

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-2' BENCH,  
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND  
SHRI YOGESH KUMAR U.S, JUDICIAL MEMBER

ITA No. 6597/DEL/2018 [A.Y. 2014-15]

M/s SMR Automotive Systems  
India Ltd. 2<sup>nd</sup> Floor, F-7,  
Block B-I, Mohan Co-operative  
Industrial Estate, Mathura Road,  
New Delhi.

Vs.

Addl. C.I.T  
Special Range-8,  
Delhi.

(Applicant)

(Respondent)

Assessee By : Shri Darshan S. Kirplani, Adv

Department By : Shri Mahesh Shah, CIT- DR

Date of Hearing : 11.04.2022

Date of Pronouncement : 25.05.2022

**ORDER**

**PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-**

This appeal by the assessee is preferred against the order dated 24.08.2018 framed u/s 143(3) r.w.s 144C of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] pertaining to Assessment Year 2014-15.

2. The sum and substance of the grievance of the assessee is that the Assessing Officer/DRP erred in holding that the Specified Domestic Transactions [SDT] undertaken by the assessee do not satisfy the arm's length principle envisaged under the Act.

3. The assessee strongly alleged that Section 92BA(1) of the Act has been omitted by the Finance Act, 2017 and, therefore, the impugned order should lapse and become invalid in law.

4. Briefly stated, the facts of the case are that the assessee is engaged in the manufacture of rear view mirrors, rear view mirror cable assemble and other automotive components. The rear view mirrors and automotive components are supplied to the domestic market to Original Equipment Manufacturers [OEMs] whereas the rear view mirror assembles are exported to group companies.

5. The international transactions undertaken by the assessee with its Associated Enterprises [AEs] are summarized as under:

Sl No	Nature of Transactions	Most Appropriate Method	Amount
	<i>International Transactions</i>		
1.	<i>Purchase of raw material</i>	TNMM	662,416,191
2.	Sale of Goods	TNMM	46,394,102
3	<i>intra-Group Services rendered</i>	TNMM	25,031,218
4	<i>Intra-Group Services received</i>	TNMM	49,965,923
5	<i>Back Office engineering design services rendered</i>	CUP/ TNMM	27,473,968
6	<i>Back Office support services rendered</i>	CUP/ TNMM	14,302,902
7	<i>Engineering design services rendered</i>	TNMM	50,170,306
8	<i>Engineering design services received</i>	TNMM	24,498,249
9	<i>Reimbursement of expenses .paid</i>	CUP	384,591
	<b>Specified Domestic Transactions</b>		
1	<i>Purchase of raw materials</i>	TNMM	5,30,018519
2	<i>Services received</i>	TNMM	73,494,894
3	<i>Reimbursement of expenses paid</i>	<i>Other Method</i>	4072
4	<i>Payment of rent</i>	<i>Other Method</i>	1397214

6. Since the aforesaid transactions exceeded the monetary limit specified in the relevant provision of the Act, the matter was referred to the TPO for determination of the arm's length price.

7. A show cause notice was issued to the TPO and sought information relating to the specified domestic transactions.

8. The assessee filed detailed reply in support of its claim that the transactions with the AEs are at arm's length and no adjustment should be made.

9. Submissions of the assessee did not find any favour with the TPO who proposed adjustment on account of purchase of raw material and business support services.

10. Objections were raised before the DRP but were of no avail and the AO finally framed the assessment order.

11. Before us, the ld. counsel for the assessee vehemently stated that sub-section (1) of Section 92BA has been omitted from the statute and by virtue of the amendment this particular sub-clause shall be deemed not to be on the statute since the beginning and, therefore, the assessment order deserves to be quashed. The ld. counsel for the assessee referred to various judicial decisions in support of his contention.

12. Per contra, the DR strongly supported the findings of the lower authorities.

13. We have given a thoughtful consideration to the orders of the authorities below. The undisputed fact is that as per sub-clause (1) of section 92BA of the Act, the assessee has undertaken the transaction which has exceeded the prescribed limit. It is also not in dispute that vide Finance Act, 2017 w.e.f. 01.04.2017 the said sub-clause (1) of section 92BA has been omitted. We find that the AO has made a reference u/s 92CA of the Act having observed that the assessee has entered into specific domestic transaction as the case is covered u/s 92BA of the Act.

14. We find that an identical issue came up for adjudication before the coordinate bench, Bangalore in IT(TP)A No. 1722/2017. The relevant findings of the coordinate bench read as under:

*"7. Having carefully examined the orders of authorities below in the light of rival submissions and relevant provisions and various judicial pronouncements, we find that by virtue of the insertion of section 92BA on the statute as per clause (i), any expenditure in respect of which payment has been made or is to be made to person referred to in clause (b) of sub section 2 of section 40A exceeds the prescribed limit, it would be a specified domestic transaction for which AO is required to make a reference to TPO under section 92CA of the Act for determination of the LP. In the instant case, since the transaction exceeds the prescribed limit it becomes the specified domestic transaction for which reference was made by the AO to the TPO under section 92CA for determination of the ALP. Consequently, the TPO submitted a report which was objected to by the learned counsel for the assessee and filed a objection before the ORP. Having adjudicated the objections. the ORP has issued certain directions and consequently the AO passed an order. Subsequently, by Finance Act, 2017 w.e.f. 01.04.2017, clause (i) of section 92BA was omitted from the statute. Now the question arises as to whether on account 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, our attention was invited to judgment of the Apex Court in the case of Kolhapur Canesugar Works Ltd., (supra) in which the impact of omission of old rule 10 and 1 OA was examined.*

*Having carefully examined the issue in the light of provisions of section 6 of the General Clauses Act, their Lordship has observed "that 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".*

*8. In the case of General Finance Co., Vs. ACIT, their Lordship Of the Apex Court has again examined the issue and held that the principle underlying section 6 as saving the right to initiate proceedings for liabilities incurred during the currency of the Act will not apply to omission of a provision in an Act but only to repeal,*

*omission being different from repeal as held in different cases. Following the aforesaid judgments, the jurisdictional High Court has also expressed the same view in the case of CIT Vs. GE Thermometrics India Pvt. Ltd. The relevant observation of the jurisdictional High Court is extracted hereunder:*

*"8. Admittedly, in the instant case, there is no saving clause or provision introduced by way of an amendment while omitting subsection (9) of Section 1 OB. Therefore, once the aforesaid section is omitted from the statute book, the result is it had never been passed and be considered as a law that never exists and therefore, when the assessment orders were passed in 2006, the AO was not justified in taking note of a provision which was not in the statute book and denying benefit to the assessee. The whole object of such omission is to extend the benefit under Section 1 OB of the Act irrespective of the fact whether during the period to which they are entitled to the benefit, the ownership continues with the original assessee or it is transferred to another person. Benefit is to the undertaking and not to the person who is running the business. We do not see any merit in these appeals. The substantial question of law is answered in favour of the assessee and against the revenue. Accordingly, the appeals are dismissed.*

*9. From the aforesaid judgments, it has become abundantly clear that once a particular provision of section is omitted from the statute, it shall be deemed to be omitted from its inception unless*

*and until there is some saving clause or provision to make it clear that action taken or proceeding initiated under that provision or section would continue and would not be left on account of omission.*

*10. In the instant case, undisputedly, by the Finance Act, 2017, clause (i) of section 92BA has been omitted w.e.f. 01.04.2017. Once this clause is omitted by subsequent amendment, it would be deemed that clause (i) was never been on the statute. While omitting the clause (i) of section 92BA, nothing was specified whether the proceeding initiated or action taken on this continue. Therefore, the proceeding initiated or action taken under that clause would not survive at all. In this legal position, the cognizance taken by the AO under section 92B(i) and reference made to TPO under section 92CA is invalid and bad in law. Therefore, the consequential order passed by the TPO and DRP is also not sustainable in the eyes of law.*

*11. Under these circumstances. where this clause (i) is omitted from the statute since its inception, the AO ought have required to frame the assessment in normal course after making necessary enquiries of particular claim of expenditure in accordance with law. But this exercise could not have been done on account of provisions of section 92BA Clause (i) of the Act. Now when this clause (i) has been omitted from the statute by virtue of the aforesaid amendments, the AO is required to adjudicate the issue of claim of expenditures in accordance with law after affording opportunity of*

*being heard to the assessee. We therefore set aside the orders of the AO and the DRP and restore the matter to the AO with the direction to re-adjudicate the issue of claim of expenditure incurred in respect of which payment has been made or is to be made to person referred to in clause (b) of sub section 2 of section 40A of the Act. Accordingly, since we have restored the matter to the AO, we find no justification to deal with the other issues on merit. Accordingly, appeal of the assessee stand allowed for statistical purposes."*

16. This decision of the coordinate bench was confirmed by the Hon'ble Karnataka High Court in ITA No. 392/2018 along with ITA No. 170/2019. The relevant findings of the Hon'ble High Court read as under:

*"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 KOHLAPUR 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."*

15. Respectfully following the decision of the co-ordinate bench [supra] which has been upheld by the Hon'ble High Court of Karnataka [supra] we have no hesitation in holding that the cognizance taken by the Assessing Officer u/s 92CA is invalid and bad in law. Therefore, the consequential order passed by the TPO and DRP is also not sustainable in the eyes of law.

16. However, at the same time, we are of the considered view that the applicability of provisions of section 40A(2) of the Act on the impugned transactions cannot be ruled out. Therefore, in the interest of justice and fair play, we restore this issue to the file of the Assessing Officer. The Assessing Officer is directed to examine the impugned transaction in light of provisions of section 40A(2) of the Act after affording reasonable and sufficient opportunity of being heard to the assessee.

17. In the result, the appeal of the assessee in ITA No. 6597/DEL/2018 is allowed for statistical purposes.

The order is pronounced in the open court on 25.05.2022 in the presence of both the rival representatives.

**Sd/-**

**[YOGESH KUMAR U.S]  
JUDICIAL MEMBER**

**Sd/-**

**[N.K. BILLAIYA]  
ACCOUNTANT MEMBER**

Dated: 25<sup>th</sup> May, 2022.

VL/

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,  
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	