

आयकर अपीलीय अधिकरण 'डी' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

माननीय श्री वी. दुर्गा राव, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI V. DURGA RAO, JUDICIAL MEMBER AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

1. आयकर अपील सं./ ITA No.2608/Chny/2017
(निर्धारण वर्ष / Assessment Year: 2013-14)

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2. IT(TP)A No.21/Chny/2018
(निर्धारण वर्ष / Assessment Year: 2014-15)

Sri Maharaja Refineries 126, Bhavani Road, Erode – 638 004.	बनाम / Vs.	ACIT Circle-1, Erode.
स्थायी लेखा सं./जीआइ आर सं./PAN/GIR No. AAFFS-8491-N		
(□ पीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

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3. आयकर अपील सं./ ITA No.2609/Chny/2017
(निर्धारण वर्ष / Assessment Year: 2013-14)

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4. IT(TP)A No.20/Chny/2018
(निर्धारण वर्ष / Assessment Year: 2014-15)

Maharaja Sivam Industries (P) Ltd. 119, Bhavani Road, Erode – 638 004.	बनाम / Vs.	ACIT Circle-1, Erode.
स्थायी लेखा सं./जीआइ आर सं./PAN/GIR No. AABCM-3049-D		
(□ पीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

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5. आयकर अपील सं./ITA No.2610/Chny/2017
(निर्धारण वर्ष / Assessment Year: 2013-14)

S. Saradha, 117, Bhavani Road, Erode – 638 004.	बनाम / Vs.	ACIT Circle-1, Erode.
स्थायी लेखा सं./जीआइ आर सं./PAN/GIR No. AJCPS-0707-K		
(□ पीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

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6. आयकर अपील सं./ITA No. 2611/Chny/2017
(निर्धारण वर्ष / Assessment Year: 2013-14)

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7. IT(TP)A No.18/Chny/2018
(निर्धारण वर्ष / Assessment Year: 2014-15)

K. Paramasivam, Prop. of Sri Maharaja Industries, 128, Bhavani Road, Erode.	<u>बनाम</u> / Vs.	ACIT Circle-1, Erode.
स्थायी लेखा सं./जीआइ आर सं./PAN/GIR No. ADIPP-1483-D		
(□ पीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

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8. आयकर अपील सं./ITA No. 2613/Chny/2017
(निर्धारण वर्ष / Assessment Year: 2013-14)

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9. IT(TP)A No.17/Chny/2018
(निर्धारण वर्ष / Assessment Year: 2014-15)

K.P.S Oil Mills, 117, Bhavani Road, Erode – 638 004.	<u>बनाम</u> / Vs.	ACIT Circle-1, Erode.
स्थायी लेखा सं./जीआइ आर सं./PAN/GIR No. AAFK-2695-A		
(□ पीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

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10. आयकर अपील सं./ITA No. 2612/Chny/2017
(निर्धारण वर्ष / Assessment Year: 2013-14)

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11. IT(TP)A No.19/Chny/2018
(निर्धारण वर्ष / Assessment Year: 2014-15)

Sivam and Company 128, Bhavani Road, Erode – 638 004.	<u>बनाम</u> / Vs.	ACIT Circle-1, Erode.
स्थायी लेखा सं./जीआइ आर सं./PAN/GIR No. AALFS-8512-Q		
(□ पीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओरसे/ Appellant by	:	Shri S. Sridhar (Advocate)-Ld. AR
प्रत्यर्थी की ओरसे/Respondent by	:	Dr. S. Palanikumar (CIT) –Ld. DR
सुनवाई की तारीख/Date of Hearing	:	11-01-2023
घोषणा की तारीख /Date of Pronouncement	:	15-02-2023

आदेश / ORDER

Per Bench:

1. Aforesaid appeals by various assessees for Assessment Years (AYs) 2013-14 & 2014-15 arises out of separate final assessment orders passed by learned Assessing Officer. All the assessees are group entities which were subjected to determination of Arm's Length Price (ALP) by revenue on specified domestic transactions (SDT) being carried by them amongst themselves during these years. It is admitted position that the facts as well as issues are quite identical and common adjudication would dispose-off all the appeals.
2. The assessee' appeal ITA No.2608/Mum/2017 for AY 2013-14 arises out of final assessment order passed by Ld. Assessing Officer (AO) u/s 143(3) r.w.s. 144C(13) on 26.09.2017 pursuant to the direction of Ld. Dispute Resolution Panel-2, Bangalore dated 11.09.2017. The ALP has been determined by Ld. Transfer Pricing Officer-3(1), Chennai (TPO) u/s 92CA(2) on 28.10.2016 proposing adjustment of Rs.673.54 Lacs which is subject matter of dispute between us.
3. Upon perusal of order of Ld. TPO, it could be seen that the assessee has purchased edible oil from its Associated Entity (AE) by the name Sri Maharaja Industries for Rs.95.53 Crores which is classified as Specified Domestic Transaction (SDT) and consequently subjected to determination of ALP. The assessee benchmarked the transaction using Comparable Uncontrolled Price (CUP) method which was rejected and Ld. TPO applied Transactional Net Margin Method (TNMM) method using Operating Income / Operating Cost (OI/OC) as Profit Level

Indicator (PLI). The PLI of the assessee happened to be -4.54% as against mean PLI of 2.02% as reflected by other two comparable entities. The Ld. TPO, finally, worked out downward adjustment of Rs.673.54 Lacs against purchases so made by the assessee. The same was confirmed by Ld. DRP. Aggrieved, the assessee is in further appeal before us. Similar adjustments were proposed by Ld. TPO in the case of other group entities.

4. The Ld. AR, at the outset, relied on the decision of Hon'ble Karnataka High Court in the case of **PCIT vs. Texport Overseas (P.) Ltd. (114 Taxmann.com 568)** and submitted that reference to TPO per se is invalid and bad in law and therefore, the consequential TP adjustments made by Ld. AO in the respective impugned orders ought to be deleted. The Ld. AR also relied on the recent decisions of Mumbai Tribunal in **Mahindra Two Wheelers Ltd. vs. DCIT (ITA No.519/Mum/2018 dated 28.04.2022)** and the decision in **Giraffe Developers Pvt. Ltd. vs. Pr. CIT (ITA No.2663/Mum/2019 dated 25.07.2022)** taking the same view by following the cited decision of Hon'ble High Court. The copies of the decisions have been placed on record.

The Ld. CIT-DR, on the other hand, submitted that these transactions were brought in the ambit of Transfer pricing (TP) mechanism pursuant to the directions of Hon'ble Supreme Court in the case of **CIT vs. Glaxo Smithkline Asia (P.) Ltd. (195 Taxman 35)**.

5. Since the plea of Ld. AR contest very validity of jurisdiction of Ld. TPO, we deal with the same. The Hon'ble Karnataka High Court in the case of **PCIT vs. Texport Overseas (P.) Ltd. (114 Taxmann.com 568)** has held 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 Kolhapur Canesugar Works Ltd. v. Union of India AIR 2000 SC 811 whereunder Apex Court has examined the effect of repeal of a statute vis-a-vis deletion/addition of a provision in an enactment and its effect thereof. The import of section 6 of General Clauses Act has also been examined and it came to be held:

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

6. In fact, Co-ordinate Bench under similar circumstances had examined the effect of omission of sub-section (9) to Section 10B of the Act w.e.f. 01.04.2004 by Finance Act, 2003 and held that there was no saving clause or provision introduced by way of amendment by omitting sub-section (9) of section 10B. In the matter of General Finance Co. v. ACIT, which judgment has also been taken note of by the tribunal while repelling the contention raised by revenue with regard to retrospectivity of section 92BA(i) of the Act. Thus, when clause (i) of Section 92BA having been omitted by the Finance Act, 2017, with effect from 01.07.2017 from the Statute the resultant effect is that it had never been passed and to be considered as a law never been existed. Hence, decision taken by the Assessing Officer under the effect of section 92B1 and reference made to the order of Transfer Pricing Officer-TPO under section 92CA could be invalid and bad in law.

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

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

substantial question of law. The Assessing Officer has to undertake the exercise of factual determination. As such, without expressing any opinion on merits with regard to question No. 2 formulated by the revenue in the respective appeals, we proceed to pass the following:

ORDER

(i) Both the appeals i.e., ITA No. 392/2018 and ITA No.170/2019 are dismissed. (ii) Order dated 22.12.2017 passed by the Income Tax Appellate Tribunal, Bangalore in Taxport Overseas (P.) Ltd. (supra) is affirmed

It has thus been held by Hon'ble Court that the reference made to Ld. TPO in respect of specified domestic transactions as mentioned in clause (i) of Sec. 92BA would be invalid since the provisions were omitted since inception. At the same time, Hon'ble Court confirmed the action of Tribunal in restoring the matter back to the file of Ld. AO to examine the claim of expenditure in accordance with the provisions of Sec. 40A(2)(b) of the Act. Similar is the decision of Mumbai Tribunal in **Mahindra Two Wheelers Ltd. vs. DCIT (ITA No.519/Mum/2018 dated 28.04.2022)**. No contrary decision is on record. Therefore, respectfully following the same and taking the same view, we would hold that reference to Ld. TPO was not valid and the consequential TP adjustments so made by Ld. AO could not be sustained in the eyes of law. At the same time, respectfully following the cited decisions, the matter stand restored back to the file of Ld. AO for examination of allowability of the expenditure in accordance with the provisions of Sec.40A(2) of the Act since these transactions would fall under those provisions. We order so.

6. The facts as well as issues in all the other appeals are stated to be pari-materia the same. This being so, our adjudication as above would mutatis-mutandis apply to all the other appeals also. In the result, all the appeals stand restored back to the file of Ld. AO on similar lines.

7. All the appeal stand allowed for statistical purposes.

Order pronounced on 15th February, 2023.

Sd/-
(V. DURGA RAO)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखक सदस्य / ACCOUNTANT MEMBER

चेन्नई / Chennai; दिनांक / Dated : 15-02-2023
EDN/-

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

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF