEB and in such report ALP has been justified. It is not the case that assessee has not declared its transaction and it was only Assessing Officer who has noticed the said transaction and or there is any qualifying remark by the accountant and they do not impact the income to the assessee. Further, it is also not the case here that any transfer pricing adjustment made in the earlier assessment years have been set aside by the courts. Thus, when such conditions were not applicable and the Ld. CIT has also not specified as to which of the conditions laid down in the CBDT instructions have been violated or Assessing Officer has not followed the same, then no fault can be found in the AO's opinion in not making reference to the TPO for the specified domestic transaction. CBDT instructions have been issued to the Field officers to curb and check the blanket reference being made by the Assessing Officers to the TPO's without any satisfaction and in a mechanical manner. CBDT has thus cautioned that reference to the TPO cannot be done in mechanical manner whenever there is any international transaction or specifying domestic transaction. If all the requisite details and Accountant's Report has been filed and Assessing Officer was satisfied with such report, then he is not supposed to make a reference to the TPO unless the conditions specified for making reference has been satisfied.

29. Further, coming to the issue, whether such profit on sale of the industrial park is allowable as deduction u/s 80 IA. Sub section (1) of section 80 IA provides that, where the gross income of an assessee includes any profits and gain derived by an undertaking or an enterprise from any business referred to in sub-section (4) which are considered to be as eligible assessee, then subject to the provisions of this section there shall, in accordance with and subject to the provisions of this section, be allowed 100 %

deduction of the profits and gains derived from such business for consecutive ten assessment years while computing the total income of the assessee. Sub-section (4) of section 80-IA in turn lays down the conditions upon fulfillment of which the said section would apply. Here clause (iii) is applicable where the deduction is allowed to any enterprise or to any undertaking which develops, develops and operates or maintains and operates an industrial park notified by the Central Government. The proviso below clause (iii) of sub section (4) of section 80 IA reads as under: -

"Provided in that case where an undertaking develops an industrial park on or after the 1st day of April, 1999 or a special economic zone on or after the 1st day of April, 2001 and transfers the operation and maintenance of such industrial park or such special economic zone, as the case may be, to another undertaking (hereafter in this section referred to as the transferee undertaking), the deduction under sub - section (1) shall be allowed to such transferee undertaking for the remaining period in the ten consecutive assessment years as if the operation and maintenance were not so transferred to the transferee under taking:"

29. The aforesaid proviso is an enabling provision by deeming fiction upon transfer of any industrial park for operation and maintenance, whereby the transferee can claim the deduction for the remaining period, that is, the transferee steps into the shoes of the transferor for the limited purpose of operation and maintenance of the industrial parks and is eligible for deduction u/s 80 IA. Clause (iii) r/w the aforesaid proviso clearly envisages that there is a 'developer' who develops and operates or maintains the industrial park and other is a 'transferee' to whom such industrial park is transferred by the developer for maintaining and operating the said industrial park. Nowhere is it envisaging that the person who has developed the industrial park; and the person who is later on maintaining or operating the said industrial park, either would be denied of the deduction after the transfer. The developer cannot be denied of the deduction on income arising out of such development or profits derived on transfer of such industrial park. The proviso does not operate to deny or deprive the developer the benefit or deduction even after development of the park and thereafter is transferred to the transferee. From the reading of clause (iii) it quite ostensible that there are following categories of profits which are contemplated to be eligible benefit of deduction u/s 80 IA, viz.: -

i. Profits made by an assessee who develops the industrial park, i.e., build / construct and sale the same.

ii. Profits made by an assessee who develops and operates the industrial park. It can be lease out for a period and then sell the same.

iii. Profits made by an assessee who though may not have constructed but maintains and operates the industrial park.

There is no condition which has been laid down that, if an industrial park developed by an assessee which is being operated by him and then sell the same to another person, then the profits derived from such sale is not eligible for deduction u/s 80 IA. This precise issue had come up for consideration before the Hon'ble Gujarat High Court in the case of PCIT Vs. Nila Baurat Engineering Limited (supra), wherein their Lordships were discussing the similar proviso appearing below clause (i) of sub section 4 of section 80 IA. Their Lordships after discussing the similar proviso observed and held as under: -

5. "As per the proviso, thus, where any infrastructure facility is transferred to another enterprise for the purpose of operating and maintaining such facility in accordance with the agreement of the Central or State Government or the local or statutory authority, the section would apply to the transferee enterprise as if it were the enterprise to which this clause applies and the deduction from profits and gains would be available to such transferee enterprise for the unexpired period during which the transferor enterprise would be entitled to the deduction, had the transfer not taken place.
6. The proviso to sub-section (4) thus makes an enabling provision providing a deeming fiction whereby upon transfer of any infrastructure facility for the purpose of operating and maintaining, the transferee could claim the deduction for the remainder of the period. The crucial words here are "the transfer of infrastructure for the purpose of operating and maintaining' and thus the transferee who would now step in the shoes of the transferor for the limited purpose of operation and maintenance, could claim deduction on the profit element arising out of such activity. We may recall, under sub-section (4) of Section 80IA of the Act, an enterprise carrying on the business of developing, or operating and maintaining, or developing, operating and maintaining infrastructure facility would be eligible for deduction. Thus this provision itself envisages that in a given project the developer and person who maintains and operates may be different. Merely because the person maintaining and operating the infrastructure facility is different from the one who developed it, would not deprive the developer the deduction under the said section on the income arising out of such development. By virtue of the operation of the proviso, the developer would not be derived of the benefit of deduction under sub-section (1) of Section 80 IA on the profit earned by it from its activity of developing the infrastructure facility. The proviso does not operate as to depriving the developer of the benefit of the deduction even after the facility is transferred for the purpose of maintenance and that derived from the activity of maintenance and operation thereof."

30. The SLP against the said judgment filed revenue has been dismissed by the Hon'ble Supreme Court vide order dated 11.05.2018. Accordingly, it cannot be held that under the law the profit earned on sale of industrial park is not eligible for deduction u/s 80 IA. In any case, this view is well supported by the judgment of Hon'ble Supreme Court and no contrary decision has been brought on record by the Revenue.

31. Another angel to appraise this issue, whether profits from sale/transfer of eligible business to any other undertaking would be eligible for deduction under section 80IA can be understood from the provisions of section 80IA (8). This section provides that, where any goods or services held for the purposes of the eligible business are transferred to any other business carried on by the assessee or to any eligible business, then consideration for such transfer should correspond to the market value of such goods as on the date of transfer. It provides that the profits and gains from transfer or sale of the eligible business should be computed as if the transfer has been made at market value of such goods or services. This provision itself clarifies that profits from transfer of the eligible business is a business income eligible for deduction u/s 80 IA. In fact, this provision endorses our view that the profits from transfer of eligible business are eligible for deduction u/s 80 IA.

32. Further, one very important fact in this case is that, assessee has shown entire profit from sale of industrial profit as business income and once such business income has been accepted and no adverse comment has been given by Ld. CIT, then such a profit arising from sale of industrial park ostensibly falls within section 80 IA (4). Hence, there was no legal infirmity by Assessing Officer in allowing the claim of deduction on the profits earned from the sale of industrial park.

33. In so far as the Ld. CIT observing that Assessing Officer has failed to examine applicability of section 80 IA(8) it is seen that it is not in dispute that the Assessing Officer during the course of assessment proceedings has examined the Approved Valuer's Report who has given a detailed report of the market value of the transfer of industrial park and also transfer pricing report by the accountant has also been furnished by the assessee. Thus, when transfer price is consonance with the fair market price then conditions of this section gets satisfied. Hence applicability of section 80IA (8) has been examined by the Assessing Officer

34. Now, coming to the issue of applicability of provision of section 14A, the assessee before the Assessing Officer has filed all the relevant details for investment made in mutual funds on which assessee has earned dividend income of Rs.77,65,278/-. It has also been brought on record before the Assessing Officer that entire money invested in the mutual funds were out of sales consideration received from the sale of industrial park and this was shown from the bank statements filed during the course of assessment proceedings. Before the Assessing Officer this issue was discussed thread bare and it was specifically pointed out that interest on bank loan amounting to Rs.1,79,46,655/- related to the period prior to making of the investment and the bank loan was fully paid from the sale consideration of the industrial park, i.e., bank loan was fully paid before making the investment in the mutual funds. In such a situation ostensibly, no interest could have been disallowed. The closing balance of current investment was 'nil' and non-current investment was only Rs. 83,509/- at the end of the

year. It was also stated before the Assessing Officer that no direct or indirect expenditure was incurred to earned the dividend income. After verifying these facts Assessing Officer accepted the assessee's plea and no disallowance were made. In any case before triggering of disallowance u/s 14A, it is axiomatic that assessee must have incurred expenditure in relation to the earning of exempt income and such expenditure has been debited to the profit and loss account or claimed as deduction. The Assessing Officer is then required to examine the assessee's claim either for the expenditure attributable for earning of such exempt income or no such expenditure has been incurred, then having regard accounts to the assessee AO has to his satisfaction with the correctness of the assessee's claim that no expenditure have incurred relation to earning of exemption of income. If AO is satisfied or having regard to the accounts no expenditure can be attributed then no disallowance is called for. Nothing has been brought on record by Ld. CIT that satisfaction could have been arrived having regard to the accounts maintained by the assessee that some disallowance is called for. There is no whisper by the Ld. CIT as to why disallowance u/s 14 A was called for on the facts of the case. The disallowance under section 14A is not automatic whenever there is any kind of exempt income. It has to be seen with regard to nature of expenses debited and whether any expenditure can be calculated. Thus, simple observation that AO should have examine the applicability of 14A without any specific finding or examination of facts and material on record, Ld. CIT cannot set aside the assessment.

35. The revisionary jurisdiction u/s 263 cannot be exercised simply to make roving and fishing enquiry. It is a well settled law decided by the various Courts in the judgments relied upon by the Ld. Counsel that, the revisionary authority first of all should give a finding as to how the assessment order is erroneous and prejudicial to the interest of the revenue. If such an authority is of the view that the Assessing Officer did not make any enquiry, then it is incumbent upon CIT to specify as to what kind of inquiry or verification has not been done and even Ld. CIT can also conduct some prima-facie enquiry himself or through AO to reach to a conclusion or inference that the assessment order passed by the Assessing Officer is erroneous in so far as prejudicial to the interest of the revenue. Such an enquiry or exercise by the Ld. CIT is completely lacking in the present case. If the Assessing Officer has carried out detailed enquiry and has examined all the records called upon by him after raising queries, then Ld. CIT without pointing out as to how such an enquiry is inadequate or not proper cannot set aside the assessment. Even the fiction created by Explanation 2 to section 263 wherein it is deemed that assessment order is erroneous and prejudicial to the interest of revenue if the order passed by the Assessing Officer is without making enquiries or verification which should have been done. Here in this case, we have already found that Assessing Officer has made proper enquiries and verification after calling for all the records and after applying his mind has allowed the deduction in accordance with

law. The Ld. CIT now cannot sit on the judgment of the Assessing Officer without pointing out any legal or factual infirmity or without carrying out his own enquiry. He simply cannot set aside the order of the Assessing Officer stating that no proper enquiry has been done. Accordingly, in view of our discussion and finding given above, we set aside the impugned order of Ld. CIT passed u/s 263 and uphold the assessment order dated 11.08.2015. The impugned order thus, stands quashed.

On the basis of the above said contentions, it was submitted by the ld. AR that since the machinery provision has been repealed from the statute book, therefore, no addition can be made on account of domestic transfer pricing adjustment as held by the Hon'ble Karnataka High Court in the case of Texport Overseas Pvt. Ltd (supra) as well as the decision of the Delhi Bench of the Tribunal in the case of M/s ETT Ltd. (formerly known as Indian Express Multimedia Ltd. (supra).

11. In the light of the above, we respectfully, following the decision of the Hon'ble Karnataka High Court in the case of Texport Overseas Pvt. Ltd (supra) as well as the decision of the Delhi Bench of the Tribunal in the case of M/s ETT Ltd. Vs. CIT, ITA No. 3341/Del/2018, order dated 26.03.2019, we hold that the Section 92BA ceases to exist from the date of its insertion. Consequently, additions made u/s.92BA are also deleted. Thus, we allow the additional ground raised by the assessee.

12. In the result, both appeals of the assessee are allowed.

Order pronounced in the open court on 07/10/ 2021.

Sd/-	Sd/-
(डॉ मीठा लाल मीना)	**(**ललित कुमार)
(DR. MITHA LAL MEENA)	**(LALIET KUMAR)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पणजी/Panaji; दिनांक Dated 07/10/2021

Prakash Kumar Mishra, Sr.P.S.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant-
2. प्रत्यर्थी / The Respondent-
3. आयकर आयुक्त(अपील) / The CIT(A),
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **पणजी** / DR, ITAT, Panjaji

6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

(**Senior Private Secretary**)
आयकर अपीलीय अधिकरण, पणजी/ITAT, Panaji