IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE

BEFORE SHRI GEORGE GEORGE K, JUDICIAL MEMBER AND
SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

IT(TP)A No.232/Bang/2022
Assessment year : 2014-15

Sri Krishna Diamonds (Firm) No.1, Kamaraj Road, Commercial Street, Bangalore-560 001. **PAN – AASFS 6946 B**	Vs.	The Dy. Commissioner of Income-tax, Central Circle-2(2), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri Rohit Goutham, C.A
Revenue by	:	Dr. Manjunath Karkihalli, CIT (DR)

Date of hearing	:	21.07.2022
Date of Pronouncement	:	13.09.2022

O R D E R

Per Laxmi Prasad Sahu, Accountant Member

This appeal filed by the assessee is directed against the final order passed by the AO dated 11/02/20022 for the assessment year 201-15 with the following grounds of appeal.

"1. The Orders passed by learned Deputy Commissioner of Income Tax, Central Circle-

2(2), Bangalore (hereinafter referred as "AO" for brevity), learned Deputy Commissioner of Income Tax (Transfer Pricing Officer) - 1(1)(2), Bangalore (hereinafter referred as "TPO" for brevity) and the Honourable DRP-1, Bengaluru ("AO", "TPO" and DRP collectively referred as "lower authorities" for brevity) are bad in law and liable to be quashed as the said order have been passed;

a) Without considering all the submissions and/or without appreciating properly the facts and circumstances of the case and the law applicable; and

b) At the fag end of the limitation period.

LEGAL GROUNDS RELATED TO TRANSFER PRICING

2. The lower authorities have erred in not appreciating that section 92BA(i) of the Act is omitted without any saving clause by Finance Act 2017, which has retrospective effect as if the clause was never in existence and therefore addition made are bad in law.

3. The learned AO has erred in:

a) Making reference for the determination of the Arm's Length Price of the international transactions to the TPO without demonstrating as to why it was necessary and expedient to do so.

b) Passing the order without demonstrating that the Appellant had any motive of tax evasion.

c) Not appreciating that there is no amendment to the definition of "income" and the

charging or computation provision relating to income under the head "Profits &

Gains of Business or Profession" do not refer to or include the amounts computed

under Chapter X and therefore addition made under Chapter X is bad in law.

GROUNDS RELATED TP ADJUSTMENT

4. The lower income tax authorities have erred in:

i. Not appreciating that the CUP Method is the most appropriate method in the facts and circumstances of the case.

ii. Rejecting the TP analysis undertaken by the Appellant based on CUP method on unjustified reasons and performing fresh transfer pricing analysis; and
iii. Not appreciating that TNMM is not the most appropriate method in the facts and circumstance of the case.
..
5. Without prejudice to the above and assuming without admitting that TNMM is most appropriate method, the lower income tax authorities have erred in:
(i) Adopting inappropriate filters in the process of selecting comparables;
(ii) Adopting companies as comparables even though they are not comparable in respect of functions performed, risks assumed, assets utilized, size, turnover etc. The lower income tax authorities have erred in adopting the following companies as comparable:
a. Kalyan Jewellers India Ltd;
b. Joyalukkas India Pvt. Ltd;
C. Sovereign Diamonds Ltd;
d. P C Chandra & Sons (I) Pvt. Ltd.
(iii) Incorrectly computing the operating profit margin of the following comparable:
a) Kalyan Jewellers India Ltd;
b) Joyalukkas India Pvt Ltd-,'
c) Sovereign Diamonds;
d) P C Chandra & Sons (I) Pvt. Ltd.
(iv) Rejecting the following additional comparables proposed by the Appellant on unjustifiable reasons:
a. Atlas Jewellery India Private Limited
(v) Incorrectly computing the TP adjustment by taking wrong operating profit of the Appellant.
6. The lower authorities have erred in:
ii. Not granting adjustment functional and transactional differences between the Assessee and the comparable companies; - .
iii. Not granting adjustment for working capital and risk differential; and

7. The lower authorities have erred in not restricting the TP adjustment to AE transactions only and thereby making an adjustment in respect of transactions with non-associated enterprise also.
8. The learned AO has erred in levying interest under section 234B of the Act. On the facts and in the circumstances of the case, interest under section 234B is not leviable, being consequential in nature. The Appellant denies its liability to pay interest under section 234B. Even otherwise the interest computed is excessive.
The Appellant submits that each of the above grounds/ sub-grounds are independent and without prejudice to one another.
The Appellant craves leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before or at, the time of hearing, of the appeal, so as to enable the Income-tax Appellate Tribunal to decide the appeal according to law."

2. The brief facts of the case are that the assessee firm is a flagship retail jewellery store for diamond studded platinum and gold jewellery. The assessee company filed original return of income for the assessment year 2014-15 on 14/09/2014 admitting income of Rs.96,87,300/-. A reference was made to the TPO u/s 92CA(2) after obtaining approval from CIT for determining ALP with reference to all international transactions reported by the assessee. On perusal of Form 3CEB, it was observed that the assessee has undertaken specified domestic transactions as under:-

Particulars	Received/ Receivables	Paid/ Payables	Method
Purchase of Goods	-	45,90,89,122	CUP
Sales of Goods	8,46,48,784	-	CUP
Total	**8,46,48,784**	**45,90,89,122**	

3. A search and seizure action was conducted in the case of the Shi Krishna Diamond on 04/01/2018 in connection with the search proceedings in the group case of M/s Vijay Gems and Jewellery. Accordingly, notice u/s 153A of the Act was issued on 11/12/2018. In pursuance of notice, the assessee filed return of income declaring the same income as declared in the original return filed u/s 139(1) of the Act since on the date of search the assessment was pending before the Income Tax Authorities, therefore it was abated assessment. The other statutory notices were issued to the assessee. It was further observed that on 28/01/2017, the order was passed u/s 92CA and there was TP adjustment of Rs.2,63,09,380/- since it was bad assessment, therefore, fresh reference u/s 92CA was made and accordingly, after obtaining approval from the appropriate authorities, after examining the details show cause notices were issued to the assessee and in response, the assessee filed details as required by the TPO and the assessee also filed TP denomination and applied CUP method. The TPO applied certain filters and selected fresh new comparables and PLI margin was computed at 7 to 18%. The ld.TPO applied TNMM method and proposed make adjustment u/s 92CA of Rs.1,84,66,332/-. The AO passed draft assessment order on 23/04/2021 making the same adjustment as suggested by the TPO u/s 92CA of the Act.

4. Feeling aggrieved from the draft assessment order, the assessee filed objections before the DRP and after considering the submissions/objections, they passed order on 27/01/2022 after

accepting rejection/objections filed by the assessee and thereafter the final assessment order was passed on 11/02/2022 by making additions towards ALP on specified domestic transactions of Rs.1,06,30,468/-.

5. Aggrieved from the order of the final assessment order, the assessee filed appeal before the ITAT.

6. At the outset of hearing, the ld.AR submitted that the assessment order for making adjustment on the specified domestic transactions is not taxable because of sec.92BA(1) of the Act has been omitted by the Finance Act 2017 from the statute, which is retrospective effect as the clause was never in existence, therefore, the addition made is bad in law. In support of his argument he has relied on the following judgments:-

Sl. No.	Particulars
1	PCIT vs Texport Overseas Pvt Ltd [TS-1222-HC-2019KAR-TP]
2	Cauvery Aqua Pvt Ltd vs DCIT [TS-64-ITAT-2021Bang-TP]
3	Sobha City vs ACIT [2021] 127 taxmann.com 39 (Bangalore- Trib.)
4	JCIT Vs Toyota Kirloskar Pvt Ltd. [ITC No.2016/Bang/2018 : AY 2013-14]
5	Bharat V Jain HUF Vs. DCIT [2022] dated 14.02.2022 [IT(TP)A No.246/Bang/2021 : AY 2016-17]

7. Out of the above judgments he has strongly relied on the recent judgment passed by the coordinate bench of the Tribunal in the case of Sobha City Vs. ACIT (1(2)(2) (Bengaluru Trib.) in ITA No.2936/Bang/2018 and he supported similar issue has been decided in favour of the assessee and observed that the section has been omitted therefore, the provisions for determination of ALP on specified domestic purposes is not applicable to the assessee.

8. On the other hand, the ld.DR relied on the order of the lower authorities and he submitted that the authorities below have rightly passed the order.

9. After hearing both the sides and perusing the entire material available on record and after examining order of the authorities below, the assessee has raised legal issue challenging the adjustment, which cannot be made to the specified domestic transaction because the section has been omitted by the Finance Act 2017 and we gone through the order relied on by the ld.AR in the case of Sobha City cited supra and the issue is similar as the case on hand before us and the ld.DR could not controvert the case law relied by the ld.AR. For the sake of convenience we reproduce the same, which is as under:-

> *"2. The assessee herein is a Partnership firm and is engaged in real estate development business. It has entered into Specified Domestic Transactions during the year. Hence the SDT transactions were referred to the Transfer Pricing Officer (TPO), who made Transfer pricing adjustments to the tune of*

Rs.14.26 crores. The Ld DRP also confirmed the adjustment made by TPO and hence the AO completed the assessment by making addition of Rs.14.26 crores towards Transfer pricing adjustment.

3. Before us, the assessee has raised a legal issue, the ground related thereto reads as under:-

"2. Ld AO/TPO/DRP has erred in law and in facts by determining an adjustment to specified domestic transactions (SDT) by applying provisions omitted from statute book.

" The Ld A.R first addressed on the above said legal issue. He submitted that the transfer pricing adjustment has been made in pursuance of provisions of clause (i) of sec. 92BA of the Act, which read as under:-

"(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"

He submitted that section 92BA was inserted by Finance Act 2012 w.e.f. 1.4.2013. However clause (i) referred above was omitted by the Finance Act 2017 w.e.f. 1.4.2017.

The Ld A.R submitted that the coordinate bench has examined the legal effect of omission of clause (i) of section 92BA was examined by the coordinate bench in the case of Texport Overseas Pvt. Ltd. Vs. Deputy Commissioner of Income-tax in IT(TP)A No.1722/Bang/2017 dated 22.12.2017 and held that it would be deemed that clause (i) was never been on the Statute. He submitted that the view so expressed by the Tribunal has since been upheld by Hon'ble High Court of Karnataka in the very same case in ITA No.392/2018 dated 12-12-2019. Accordingly he submitted that the Transfer pricing adjustment made in the instant case is liable to be deleted, since clause (i) of sec.92BA shall be deemed to be never existed in the Statute. 4. The Ld D.R, however, submitted that the Tribunal in the case of Export Overseas P Ltd (supra) has held that the payments covered by clause (i) of sec.92BA are required to be examined in terms of sec.40A(2)(b) of the Act. Accordingly, the Ld D.R submitted that the matter may be restored to the file of the AO for examining the same in accordance with the provisions of sec. 40A(2)(b) of the Act. 5. We heard the parties and perused the

record. We notice that an identical issue was examined by the co-ordinate bench in the case of M/s Cauvery Aqua Private Limited (IT(TP)A No.2021/Bang/2019 dated 17-02-2021), wherein the decisions rendered by the coordinate bench and the Hon'ble High Court of Karnataka in the case of Texport Overseas Pvt Ltd were followed. For the sake of convenience, we extract below the decision rendered in the case of Cauvery Aqua Private Ltd (supra) by the co-ordinate bench:-

"The Ld. A.R. submitted that the legal effect of omission of clause (i) of section 92BA was examined by the coordinate bench in the case of Texport Overseas Pvt. Ltd. Vs. Deputy Commissioner of Income-tax in IT(TP)A No.1722/Bang/2017 dated 22.12.2017 and the coordinate bench held 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 ALP. 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 DRP 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 10A 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 10B. 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 10B of the Act irrespective of the fact whether during th$ 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 928A, 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."

5. The Ld. A.R. submitted that the above said decision rendered by coordinate bench has since been upheld by the High Court of Karnataka in the very same case of Texport Overseas Pvt. Ltd. in ITA No.392/2018 dated 12.12.2019. Accordingly, the Ld. A.R. submitted that the transfer pricing adjustment is liable to be deleted. When it was pointed out that the coordinate bench has restored the issue to the file of the A.O. for examining the payments in terms of section 40A(2) of the Act, the Ld. A.R. submitted that this issue may be restored to the file of the A.O. for examining it in accordance with the provisions of section 40A(2) of the Act.

6. The Ld. D.R., on the contrary, placed her reliance on the decision rendered by the Mumbai Bench of Tribunal in the case of Firemenich Aromatics India Pvt. Ltd. Vs. ACIT in ITA No.348/Mum/2014 dated 15.7.2020. The Ld. D.R. submitted that the Mumbai Bench of Tribunal has expressed the view that the decision rendered by Hon'ble Apex Court in the case of Fiber Bores Pvt. Ltd. (2015) 52 Taxmann.com 135 and in the case of M/s. Shree Bhagawati Steel Rolling Mills Ltd. (CA No.4280/2007 dated 24.11.2015) shall prevail in the case of omission of the provision in the Income Tax Act. As a result, the provisions of section 6 of the General Clauses Act would apply to save operation of the previous provision so omitted or anything duly done or suffered there under. The Ld. D.R. further submitted that the above said two decisions of Hon'ble Supreme Court were not considered by the Tribunal as well as Hon'ble High Court of Karnataka in the case of Texport Overseas Pvt. Ltd. (supra), relied upon by the Ld. A.R. The Ld. D.R. placed heavily on the decision rendered by the Mumbai Bench of Tribunal, particularly paragraph 13 to 21 of the order, which reads as under:

"13. We have heard the submissions of the learned authorised representative (ld AR) for the assessee and the learned Departmental Representative (ld. DR) for the revenue and deliberated on the case laws relied on behalf of the assessee. It is an admitted position that the assessee has neither filed Cross Objection for objecting the maintainability of the appeal filed by the revenue. However, the ld. AR for the assessee has raised legal objection, which goes to the root of amenability of the appeal filed by the revenue. Therefore, we admit the objection of the assessee on the maintainability of revenue's appeal. For appreciation of various legal aspects and effect of 'repeal' or 'omission', we have gone through the various sections 6, 6A and 24 of General Clauses Act. The section(s) 6, 6A and 24 of General Clauses Act are read as under;

6. Effect of repeal.-Where this Act, or any (Central Act) or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not- (a) revive anything not in force or existing at the time at which the repeal takes effect; or (b) affect the previous operation of any enactment so repealed or anything duly done or suffered there under; or (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed. 6-A. Repeal of Act making textual amendment in Act or Regulation:— Where any [Central Act] or Regulation made after the commencement of this Act repeals any enactment by which the text of any [Central Act] or Regulation was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such

amendment made by the enactment so repealed and in operation at the time of such repeal

24. Continuation of orders, etc., issued under enactments repealed and reenacted,. Where any (Central Act) or Regulation, is, after the commencement of this Act, repealed and re-enacted with or without modification, then, unless it is otherwise expressly provided any (appointment notification,) order, scheme, rule, form or bye-law, (made or) issued under the repealed Act or Regulation, shall, so far as it is not inconsistent with the provisions reenacted, continue in force and be deemed to have been (made or) issued under the provisions so reenacted, unless and until it is superseded by any (appointment, notification,) order, scheme, rule, form or bye-law, (made or) issued under the provisions so re-enacted (and when any (Central Act) or Regulation, which, by a notification under Section 5 or 5A of the Scheduled Districts Act, 1874, (14 of 1874) or any like law, has been extended to any local area, has, by a subsequent notification, been withdrawn form the re-extended to such area or any part thereof the provisions of such Act or Regulations shall be deemed to have been repealed and re-enacted in such area or part within the meaning of this Section).

14. A careful reading of section 6 of General Clauses Act (this Act) makes it clear that made after the commencement of General Clauses Act, any Central Act or Regulation repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not effect affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

15.Further a careful reading of section 6A this Act make it clear that where any Central Act or Regulation made after the commencement of this Act repeals any enactment by which the text of any Central Act or Regulation was amended by the express omission, insertion or substitution of any matter, ITA

then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal.

16. The Hon'ble Supreme Court in Bhagat Ram Sharma Vs Union of India (AIR 1988 SC 740) held that it is a matter of legislative practice to provide while enacting an amending law that an existing provision shall be deleted and a new provision substituted. Such deletion has the effect of repeal of the existing provision. Such a law may also provide for the introduction of a new provision. There is no real distinction between 'repeal' and an 'amendment'. As per the commentary on Principles of Statutory interpretation by Justice G.P. Singh, "the legislative practice in India shows that 'omission' of a provision is treated as 'amendment'. (page 675, Chapter; "Express Repeal"). Further Hon'ble Supreme Court in Ekambrarappa Vs EPTO (AIR 1967 1541), held that amending Act which limits the area of operation of existing Act by modifying the extent clause, result in partial repeal of the Act in respect of the area which its operation is excluded (emphasis and under lines are added by us).

17. Further, the Hon'ble Supreme Court in the matter of Fibre Boards P. Ltd dated 11.08.2015 reported vide [(2015) 52 taxmann.com 135] /(2015) 10 SCC 333, as well as in the matter of M/s. Shree Bhagwati Steel Rolling Mills [CA No.4280 of 2007, dt.24.11.2015], reported vide (2016) 3 SCC 643, wherein the Hon'ble Supreme Court in these two cases elaborately discussed the issue of repeal /omission/ amendment etc, and held that 'omission' would amount to 'repeal'. It is also held that there is no real distinction between an amendment and that "amendment" is in fact a wider term which includes deletion of the provision in an existing statue. 18. The Hon'ble Court in M/s. Shree Bhagwati Steel Rolling Mills (supra) in a later decision, while referring its order in Fibre Board Private Ltd (supra) held that omission would amount to repeal. "On the argument of the contesting parties that the omitted provision being treated as it never existed as per section 6 of General clauses Act would not apply to allow the previous operation of

the provisions is omitted or anything done or suffered thereunder. Nor may a legal proceeding in respect of any rights and liability acquired or incurred under the enactment so omitted." The Hon'ble Apex Court took a view that in majority of the cases, this would cause great public mischief, and that the decision in Fibre Board case was therefore clearly delivered by their lordship for the public good, being, at the least reasonably possible view and that no aspect of the question at their hand was remained unnoticed in Fibre Board Case.(emphasis added by us) 19. With the aforesaid legal back ground and with utmost regard to the decision of coordinate bench the coordinate bench relied by ld AR for the assessee in Texport Overseas (supra), we have noted that the bench was not having the benefit of the latest judgment of the Hon'ble Supreme Court in the matter of Fibre Boards P. Ltd [(2015) 52 taxmann.com 135] as well as in the matter of M/s. Shree Bhagwati Steel Rolling Mills [CA No.4280 of 2007, dt.24.11.2015] which were not brought to the notice of the bench by either of the parties.

20. The Hon'ble Supreme Court in these two matters had elaborately discussed the issue of repeal /omission and after relying upon the decision of the coordinate bench had decided the issue that omission will also be repealed and therefore by virtue of section 6 and 6A the action taken pursuant to the valid legislation during its life time before omission will be saved and will not come to end. The decision in the case of Texport Overseas Private Ltd (supra) was rendered without considering the decisions of the Hon'ble Apex Court in the cases of (i) M/s. Fibre Boards Pvt. Ltd and (ii) M/s Shree Bhagwati Steel Rolling vs. Commissioner of Central excise & another and also the statutory provision contained in section 6A of General clauses Act and hence, lacks any binding or persuasive value.

16. The Hon'ble Apex court in the case of Fibre Boards Pvt. Ltd and M/s. Shree Bhagwati Steel Rolling has doubted and disapproved its earlier decisions rendered in the case of Rayala Corporation (P) Ltd Vs Enforcement (1969) 2 SCR 412 and Kolhapur Cane Sugar Works Ltd Vs Union of India (2000) 2SCC536 and in the case of General Finance Company Vs CIT (2002) 7 SCC 1. Further, the Hon'ble Supreme Court in the case

of Fibre Boards (I) Ltd, after referring to the provisions of Section 6A of the General Clauses Act held that "a repeal can be by way of an express "omission" and that even an implied repeal of a statute would fall within the expression "repeal" in section 6 of the General clauses Act. Repeals may take any form and so long as a statute or part of it is obliterated, such obliteration would be covered by the expression "repeal" in section 6 of General clauses Act. Considering the latest decision of Hon'ble Supreme Court in Fibre Board and Bhagwati Steel, the earlier decisions rendered by the Constitution Bench in Rayala Corporation (P) Ltd and Kolhapur Cansugar Works cannot be said to have laid down any ratio decidendi on an interpretation of the word "repeal" an "omission" would not be included. Their observations are in the nature of obiter dicta as held by the Supreme Court in Fibre Boards. It is also held that the earlier decisions have not referred to Section 6A of the General clauses Act and they lose their binding effect on an application of the "per incuriam" principle, as held by the Supreme Court in the case of Fibre Boards Private Limited. Thus, in our view the decision rendered in Royala Corporation Pvt. Ltd lacks binding value for the reasons discussed by the Apex Court in Fibre Boards Pvt. Ltd, the decision rendered in the case of Kolhapur Cane Sugar Works Ltd as also in the case of General Finance Company following the decision in Royala Corporation Ltd, loses its binding value.

17. As we have already noted that the Hon'ble Supreme Court in the case of Shree Bhagwati Steel Rolling Mills again reiterated that repeal would include repeal by way of an express omission. The Supreme Court further held that the decision in Fibre Boards Private Limited clarifies the law in holding than an omission would amount to repeal. As a result, the provisions of Sec. 6 of the General Clauses Act would apply to allow the previous operation of the provision so omitted or anything duly done or suffered there under, and such a view is reasonable and for the public good. 18. At the coast of repetition we may note that the Hon'ble Supreme Court in the matter of Fibre Board (supra) and Bhagwati Steel Rolling (supra) had elaborately reproduced the paragraphs of General Finance Co., (supra) and

also the earlier two judgments relied in General Finance Co., (supra), namely Rayala Corporation P. Ltd and Kolhapur Cane Sugar Works Ltd, and observed that even the court has not referred the matter to the larger bench. The Hon'ble Supreme Court in Fibre Board (supra) and Bhagwati Steel Rolling (supra) had also discussed the provision of law including the General Clauses Act, Section 6A and 24 and thereafter held that the repeal, omission and deletion are interchangeable and thereafter had held that 'omission' will have an effect of 'repeal' and 'repeal' will have an effect of 'omission'. The distinction carved out in Rayala Corporation (supra) was not correct and further the reference to the Constitution bench has not considered in view of a binding judgment of the Constitution bench in the matter of M.A.Tulloch& Co as well as the provisions of Section 6A of the General Clauses Act and thereafter the Court had held that the decision, in the matter of Rayala Corporation (supra) was per incurium. 19. In our humble view the Hon'ble Supreme Court in Fibre Board (supra) and Bhagwati Steel Rolling (supra) have declared that the law in Rayala Corporation is per in curium, on the basis of which General Finance Co., (supra) was passed. Thus, the later judgments in Fibre Board (supra) and Bhagwati Steel Rolling (supra) shall have a binding precedent on all Courts in India including this Tribunal. 20. We may mention that the decision of the Hon'ble Apex Court is declaration of law as per Article 141 of the Constitution of India. The law declared by Hon'ble Apex Court in Fibre Boards (P) Ltd (supra) dated 11.08.2015, was available when the decisions was rendered by Bangalore Tribunal Textport Overseas Pvt Limited Vs DCIT (supra), however, the same was not brought to the notice of the bench. The coordinate bench while rendering the decision relied on the decision of Hon'ble Apex Court in General Finance Co. Vs ACIT (supra), which was already declared as perin curium. Similarly, the decision in General Finance Co (supra) is based on Rayala Corporation P. Ltd Vs Director of Enforcement (supra) and Kolhapur Canesugar Works Ltd Vs Union of India (supra). Considering the aforesaid legal position and the dates of various judgments of the Hon'ble Apex Court, we are of the

view that ld. AR for the assessee has referred and relied on the decisions of General Finance Company Vs ACIT (supra) which have been declared as per-in curium by Hon'ble Apex Court.

21. We are conscious of the facts that the latest law declared by Hon'ble Apex Court in various cases (supra) was not confronted with the ld. AR for the assessee; however, it is always presumed that the law declared by the Court is in the knowledge of the legal practitioner. We instead of going in further discussions are of the view that in view of the decision of Hon'ble Apex Court in Fibre Boards (P) Ltd (supra), the word 'repeal' includes 'omission'. Thus, we do not find any merit in the objection raised by the ld. AR for the assessee which we are rejecting, being without any merit and held that appeal filed by the revenue with in currency of the sub-section 2A of Section 253 of the Act, is valid."

7. We heard the rival contentions and perused the record. We notice that the decision rendered by the coordinate bench of Bengaluru Tribunal in the case of Texport Overseas Pvt. Ltd. (supra) has since been upheld by the High Court of Karnataka 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-intigra in the light of authoritative pronouneenient 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 ITA No.2936/Bang/20180 M/s. Sobha City, Bangalore Page 15 of 16 arise for consideration particularly when the said issue being no more res Integra." 8. 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. 9. We notice that the co-ordinate bench 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 tothe 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. 10. In the result, the appeal filed by the assessee is treated as allowed for statistical purposes."

6. 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.

7. 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.

10. Respectfully following the above judgment the adjustment made by the TPO u/s 92CA will not sustain.

11. We further observe that the issue has not been examined by the lower authorities in the pursuance of the provisions of sec.40A(2) of the Act. Therefore, the issue is remitted back to the AO for examination of the payment in the light of sec.40A(2) of the Act as held by the above cited decisions and the assessee is directed to appear before the AO and he has to comply the requirements of the AO and also not to seek adjournment for early disposal of the case and the AO is directed to give three effective opportunity of being heard to the assessee.

12. The ld.AR of the assessee has not pressed Ground no. 3-7, therefore, the remaining grounds raised by the assessee is dismissed as not pressed. The Ground No.8 is consequential in nature, hence no adjudication is required.

13. In the result, the appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in court on 13th day of September, 2022

Sd/-	Sd/-
(GEORGE GEORGE K)	**(LAXMI PRASAD SAHU)**
Judicial Member	Accountant Member

Bangalore,
Dated, 13th September, 2022
/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.

1. Date of Dictation
……
2. Date on which the typed draft is placed
before the dictating Member …….
3. Date on which the approved draft comes to Sr.P.S
…….
4. Date on which the fair order is placed
before the dictating Member ……..
5. Date on which the fair order comes back to the Sr.
P.S. ……..
6. Date of uploading the order on
website……..
7. If not uploaded, furnish the reason for doing so
……..
8. Date on which the file goes to the Bench Clerk
……..
9. Date on which order goes for Xerox &
endorsement……
10. Date on which the file goes to the Head Clerk
…….
11. The date on which the file goes to the Assistant
Registrar for signature on the order
…….
12. The date on which the file goes to dispatch section
for dispatch of the Tribunal Order
…….
13. Date of Despatch of Order.
……..