

THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai
Shri B.R. Baskaran (AM) & Shri Kuldip Singh (JM)

I.T.A. No. 7475/Mum/2017 (A.Y. 2013-14)

Edelweiss Rural & Corporate Services Limited (Earlier known as M/s. Edelweiss Commodities Services Limited) Edelweiss House, 4 th Floor Off CST Road, Kalina Mumbai-400 098. PAN : AAKCS7311R (Appellant)	Vs.	DCIT, Circle 1(1) Room No. 903 9 th Floor Pratistha Bhavan M.K. Road Churchgate Mumbai-400 020. (Respondent)
--	-----	--

Assessee by	S/Shri Jitendra Jain, Ravikant S. Pathak & Shri A.T. Jaind
Department by	Dr. Yogesh Kamat
Date of Hearing	17.05.2022
Date of Pronouncement	24.06.2022

ORDER

Per B.R.Baskaran (AM) :-

The assessee has filed this appeal challenging the assessment order dated 30.10.2017 passed by the Assessing Officer for A.Y. 2013-14 under section 143(3) read with section 144C of the Act in pursuance of the direction given by learned Dispute Resolution Panel (DRP).

2. The grounds of appeal and additional grounds of appeal urged by the assessee give rise to the following issues :-

- a) Disallowance of mark to market losses
- b) Disallowance made under section 14A of the Act
- c) Transfer pricing adjustment in respect of specified domestic transactions
- d) Validity of the assessment order on the ground that it is time barred
- e) Short credit of TDS

3. From the orders passed by the AO and Ld DRP, we notice that the assessee is engaged in various activities, viz., (a) dealing in immovable properties as owner, lessors, licensors, developers, builders and caretaker; (b) business of procuring import of precious metals and distributing it to its clients; (c) broking and arbitrage trading in metals, agricultural products and other commodities; (d) acting as sourcing agent for a range of agricultural commodities.

4. The Assessing Officer passed draft assessment order making various additions. The assessee has filed objections before learned DRP. After passing of the order by learned DRP, the Assessing Officer passed final assessment order on 30.10.2017. The assessee is aggrieved by the additions made by the Assessing Officer and accordingly preferred this appeal.

5. The first issue relates to disallowance of mark to market loss of Rs. 16.26 crore. The facts relating thereto are that the assessee had claimed deduction on account of provisions made for loss of currency, commodities futures amounting to Rs. 16,26,06,114/-. The Assessing Officer treated the same as contingent in nature and accordingly disallowed the same both for computing total income under normal provision of the Act and also for computing book profit under section 115JB of the Act. The Ld DRP confirmed the disallowance made under normal provisions of the Act. It declined to adjudicate the addition made u/s 115JB of the Act holding it as academic in nature.

6. The Learned AR appearing for the assessee submitted that the assessee is holding commodity, currency futures and stock options as its "stock-in-trade". As per the accounting standard, the assessee is following method of valuing stock-in-trade at cost or market value whichever is less. The loss at Rs. 16.26 crore claimed by the assessee, even though referred as marked to market loss, is in effect represents valuation of stock-in-trade at lower of cost

of market value. Instead of reducing the value of closing stock, the assessee has shown it as a separate Provision in the debit side of Profit and Loss account. The Learned AR further submitted that identical issue has been considered by the Coordinate Bench in the case of M/s. Edel Commodities Limited Vs. DCIT (ITA No. 3426/Mum/2016 dated 6.4.2018), wherein identical disallowance made by the Assessing Officer has been deleted. Learned AR submitted that the Coordinate Bench in the above said case has followed the decision rendered by another Coordinate Bench in the case of Edelweiss Capital Limited Vs. ITO (ITA No. 5324/Mum/2007). Accordingly learned AR prayed for deletion of the disallowance made by the Assessing Officer.

7. Learned Departmental Representative, on the contrary, supported the order passed by the Assessing Officer.

8. We have heard the rival contention and perused the record. The Learned AR submitted that the assessee has held commodities futures, currency futures and stock options as stock-in-trade. The question as to whether loss arising out valuation of stock-in-trade (also termed as marked to market loss in this case) is allowable as deduction or not has been adjudicated by the Coordinate Bench in the case of M/s. Edel Commodities Limited (supra) in favour of the assessee. For the sake of convenience we extract below the discussions made and the decision rendered by the Coordinate Bench :

24. On this issue, the Assessing Officer observed that the assessee was also carrying trading activities in stock and commodities. From the assessee's details, the Assessing Officer observed that it has recognized the unrealistic loss of Rs.5,24,53,455/- by debiting to loss on trading in currency derivative instruments (net) and profit in trading commodity derivative instrument (net) under the income head 'income from treasury operation' as per Schedule XVII of the profit and loss account. The assessee gave detailed submissions in this regard. After elaborating and discussing the issue, the Assessing Officer held that mark to market losses account cannot constitute deductible expenditure for the purpose of income tax act, simply because they have to be provided for in the accounting as per the accounting standard. He held that the assessee

had made provision for such losses which cannot be allowed at all as they are contingent in nature.

Hence, the Assessing Officer concluded that the assessee's claim for provision for losses future/options (market to market losses) of Rs.5,24,53,455/- on commodities cannot be allowed and, therefore, sum was added back to the total income of the assessee.

25. Upon the assessee's appeal, the ld. Commissioner of Income Tax (Appeals) found the issue in favour of the assessee by several decisions of the ITAT in assessee's own group companies. The ld. Commissioner of Income Tax (Appeals) held as under:

"I find that this is a covered issue in favour of the appellant in jurisdictional Mumbai ITAT in the following cases relied upon by the appellant:

*Edelweiss Capital Limited vs ITO [ITA 5324/Mum/2007]
Edelweiss Securities Limited vs Addl. CIT [ITA 2193/Mum/2009]
DCIT vs ECL Finance Limited [ITA 7656/Mum/2011]
[DCIT vs Edelweiss Securities Limited \[ITA 7792/Mum/2012\]](#)
[DCIT vs Kotak Mahindra Investment Limited \[ITA 1502/Mum/2012\]](#)
Shri Ramesh Kumar Damani vs Addl. CIT [ITA 1443/Mum/2009]
M/s. Ekansha Enterprises P. Ltd vs DCIT [ITA 809/M/2012]
ACIT vs Suryakant D. Nissar [ITA 2750/Mum/2010]
[DCIT vs Edelweiss Securities Limited \[ITA 5939/Mum/2011\]](#)*

5.3.2 In view of direct decisions on the issue from jurisdictional ITAT, the disallowance of Rs. 5,24,53,455/- made on this account is deleted. These grounds of appeal are allowed."

26. Against the above order, the Revenue is in appeal before us.

27. We have heard both the counsel and perused the records. The ld. Departmental Representative relied upon the orders of the Assessing Officer. He further contended that there is a specific CBDT Circular No. 3/2010 dated 23.3.2010 in which the CBDT has categorically directed that mark to market losses are notional, and they cannot be allowed to be set off against the taxable income, that the same therefore should be added back for computing the taxable income of the assessee.

28. Per contra, the ld. Counsel of the assessee submitted that in the assessee's own group case, the ITAT has decided the issue in favour of the assessee. Furthermore, the ld. Counsel of the assessee submitted that the assessee has incurred losses on account of valuation of closing stock in commodities/derivative. He submitted that as per the accounting norms, the

assessee had valued the stock and accounted for the loss upon valuation in terms of market position. He further placed reliance upon the Hon'ble Apex Court decision in the case of *CIT vs. Woodward Governor* 294 ITR 451 (SC).

29. Upon careful consideration, before proceeding further we note that the ITAT in the case of *Edelweiss Capital Limited vs ITO* (in ITA 5324/Mum/2007 vide order dated 10.11.2010) has considered this issue and held as under:

"7. We have considered the facts and the rival contentions. In the Schedule annexed to and forming part of the Balance Sheet and Profit & Loss Account for the year under appeal (page 13 of the Paper Book), the assessee has made the following Note: -

"H. Equity Futures - Index/Stock

(a) "Initial Margin-Equity Derivative Instruments", representing initial margin paid, and "Margin Deposits", representing additional margin over and above initial margin, for entering into contracts for Equity Index/Stock Futures, which are released on final settlement/squaring-up of underlying contracts, are disclosed under Loans and Advances.

(b) Equity Index/Stock Futures are marked-to-market on a daily basis. Debit or credit balance disclosed under Loans and Advances or Current Liabilities, respectively, in the 'Mark-to-Market Margin-Equity Index/Stock Futures Account', represents the net amount paid or received on the basis of movement in the prices of Index/Stock Futures till the Balance Sheet date. Amount paid to brokers in addition to Mark-to-Market Margins is disclosed as 'Margin Deposits' under Loans and Advances.

(c) As on the Balance Sheet date, profit/loss on open positions in Index/Stock Futures are accounted for as follows:

- Credit balance in the "Mark-to Market Margin - Equity Index/Stock Futures Account, being anticipated profit, is ignored and no credit for the same is taken in the Profit and Loss Account
- Debit balance in the "Mark-to-Market Margin - Equity Index/Stock Futures Account", being anticipated loss, is adjusted in the Profit and Loss Account.

d) On final settlement or squaring-up of contracts for Equity Index/Stock Futures, the profit or loss is calculated as the difference between settlement/squaring-up price and contract price. Accordingly, debit or credit balance pertaining to the settled/squared-up contract in "Mark-to-Market Margin - Equity Index/Stock Futures Account" is recognized in the Profit and Loss Account."

The aforesaid Note gives a fair picture of the nature of the provision. The provision in substance has been made to cover the anticipated loss in

the derivatives trading. There is no dispute that the assessee holds derivatives as its stock-in-trade and there is also no dispute that it follows the principle "cost or market price, whichever is lower" in valuing the derivatives. When the derivatives are held as stock-in-trade then whatever rules apply to the valuation of stock-in-trade will have to be necessarily apply to their valuation also. It is a well settled position in law that 'while anticipated loss is taken into account in valuing the closing stock, anticipated profit in the shape of appreciated value of the closing stock is not brought into the account, as no prudent trader would care to show increased profit before its realization. This is the theory underlying the rule that the closing stock is to be valued at cost or market price whichever is the lower, and it is now generally accepted as an established rule of commercial practice and accountancy". This is what the Supreme Court held in the case of [Chainrup Sampatram vs. Commissioner of Income Tax, West Bengal](#) (1953) 24 ITR 481 (SC), speaking through Hon'ble Justice Patanjali Sastri, the then Chief Justice of India (page 485- 486 of the Report). At page 486 the Supreme Court further observed that "loss due to a fall in price below cost is allowed even if such loss has not been actually realized". Quoting from the case of [Whimster & Co. vs. Commissioners of Inland Revenue](#) (1926) 12 Tax Cases 813, the Supreme Court observed that the profits that are chargeable to tax are those realized in the year and that an exception is recognized where a trader purchased and still holds goods which are fallen in value in which case though no loss has been realized nor it has occurred, nevertheless at the close of the year he is permitted to treat these goods as of their market value. This decision of the Supreme Court governs the facts of the present case. It is to the assessee's strength that the Institute of Chartered Accountants of India in its guidelines have also approved of the rule of prudence which really means that while anticipated losses can be taken note of while valuing the closing stock, anticipated profits cannot be recognized. The anticipated loss, in the light of the judgment of the Supreme Court cited above, cannot be treated as a contingent liability.

8. The learned DR pointed out that the assessee has valued each scrip of the derivatives as at the end of the year. We do not see how this can make any difference to the legal principle. If the derivatives have been treated as stock-in-trade then there is nothing unusual in the assessee valuing each derivative by applying the rule cost or market whichever is lower.

9. We, therefore, direct the Assessing Officer to allow the provision as reflecting in substance the loss arising on account of valuation of the closing stock. The ground is allowed."

30. From the above, we note that the ITAT had carefully examined the issue and had come to the decision that the provision is being made to cover the anticipated loss in the derivatives trading. There was no dispute that the assessee's hold derivatives as its stock-in-trade and there is also no dispute

that it follows the principle "cost or market price, whichever is lower" in valuing the derivatives. Thereafter, the Tribunal had opined that when the derivatives are held as stock-in-trade then whatever rules apply to the valuation of stock-in-trade will have to be necessarily applied to their valuation also. In this regard, the tribunal had referred to the Hon'ble Apex Court decisions referred hereinabove. The tribunal in coming to the aforesaid decision has also held that the decision of the Hon'ble Supreme Court covered the facts of the present case and it was to the assessee's strength that the Institute of Chartered Accountants of India in its guidelines have also approved of the rule of prudence which really means that while anticipated losses can be taken note of while valuing the closing stock, anticipated profits cannot be recognized. The tribunal had held that in the light of the judgment of the Supreme Court cited above, the anticipated losses cannot be treated as a contingent liability.

31. Now we examine the present case on the touch stone of the above said decision. We find that the facts are identical. Thus, the same are held to be as stock-in-trade by the assessee and the Revenue does not dispute that. It is also not disputed that these have been valued on the principle of cost or market value, whichever is less. In such scenario, the Revenue's only ground is that the CBDT vide its Instruction No. 3/2014 as noted above has directed that these losses should not be allowed. We agree with the ITAT wherein the ITAT in assessee's group cases in ITA No. 6612/Mum/2012 vide order dated 30.01.2013 had opined that the CBDT Instructions though may be binding upon the Revenue authority but are not binding upon the appellate authority. We find ourselves in agreement with the co-ordinate Bench that these instructions are not binding in light of the ratios emanating from the Hon'ble Apex Court decision on the issue of the valuation of stock.

32. When it is held that these derivatives held are stock-in-trade then there cannot be any reservation in valuation thereof as per the well settled practice of valuation of closing stock at market value or cost whichever is lower. No case has been made out by the Revenue that the valuation done is not correct or not properly explained. In these situations, the decisions of the Hon'ble Apex Court relied upon hereinabove in the case of [Chainrup Sampatram vs. Commissioner of Income Tax, West Bengal](#) (1953) 24 ITR 481 (SC), is quite germane. Furthermore, we find the Assessing Officer has totally erred in placing reliance upon the decision of the Hon'ble Apex Court in the case of [M/S. Sanjeev Woolen Mills vs Commissioner Of Income-Tax](#) (in Civil Appeal No. 6735-6736/2003 vide order dated 24.11.2005). In the said decision, the Hon'ble Apex Court has analyzed the entire gamut of decisions on the issue of valuation of the stock. It has categorically held that recognized and settled accounting practice of accounting for the closing stock in the accounts is that it has to be valued on the cost basis or at the market value basis if the market

value of the stock is less than the cost value. It was also expounded that the established and well settled practice in this regard should not be disturbed. Similar view was expressed by the Hon'ble Apex Court in the case of CIT vs. Woodward Governor 294 ITR 451 (SC). In this decision, the Hon'ble Apex Court has held that the accounts and the accounting method followed by an assessee continuously for a given period of time needs to be presumed to be correct till the Assessing Officer comes to the conclusion for reasons to be given that the system does not reflect true and correct profits. In the said case, the Hon'ble Apex Court has held that the loss on account of fluctuation in the rate of exchange has to be allowed and the same has to be computed at each balance sheet date, pending actual payment of the liability. Hence, this decision also supports the proposition that even though the loss has not finally crystallized if as per prudent and regular system of accounting, the loss has to be accounted for, the same should be allowed. Hence, in the background of the aforesaid discussion and precedent from the Hon'ble Apex Court decision, we find that the aforesaid CBDT Circular is in contradiction of Hon'ble Apex Court decision. Hence, we do not find any infirmity in the order of the Id. Commissioner of Income Tax (Appeals). We uphold the order of the Id. Commissioner of Income Tax (Appeals) that the mark to market loss in this case is allowable.”

9. Since the facts prevailing in the present case is identical with the facts considered by the co-ordinate bench in the above cited cases, following the same, we hold that the claim of Rs.16,26,06,114/- made by the assessee is allowable as deduction. Accordingly, we direct the AO to delete this disallowance.

10. We notice that the AO has added the above said amount to the net profit while computing book profit u/s 115JB of the Act treating it as “contingent liability”. In the preceding paragraph, we have held that it is not a contingent liability and accordingly we direct the AO to delete addition of the above said amount made in computing book profit u/s 115JB of the Act.

11. The next issue urged by the assessee relates to the disallowance made u/s 14A of the Act. The AO noticed that the assessee has held investments to the tune of Rs.403.09 crores and Rs.468.71 crores respectively as at the beginning and end of the year. He further noticed that the assessee has not

made any disallowance u/s 14A of the Act. Hence the AO computed the disallowance as per Rule 8D, which worked out to Rs.4,71,81,176/- and added the same to the total income of the assessee. The AO added the very same amount for computing book profit u/s 115JB of the Act. The Ld DRP confirmed the disallowance made for computing total income under normal provisions of the Act. With regard to the computation of book profit u/s 115JB of the Act, the Ld DRP did not adjudicate the same holding it as academic in nature.

12. The Ld A.R submitted that the assessee did not earn any exempt income during the year under consideration. It had received loss of profit from a partnership firm amounting to Rs.1,62,708/-. Accordingly, the Ld A.R contended that there is no requirement of making any disallowance u/s 14A of the Act and also u/s 115JB of the Act, in the absence of exempt income.

13. We heard Ld D.R on this issue and perused the record. There is no dispute with regard to the fact that the assessee did not earn any exempt income during the year under consideration. The Hon'ble Delhi High Court has held in the case of PCIT vs. IL & FS Energy Development Company Ltd (250 Taxman 0174) has held that the no disallowance u/s 14A of the Act was called for in case of no exempt income earned by the assessee. Accordingly, following the above said decision of Hon'ble Delhi High Court, we direct the AO to delete the disallowance made u/s 14A of the Act for computing total income under normal provisions of the Act.

14. We noticed that the AO has added the amount of disallowance computed as per Rule 8D r.w.s. 14A of the Act to the net profit while computing book profit u/s 115JB of the Act. The Delhi special bench of Tribunal has held in the case of Vireet Investments P Ltd (2017)(188 TTJ 1)(Delhi)(SB) has held that the disallowance computed u/s 14A cannot be adopted for the purpose of

clause (f) of Explanation 1 to sec. 115JB of the Act for computing book profit, meaning thereby, the AO has compute the disallowance under clause (f) of Explanation 1 to sec. 115JB separately on the basis of profit and loss account. In the instant case, the assessee has not earned any exempt income. Hence the question of making any addition under clause (f), referred above, does not arise. Accordingly, we direct the AO to delete the addition of Rs.4,71,81,176/- made to the net profit while computing book profit u/s 115JB of the Act.

15. The next issue urged by the assessee relates to the transfer pricing adjustment made in respect of specified domestic transactions. The TPO had proposed transfer pricing adjustment of Rs.15,43,05,000/-. The Ld DRP reduced the same to Rs.9,18,05,000/-.

16. Without going into the merits of this addition, the Ld A.R submitted that the clause (i) of sec. 92BA has been omitted by the Finance Act, 2017 w.e.f. 1st July, 2017 without making any 'saving clause' and hence the said omission shall have retrospective effect as if the said clause was never in existence . Therefore, the transfer pricing adjustment made by the TPO with respect to Specified Domestic Transactions are bad in law. In support of this legal proposition, the Ld A.R placed his reliance on the following case law:-

- (a) Neogenetics Foods P Ltd vs. DCIT (IT(TP)A No.361/Bang/2021
- (b) PCIT vs. Texport Overseas P Ltd (2020)(313 CTR (Kar) 485)
- (c) Mahindra Two Wheelers Ltd vs. DCIT (ITA No.519/Mum/2018)

17. In the case of Neogenetics Foods (P) Ltd vs. CIT (supra), the Bangalore bench of ITAT has accepted the above said legal contentions following the decision rendered by Hon'ble Karnataka High Court in the case of PCIT vs. Texport Overseas (P) Ltd (2020)(313 CTR (Kar) 485). However, the Tribunal restored the issue to the file of the AO for examining the claim in terms of sec.

40A(2)(a) of the Act. For the sake of convenience, we extract below the decision rendered by the Bangalore bench of Tribunal in the above cited case:-

13. We have carefully considered the rival submissions. [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.

14. In terms of the above statutory provisions of Sec.92BA(i) the transactions in question are to be regarded as falling within the ambit of Sec.40A(2)(b) of the Act and therefore covered by the provisions of Sec.92BA(i). Before the DRP, the assessee submitted (i) that the transaction between the Assessee 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 the 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 the rule under which the notice was issued or proceeding being omitted or deleted.

15. 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). 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 question is whether the transactions in question 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 Textport 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 the 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 ITA No.2936/Bang/20180 M/s. Sobha City, Bangalore 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 IT(TP)A No.361/Bang/2021 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."

16. 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.

17. We however 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 Textport 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 Textport 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. In view of the above conclusion, we refrain from adjudicating other issues raised by the assessee in the grounds of appeal with regard to correctness of determination of ALP of the SDT."

18. We notice that the co-ordinate Mumbai bench has also taken an identical view in the case of Mahindra Two Wheelers Ltd (supra). Accordingly, following the above said decisions, we hold that the reference made to TPO under clause (i) of sec.92BA is not valid and consequently, the transfer pricing adjustment made in respect of Specified Domestic Transaction is liable to be deleted. Accordingly, we direct the AO to delete the transfer pricing adjustment.

19. However, as held in the above said cases, the issue is required to be examined afresh in terms of sec. 40A(2)(a) of the Act. Accordingly, 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.

20. The next issue urged by the assessee relates to the validity of the assessment order on the ground that it is time barred. Since we have decided all the issues in favour of the assessee, the Ld A.R submitted that this issue may be kept open so that the assessee may raise it before appropriate forum, if the need arises. Accordingly, we leave this legal issue open unanswered.

21. The last issue relates to the short credit of TDS amount. Since this issue requires verification at the end of AO, we restore this issue to the file of AO.

22. In the result, the appeal filed by the assessee is treated as allowed.

Order pronounced in the open court on 24.06.2022.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 24/06/2022

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS