**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"B" BENCH : BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT AND**
**SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

| **IT(TP)A No.3282/Bang/2018** |
|---|
| **Assessment Year : 2014-15** |

| | | |
|---|---|---|
| M/s. Sterling Urban Development Pvt. Ltd.,<br>No.8, Level-5, Prestige Nebula,<br>Cubbon Road,<br>Opp. to Income Tax Office Building,<br>Bengaluru – 560 001.<br>**PAN : AAACF 9183 C** | Vs. | The Deputy Commissioner of Income Tax,<br>Circle -6(1)(2),<br>Bengaluru. |
| APPELLANT | | RESPONDENT |

| | | |
|---|---|---|
| Appellant by | : | Shri. Ramasubramaniyan, CA |
| Respondent by | : | Shri. Muzaffar Hussain, CIT(DR)(ITAT), Bengaluru |

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|---|---|---|
| Date of hearing | : | 12.10.2021 |
| Date of Pronouncement | : | 22.11.2021 |

**O R D E R**

***Per Chandra Poojari, Accountant Member:***

This is an appeal by the Assessee against the final order of assessment dated 12.10.2018 passed by the DCIT, Circle-6(1)(2), Bengaluru, passed u/s. 144C r.w.s. 143(3) of the Income-tax Act, 1961 [the Act] relating to assessment year 2014-15.

2. The Assessee is a Company incorporated under the Companies Act, 1956 on 12th June 2002 under the name and style "Foundation Habitats (India) Private Limited". The company has been converted as a SPV in the year 2006. The Assessee is engaged in the activities relating to real estate,

builders, designers, architects, estate, decorators, consultants and brokers of all types of buildings and structures and to purchase, sale or deal in all types of immovable properties for development, investment, or for resale and to act as buyers, sellers and agents.

3. In the year 2004-05, a company by name Sterling Deveopers Private Limited (SDPL) planned to develop a Villa project (later named it as "STERLING VILLAGRANDE") on 39 Acres of Land by acquiring lands at Sy. No.109, 110, 111, 112, 113, 114, 115 and 116 situated at Seegehalli Village, Bidarahalli Hobli, Bengaluru, measuring 43 Acres 12 Guntas and submitted a loan proposal to HDFC Limited for Project Finance. HDFC Limited came up with an investment proposal. Based on discussions held with the HDFC Limited, the HDFC Property Fund, Sterling Developers Pvt. Ltd., (SDPL) agreed to invest in the ratio of 50:50 in both Equity shares and Optionally Convertible Debentures vide Master Agreement dated 19th November 2005.

4. M/s. HDFC Property Fund is a venture capital trust investing in various venture undertakings and companies. It has executed a trust deed dated 6.11.2004.and as per the terms of the trust, HDFC Property Fund is a trust created for the benefit of various persons mentioned therein.

5. M/s. HDFC Property Fund as agreed under the Master Agreement dated 19.11.2005 had invested in the equity shares of the Assessee and it was holding 50% of the total equity capital of the Assessee and the remaining 50% of the equity was held by SDPL. In addition, it had

subscribed to convertible debentures of Rs.19.05 Crore. Such debentures are convertible into equity at the option of HDFC Property Fund.

6. As per the terms of the debenture agreement, the HDFC Property Fund is entitled to 10% as interest on the face value of the debenture. If there is any default in payment of interest, the HDC Property Fund is entitled to penal interest of 10%, per annum. It may be stated here that even though the interest is payable at 10% for many years, the interest was not provided at 10% but only at 1%. The details of interest provided for various years at convertible debentures are given below:;

| **Sl. No.** | **Financial Year** | **interest %** |
|---|---|---|
| 1 | 2005 — 2006 (From 21.01.16 to 31.03.16) | 16% |
| 2 | 2006 — 2007 | 10% |
| 3 | 2007 — 2008 | 10% |
| 4 | 2008 — 2009 | 1% |
| 5 | 2009 — 2010 | 1% |
| 6 | 2010 — 2011 | 1%' |
| 7 | 2011 — 2012 | 1% |
| 8 | 2012 — 2013 | 1% |
| 9 | 2013 — 2014 (from 01.04.2013 to 21.03.2014) | 22% |

7. The detailed list of beneficiaries of the trust, Form 64, the statement of total income and a copy of the return filed by the HDFC Property Fund were filed before the lower authorities.

8. M/s. HDFC Property Fund did not exercise the option to convert the debentures into equity. Instead the Assessee and HDFC Property Fund agreed to redeem the debentures at a premium. The premium was determined on the basis of the projected profits of the project. It was also decided that interest @ 22% will be paid for the period from 1.4.2013 to 21.3.2014.

9. The Assessee had entered into similar transactions with SDPL. It had paid interest @ 22% to SDPL during the FY 2013-14. Here also though the contractual rate was 10% (with a provision for payment of penal interest at 10% in case of default) the Assessee did not provide for the full contracted rate of interest for many years. The details of interest paid are given below:

| **SI. No.** | **Financial Year** | **Interest %** |
|---|---|---|
| 1 | 2005 — 2006 (From 21.01.16 to 31.03.16) | 10% |
| 2 | 2006 — 2007 | 10% |
| 3 | 2007 — 2008 | 10% |
| 4 | 2008 — 2009. | 1% |
| 5 | 2009 — 2010 | 1% |
| 6 | 2010 — 2011 | 1% |

| | | |
|---|---|---|
| 7 | 2011 — 2012 | 1% |
| 8 | 2012 — 2013. | 1% |
| 9 | 2013 — 2014<br>(from 01.04.2013 to 21.03.2014) | 22% |

10. The Finance Act, 2012 extended its scope to cover certain domestic transactions with related parties within India, defined as 'Specified Domestic Transactions' (SDT) with effect from AY 2013-14. The Finance Act, 2012 introduced Section 92BA giving the meaning of SDT and it provided as follows:

> *"SECTION 92BA: MEANING OF SPECIFIED DOMESTIC TRANSACTION.*
>
> *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) 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.*
>
> *(ii) any transaction referred to in section 80A;*
>
> *(iii) any transfer of goods or services referred to in sub-section (8) of section 80-IA;*
>
> *(iv) any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA;*
>
> *(v) any transaction, referred to in any other section under Chapter VI-A or section 10AA, to which provisions of sub-section (8) or sub-section (10) of section 80-IA are applicable; or*
>
> *(vi) any other transaction as may be prescribed,*

> *and where the aggregate of such transactions entered into by the assessee in the previous year exceeds a sum of twenty crore rupees.*

Section 92(2), as amended provided that where in an international transaction or specified domestic transaction, two or more associated enterprises enter into a mutual agreement or arrangement for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises, the cost or expense allocated or apportioned to, or, as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be.Section 92(2A) provided that any allowance for an expenditure or interest or allocation of any cost or expense or any income in relation to the specified domestic transaction shall be computed having regard to the arm's length price.

11. In terms of the above statutory provisions of Sec.92BA(i) the transaction of redemption of debentures at a premium and payment of interest to the debenture holders were SDT and the Arm's Length Price (ALP) of the said transaction had to be determined. HDFC Property Fund and SDPL held 50% equity shares of the Assessee and therefore covered by the provisions of Sec.92BA(i) i.e., 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. Sec.40A(2)(b) of the Act to the extent necessary for disposal of the issue in the present appeal, provides as follows:

*"Expenses or payments not deductible in certain circumstances.*

*40A. (1) The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other provision of this Act relating to the computation of income under the head "Profits and gains of business or profession" .*

*(2)(a) Where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in clause (b) of this sub-section, and the Assessing Officer is of opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction :*

*Provided that no disallowance, on account of any expenditure being excessive or unreasonable having regard to the fair market value, shall be made in respect of a specified domestic transaction referred to in section 92BA, if such transaction is at arm's length price as defined in clause (ii) of section 92F.*

*(b)* ***The persons referred to in clause (a) are the following, namely :—***

*(i)…….*

*(i).....*

*(i)……*

*(ii) a company, firm, association of persons or Hindu undivided family having a substantial interest in the business or profession of the assessee or any director, partner or member of such company, firm, association or family, or any relative of such director, partner or member [50][or any other company carrying on business or profession in which the first mentioned company has substantial interest];*

*Explanation. —For the purposes of this sub-section, a person shall be deemed to have a substantial interest in a business or profession, if, —*

***(a)*** *in a case where the business or profession is carried on by a company, such person is, at any time during the previous year,* ***the beneficial owner of shares (not being shares entitled***

***to a fixed rate of dividend whether with or without a right to participate in profits) carrying not less than twenty per cent of the voting power; and in any other case, such person is, at any time during the previous year, beneficially entitled to not less than twenty per cent of the profits of such business or profession.***

Analysis of above sections would show that a person referred to in sub clause (iv) would be covered by section 40A(2)(b) if he has a substantial interest in the business of the assessee. The explanation below section 40A(2)(b) defines when a person is deemed to have a substantial interest in the business. Clause (a) of the explanation is applicable to the present case. Under this clause, **a person who is the beneficial owner of carrying not less than 20% of the voting power of shall be deemed to be sub interested in the company.**

12. The Assessee in its Transfer Pricing Study filed in support of its claim that aforesaid two SDT are at ALP, claimed that the payment of premium and interest was justified and has to be regarded at Arm's Length in view of the non-payment of agreed interest for earlier years and default clause in the agreement. The same was rejected by the Transfer Pricing Officer (TPO) to whom the Assessing Officer (AO) referred the question of ALP of the SDT u/s.92CA of the Act. The TPO suggested the following adjustment to the ALP and consequent addition to be made to the total income of the Assessee:

*"6.10 Interest paid on debentures:*

*The rate of interest agreed upon by the parties concerned is 10%. Hence the ALP of the interest rate is restricted to 10% and any amount paid in*

*excess of this would be treated as adjustment u/s 92CA(3) as discussed in the preceding paragraphs.*

*6.11 Arms length price calculation on premium & interest as follows:*

*6.11.1* ***Interest paid to Sterling developer ltd.:***

| | |
|---|---|
| ***Sterling Developer Ltd.,*** | |
| **Interest on debenture for the year** | **407,61,781** |
| **ALP on interest @10%** | **190,50,000** |
| **Difference** | **217,11,781** |

*Difference amount of Rs.2,17,11,781 is considered as TP adjustment for specific domestic transaction with Sterling Developer 1td for interest payment.*

*6.11.2* ***Premium & interest paid to HDFC Venture trustee company Ltd.,*** *is*

| *Premium Paid:* | *As claimed in P&L* | *ALP* |
|---|---|---|
| *Accumulated Interest* | *854,21,313* | *854,21,313* |
| *Debenture Premium* | *8911,48,219* | |
| *Principal* | *1905,00,000* | *1905,00,000* |
| *Interest for 13-14 @10%* | *487,35,710* | *190,50,000* |
| *Total premium paid on redemption* | *12158,05,242* | *2949,71,313* |

| *HDFC Venture trustee company ltd., is* | |
|---|---|
| *Total amount paid to AE (premium) and interest)* | *121,58,05,242* |
| *ALP calculated* | *29,49,71,313* |
| *Difference* | *92,08,33,929* |

13. Besides the above addition, the AO in his draft assessment order dated 26.12.2017 also held that premium paid on debentures is capital expenditure and it cannot be allowed as a deduction. The above addition was made on a protective basis because premium paid on debentures is already part of the addition on account of determination of ALP. The relevant observations of the AO for considering premium paid on debentures as capital expenditure was as follows:

> ***"Premium paid on redemption of Premium:***
> *On going through the P&L A/c, it is observed that the assessee company has debited a sum of Rs. 89,11,48,219/- as premium paid on redemption of debentures. On a perusal of the financials it is observed that the assessee had issued optionally convertible debenture of Rs. 19,05,00,000/- which was subscribed by Sterling Developers Limited and HDFC Venture Trustee Company Limited on 19.11.2005. During the financial year relevant to asst.year 2015-16 the debenture holder redeemed the debentures and was paid debenture premium of Rs. 89,11,48,219/- alongwith accumulated interest of Rs. 8,54,21,313/- and interest of Rs.4,87,35,710/- and principal of Rs. 19,05,00,000/-. On redeeming the optionally convertible debentures valued at Rs. 19,05,00,000/- the assessee has paid the debenture holder an amount of Rs. -1,16.33 crores inclusive of debenture premium of Rs. 89,11,48,219/-. Any payment made to discharge a debt whether called as premium or otherwise is a return on investment to the debenture holder. Debentures are noting but a debt secured only by a debtor's earning power, not by a lien on any specific asset. The debenture partakes the character of a loan in a more polished way. The assessee in this ease had issued optionally convertible debentures of Rs.19,05,00,000/- and on these debentures the assessee is bound by Debenture Subscription Agreement to pay 10% of the interest. There is no condition prescribed in the agreement for payment of premium on debenture.*
>
> *The assessee has paid interest of Rs. 4,87,35,710/-, accumulated interest of Rs. 8,54,21,313/- and premium of Rs. 89,11,48,219/- on*

*redemption of optionally convertible debentures which is much higher that what was agreed in the Debenture Subscription Agreement i.e., 10%. It is observed that the transaction of the assessee is with a related party and the parties have mutually agreed upon an arrangement wherein the income on which the assessee should otherwise have ,paid taxes has been shifted to a specified person in whose hands this receipt is totally exempt. The assessee has given a colourable device to avoid the incidence of tax. In view of the above, the premium paid on redemption of debenture amounting to Rs. 89,11,48,219/- is disallowed and brought to tax. However, as the TPO in its order u/s 92CA dated 31.10.2017 has already considered the premium paid on redemption of debenture hence this addition of Rs. 89,11,48,219/- is made on protective basis.*

*Without prejudice to the stand that the payment is excessive, subject to matter of TP adjustment and an addition of Rs. 94,25,45,710/- is made u/s 92CA(3) of the Act, I hold that the premium payment is in nature of capital expenditure and the same is in nature of expanding the capital base. The assessee has also put forth the argument in its submission before the TPO.*

*Considering the argument, I protectively hold that the payment of Rs. - 89;11.48,219/- is in the nature of expanding the capital base and the same has to be disallowed since it is capital in nature.*

*I protectively hold that the expenditure of Rs.89,11,48,219/- is capital in nature and hence disallowable. In the event of it being held that the adjustment u/s 92CA(3) of the Act is possible for the reason that the expenditure is capital in nature, the same is to be held disallowable and cannot be allowed as revenue. This finding is protective in nature. An addition of Rs.89,11,48,219/- is made protectively to the income declared.*

*However, if the assessee succeeds in getting relief from Hon'ble Dispute Resolution Panel or from the appallate authorities, on the said TP issue, the said addition will be considered as substantive."*

14. The Assessee filed objections to the draft assessment order in which the addition suggested by the TPO was incorporated as an addition to the total income of the Assessee before the Dispute Resolution Panel (DRP). Before DRP, the Assessee submitted :

(i) that the transaction of redemption of debenture cannot be regarded as SDT, because by Finance Act, 2017 w.e.f. 01.04.2017, clause (i) of section 92BA was omitted from the statute and by virtue of omission of clause (i) from the statute, the proceedings already initiated or action taken under clause (i) becomes redundant or otiose. In this regard, the Assessee placed reliance on decision of ITAT Bangalore Bench in the case of Textport Overseas Pvt.Ltd. Vs. DCIT IT(TP)A.No.1772/Bang/2017 order dated 22.4.2021 wherein it was held that in the light of provisions of section 6 of the General Clauses Act, in such a case, the court is to look to the provisions in the rule which has been introduced after omission of the previous rule to determine whether a pending proceeding will continue or lapse. If there is a provision therein that pending proceedings shall continue and be disposed of under the old rule as if the rule has not been deleted or omitted then such a proceeding will continue. If the case is covered by Section 6 of the General Clauses Act or there is a pari-materia provision in the statute under which the rule has been framed in that case also the pending proceeding will not be affected by omission of the rule. In the absence of any such provisions in the statute or in the rule, the pending proceeding will lapse under rule under which the notice was issued or proceeding being omitted or deleted.

(ii) The Assessee contended that the expression used in Sec.40A(2)(b) read with explanation thereto refers to “beneficial owner of shares. The

Assessee contended that the expression “beneficial owner” is not defined in the Act. It was submitted that a beneficial owner would refer to that person who can enjoy the benefits of the ownership. A beneficial ownership is to be distinguished from the legal ownership. A person may be a legal owner but he may not be a beneficial owner. It is trite to state that a trustee of a trust stands in fiduciary relationship to the beneficiaries. He may be legal owner of various assets but he has no beneficial interest in such assets. It is well settled that the trustees own the properties / assets not in their personal capacity but on behalf of benefit of the beneficiaries. In this connection, the assessee drew the kind attention of the Hon'ble DRP to the decision of the Court of Appeal in J. Sansbury PLC v. O'Conner (Inspector of Taxes) 197 ITR 462. The Court of Appeal explained the concept of beneficial ownership in pages 471 to 480 of 197 ITR. At page 471, the concept of beneficial ownership was explained as under;

> *"The archetype is the trust. The 'legal ownership' of the trust property is in the trustee, but he holds it not for his own benefit but for the benefit of the cestui que trust or beneficiaries. Upon the creation of a trust in the strict sense as it was developed by equity the full ownership in the trust property was split into two constituent elements, which became vested in different persons : the 'legal ownership' in the trustee, what came to be called the 'beneficial ownership' in the cestui que trust. "*

Reliance was place on the decision of Hon'ble Supreme Court in CWT v. Trustees of Nizam's Trust 108 ITR 555 (SC) wherein a contention was advanced that assets held by a trustee in trust for others cannot be said to be assets " belonging to" the trustee so as to be includible in his net wealth. The assets so held "are not the trustee's property in any real sense " : they are the property of the beneficiaries and, to use the words of Lord Macnaghten in Heritable Reversionary Co. Ltd. v.

Miller [1892] AC 598 (HL), the beneficiaries are the true owners all along. On this contention, the Hon'ble Supreme Court in page 591 held that prima facie, there seems to be force in this argument though the Hon'ble Court felt that it is not necessary to express final opinion on this issue. It was submitted that a reading of the above decisions would show that the trust is not a beneficial owner of the shares in the assessee. The trust is only a legal owner. Since it is not beneficially owning the shares, HDFC Property Fund cannot be treated as a person substantially interested in the assessee. The assessee submitted that in 'the proceedings before the TPO, the assessee had filed a copy of the return filed by the HDFC Property Fund wherein it had claimed the exemption u/s. I 0(23FB) of the Act. Section 10(23FB) of the Act exempts the income earned by a Venture Capital Fund by the investments made in a Venture Capital Undertaking. It was also submitted that the Venture Capital Fund is given a pass through status by section 115U of the Act and the income earned from the investment in Venture Capital Undertaking is to be assessed in the hands of the beneficiaries. Hence, it was submitted that the HDFC Property Fund is not a person substantially interested in the petitioner company. Since HDFC Property Fund is not a person substantially interested in the petitioner company. It is not a person specified in section 40A(2)(b) of the Act. Therefore, the transactions with HDFC Property Fund are not to be treated as Specified Domestic Transactions. The assessee also submitted that it is no doubt true that the petitioner itself treated the transaction as SDT, prepared a Transfer Pricing Study Report and filed the Audit Report. It is submitted that the petitioner company had taken the above stand based on a wrong reading of the relevant statutory

provisions. There is no estoppel against law. It is always open to an assessee to contend that the legal stand taken earlier is not correct in law and he is entitled to change his stand based on the correct legal position. The Assessee in this regard relied on the following decisions;

- Narsapalli Oil Mills Vs The State of Mysore 32 STC 599 (Kar)
- Bhandari Metals and Alloys (Private) Ltd Vs State of Karnataka 56 KU 438
- 60 ITR Trib (1) — Canara bank
- Peerless Financial Services Ltd v. CIT 335 ITR 452 (Cal)
- DCIT 11(3) Vs GEBE (P) Ltd 64 SOT 129 (URO) (Bang)

Hence it was prayed that the Hon'ble DRP be pleased to hold that the transaction entered into with HDFC Property Fund is not a Specified Domestic Transaction.

(iii) With regard to treating premium paid on redemption of debentures as capital expenditure and making a protecting addition and observing that it would become substantive addition, if the Transfer Pricing addition made in respect of premium paid on redemption debentures, the Assessee relied on the decision of the Hon'ble Gujarat High court in DCIT Vs Gujarat Narmada Valley Fertilizers Co Ltd .356 ITP. 460 and Bombay High Court in CIT Vs Grindwell Norton Ltd ITA 694/2012 wherein it was held that premium paid on redemption of debentures is a revenue expenditure. Hence, the Assessee prayed that this ground may kindly be allowed. The Assessee denied allegation in the assessment order that the premium has been paid to shift profits and is a colorable transaction. The Assessee

submitted that in draft assessment order no such proposition was made. Hence, such a conclusion cannot be reached in the final assessment order. Even otherwise, this finding is totally perverse. and it is not based on any material and evidences on record. It is submitted that it is a wild allegation bereft of facts. Hence, it was prayed that this finding of the lower authorities may be quashed. Even the finding of the learned assessing officer that HDFC Property Fund is not liable to pay tax and therefore. the profit is being shifted is a finding which is perverse. The Form 64 issued by HDFC Property funds shows that it is liable to pay tax. Even otherwise the beneficiaries are liable to pay tax on the income earned by them as beneficiary of HDFC Property Fund. This is very clear from S.115U of the Act. Hence this finding may also be quashed.

(iv) Arguments were advanced as to how the payment of interest and premium on redemption of debentures was justified at Arm's Length. It was also submitted that in case the transaction of redemption of debentures of HDFC Property Fund is regarded as non SDT, then the said interest and premium payment by itself would be an internal Comparable uncontrolled transaction and based on the said internal comparable uncontrolled Price (CUP) would itself be a yardstick to hold that payment of interest and redemption premium to SDPL as at arm's length.

15. The DRP however rejected all the contentions and confirmed the order of the AO. With regard to the contention that there could be no addition u/s.92BA in view of the subsequent deletion of the aforesaid provisions by the Finance Act, 2017, the DRP refused to follow the decision of ITAT in the case of Textport Overseas Pvt.Ltd. (supra). With

regard to the contention that HDFC Property Fund cannot be regarded as a person falling within the ambit of Sec.40A(2)(b) of the Act, the DRP held there is no distinction between beneficial and legal ownership and the arguments advanced by the Assessee were frivolous. With regard to the premium on redemption of debentures being treated as capital expenditure, the DRP, did not adjudicate the said argument. The other arguments with regard to justification of interest and premium paid on debentures as at Arm's length were also rejected.

16. Aggrieved by the final order of assessment of the AO, incorporating the directions of the DRP, the Assessee is in appeal before the Tribunal. We have heard the rival submissions. The learned AR reiterated submissions made before the DRP and brought to our notice that the decision of the ITAT in the case of Textport Overseas Pvt.Ltd. (supra) has been confirmed by the Hon'ble Karnataka High Court and hence the order of the DRP is unsustainable. The learned DR relied on the orders of the revenue authorities.

17. We have carefully considered the rival submissions. The first issue is with regard to whether the transaction of payment of interest and premium on redemption of debentures can be said to be an SDT. On this issue, as rightly pointed out by the learned counsel for the Assessee, the decision of the ITAT in the case of Textport Overseas Pvt.Ltd. (supra) has been confirmed by the Hon'ble Karnataka High Court in the very same case of Texport Overseas Pvt. Ltd. in ITA No.392/2018 order dated 12.12.2019, with the following observations:-

*"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-integra in the light of authoritative pronouncement of Hon'ble Apex Court in the matter of KOBLAPUR CANESUGAR WORKS LTD. v. UNION OF INDIA reported in AIR 2000 SC 811 whereunder Apex Court has examined the effect of repeal of a statute visa-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 coordinate 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. vs. 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-TOP 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."*

18. Since the decision rendered by the Hon'ble High Court of Karnataka is binding on this bench of Tribunal sitting in Bengaluru, we follow the same. Accordingly, we hold that the reference to the TPO in respect of specified domestic transactions mentioned in clause (i) of sec.92BA is not valid, as the said provision has been omitted. Accordingly, we direct the AO to delete the addition relating to specified domestic transactions made u/s 92CA of the Act.

19. We notice that the co-ordinate bench in the case of Textport Overseas (supra) has restored the matter to the file of the A.O. with the

direction to examine the claim of expenditure in accordance with the provisions of section 40A(2) of the Act. Following the same, we restore this issue to the file of the AO with the direction to examine the claim of expenditure mentioned above in terms of the provisions of section 40A(2) of the Act. Accordingly, following the binding decision rendered by Hon'ble High Court of Karnataka in the case of Texport Overseas P Ltd (supra), we hold that the reference to the TPO in respect of specified domestic transactions mentioned in clause (i) of sec.92BA is not valid, as the said provision has been omitted. Accordingly, we direct the AO to delete the addition relating to specified domestic transactions made u/s 92CA of the Act. However, as pointed out by Ld D.R, the co-ordinate bench, in the case of Texport overseas P Ltd, has restored the matter to the file of the A.O. with the direction to examine the claim of expenditure in accordance with the provisions of section 40A(2) of the Act. Following the same, we restore this issue to the file of the AO with the direction to examine the claim of expenditure mentioned above in terms of the provisions of section 40A(2) of the Act. The above directions are subject to the decision with regard to the contention of the Assessee that the transaction with HDFC Property Fund, cannot be regarded as an SDT because HDFC Property Fund is not a person covered within the ambit of Sec.40A(2)(b) of the Act.

20. The next issue to be considered is as to whether transaction with HDFC Property Fund, cannot be regarded as an SDT because HDFC Property Fund is not a person covered within the ambit of Sec.40A(2)(b) of the Act. The decision rendered by the Hon’ble Bombay High Court in the case of HDFC Bank Ltd. (supra) supports the plea of the Assessee. The

Hon'ble Bombay High Court held that there is distinction in law between beneficial and legal ownership and what is relevant to see is the beneficial ownership and if the legal owner is not the beneficial owner of the shares, then the provisions of Sec.40A(2)(b) of the Act will not be attracted. The following observations of the Hon'ble Court are relevant in this regard:

> *"25. It is undisputed that the Petitioner purchased the loans of HDFC Ltd. of more than Rs. 5,000 Crores. HDFC Ltd. admittedly holds 16.39% of the shareholding in the Petitioner. If one were to go merely by this figure of 16.39%, then, on a plain reading of section 40A(2)(b)(iv) read with explanation (a) thereof, HDFC Ltd. would not be a person who would have a substantial interest in the Petitioner. This is simply because explanation (a) clearly stipulates that for one to have a substantial interest, it should be the beneficial owner of shares carrying not less than 20% of the voting power.*
>
> *26. However, the Revenue contends that the requirement of explanation (a) of having more than of 20% of the voting power is clearly established in this case because HDFC Ltd. holds 100% of the shareholding in another company called HDFC Investment Ltd., which in turn, holds 6.25% shareholding in the Petitioner. When Pg 37 of 57 WP462OF2017.doc one clubs the shareholding of HDFC Ltd. of 16.39% with the shareholding of the HDFC Investments Ltd. of 6.25% (and which is a wholly owned subsidiary of HDFC Ltd.), the threshold of 20% as required under explanation (a) to section 40A(2)(b), is clearly crossed. This being the case, it is the Revenue's contention that HDFC Ltd. clearly has a substantial interest in the Petitioner, and therefore, the transaction of purchasing loans by the Petitioner from HDFC Ltd. would fall within the meaning of a SDT, in which case, for this transaction, the ALP has to be determined by the TPO.*
>
> *27. On a plain reading of the aforesaid provisions, we are unable to agree with the submissions of the Revenue. What explanation (a) to section 40A(2)(b) clearly stipulates is that a person shall be deemed to have a substantial interest in a business or profession in a case where the business or profession is carried on by a company,*

*such person is, at any time during the previous year, the beneficial owner of shares carrying not less than 20% of the voting power. In other words, explanation (a) when broken down, requires two conditions that need to be fulfilled. The first condition is that, that the person should be the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits); and second that these shares which the person is the beneficial owner) are carrying not less than 20% of the voting power. In the facts of the present case, admittedly HDFC Ltd., on its own, is not the beneficial owner of shares carrying at least 20% of the voting power as required under explanation (a) to section 40A (2) (b) of the I. T. Act. The shareholding that HDFC Ltd. has in the Petitioner is only 16.39%.*

*28. We cannot, and the law does not permit us, to hold that HDFC Ltd. is the beneficial owner of 22.64% of the shares in the Petitioner by clubbing the share holding of HDFC Investments Ltd. with the shareholding of HDFC Ltd. If we were to do this, we would be effectively holding that HDFC Ltd., being a shareholder of HDFC Investments Ltd., is the beneficial owner of the shares which HDFC Investments Ltd. holds in the Petitioner. This, in law, is clearly impermissible because a shareholder of a company can never have any beneficial interest in the assets (movable or immovable) of that company. In the present case, if we were to accept the contention of the Revenue, it would mean that HDFC Ltd. is the beneficial owner of the shares which HDFC Investments Ltd. holds in the Petitioner. This would be contrary to all canons of Company Law. It is well settled that a shareholder of a company can never be construed either the legal or beneficial owner of the properties and assets of the company in which it holds the shares. This being the position in law, we find that the Revenue is incorrect in trying to club the shareholding of HDFC Investments Ltd. in the Petitioner along with the shareholding of HDFC Ltd. in the Petitioner, to cross the threshold of 20% as required in explanation (a) to section 40A(2)(b)……..”*

21. The Hon’ble Supreme Court in the case of Trustees of Nizam’s trust 108 ITR 555 (SC) (Supra) also observed in its judgment that property held by trustees are not be treated as property beneficially held by the trust as

the beneficiaries are the real owners and not the trustees who are only legal owners. As held by the Court of Appeal in J.Sansbury PLC V. O'Conner (Inspector of Taxes) 197 ITR 462, in a trust legal ownership is with the trustee but he holds the property for the benefit of the cestuique trust or beneficiaries. Upon the creation of a trust the full ownership of the trust property is split into two constituent elements which vested in different person, the legal ownership in the trustee and the beneficial ownership in the cestui que trust. Therefore the expression "beneficial owner of shares" referred to Sec.40A(2)(b) of the Act refers to a beneficial shareholder. If a person is a registered shareholder but not the beneficial shareholder than the provisions of section 40A(2)(b) will not apply. Therefore to attract the provisions of Sec.40A(2)(b) of the Act, the SDT should have been with the beneficial shareholder and not with a registered shareholder then also the first limb of provisions of section 2(22)(e) will not apply. Therefore the transaction of redemption of debentures held by HDFC Property Fund who is only registered owner or legal owner and not the beneficial owner cannot be subject matter of consideration either u/s.92BA(i) or Sec.40A(2)(b) of the Act. We hold accordingly.

22. The next aspect to be considered is as to whether the premium paid on redemption of debentures can be said to be capital expenditure in nature and therefore cannot be claimed as deduction. On this aspect, we find that the Hon'ble Gujarat High Court in the case of Gujarat narmada Valley Fertilizers Company Ltd. 256 ITR 460 (Guj.) considered identical issue of payment of premium on redemption of debentures and held that as per section 36(1)(iii) of the Act, it was a necessary condition that the capital

must have been borrowed for the purpose of business on which interest had been paid. The provision does not distinguish between money borrowed for capital or revenue purposes. The new facility had been started for captive consumption, i.e., for the purpose of its existing business. Reliance was placed on the decision in the case of Taparia Tools [2015] 372 ITR 605 (SC) to hold that the taxpayer had paid accrued return and premium for early foreclosure and claimed the entire expenditure by way of interest liability during the year under which the same was expended. It was not the case of contingent liability, as it would absolve future payment of such liability. In what manner the taxpayer raises its required funds was essentially a case of business decision and the Revenue could not certainly question the priority of the taxpayer in DCIT v. Core Health Care Limited [2008] 298 ITR 194 (SC) this respect. The taxpayer's decision of early redemption and the terms on which such early redemption would be resorted to, was within the public domain. The decisions were already taken and made public. Merely because certain tax treatment on the respective expenditures and gains had been claimed, it would not be a determinative factor insofar the claim for interest expenditure under section 36(1)(iii) of the Act was concerned. If the claim of the taxpayer was otherwise genuine but was not acceptable to the revenue, the entire scheme could have been seen as permissible tax planning and not a sham or colourable device. There was always a line, although not always clear, between legitimate tax planning, even exploiting legal loopholes and sham or bogus devices to defeat the genuine claims of the Revenue.

23. The ratio laid down in the aforesaid decision is that both yearly premium and additional premium are to be treated on same footing, as interest, and deduction under the Act is available in both the cases. The provision of section 36(1)(iii) does not make any distinction between money borrowed for capital or revenue purposes. The same is also the principle laid down by the Hon'ble Bombay High Court in the case of CIT Vs. Grindwell Norton Ltd. (ITA No.694/2012) and it was held therein that premium paid on redeption of debentures is a revenue expenditure. In the light of the law as explained above, we are of the view that the premium paid on redemption of debentures cannot be regarded as capital expenditure. The said protective addition is unsustainable and is hereby deleted.

24. In the result, the grounds of appeal are decided as follows: Ground No.1 and 2 Academic and hence not pressed and hence dismissed. Ground No.3.1 & 3.2 set aside to the AO for consideration de novo as per provisions of Sec.40A(2)(b) of the Act, in so far as SDT with SDPL is concerned; Ground No.4 allowed and is held that redemption of debentures held by HDFC Property Fund is not a transaction falling within Sec.40A(2)(b) of the Act. Ground No.5 & 6 does not arise for consideration because of conclusion on Ground No.4. Ground No.7 is remanded to AO/TPO for consideration de novo as per ground No.3.1 & 3.2 Ground No.8 is allowed holding that premium paid on redemption of debentures is revenue expenditure.

25. In the result, appeal is partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

| Sd/- | Sd/- |
|---|---|
| **(N. V. VASUDEVAN)** | **(CHANDRA POOJARI)** |
| **VICE PRESIDENT** | **ACCOUNTANT MEMBER** |

Bangalore,
Dated : 22.11.2021.
/NS/*

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.