

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI 'J' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Shri Rahul Chaudhary (JM)

I.T.A. No. 1471/Mum/2020 (A.Y. 2020)

Maari Multi Trading Pvt. Ltd. 51, Bajaj Bhavan Nariman Point Mumbai-400 021.  PAN : AAHCM5894N (Appellant)	Vs.	ACIT-12(3)(2) Room No. 147B 1 <sup>st</sup> Floor Aayakar Bhavan M.K. Road Mumbai-400 020. (Respondent)
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Assessee by	Shri Chandresh Gandhi
Department by	Shri Samuel Pitta
Date of Hearing	25.01.2023
Date of Pronouncement	24.02.2023

ORDER

Per B.R.Baskaran (AM) :-

The assessee has filed this appeal challenging the assessment order dated 31.10.2016 passed by the assessing officer for assessment year 2015-16 in pursuance of directions given by Ld Dispute Resolution Panel (DRP). The assessee is aggrieved by the addition made in respect of Specified Domestic Transactions.

2. The facts relating to the case are that the assessee is engaged in the business of trading in polymers. The assessee had entered in Specified Domestic Transactions to the tune of Rs.87.52 crores and hence the AO referred the matter of determining ALP of the same to the Transfer Pricing Officer (TPO) u/s 92C of the Act. The TPO made transfer pricing adjustment of Rs.3,91,41,811/-. The AO passed draft assessment order, which was objected to by the assessee before Ld DRP. The Ld DRP gave certain directions to the AO/TPO and the same has resulted in upward adjustment of Rs.6,76,57,646/-. The AO accordingly passed the final assessment order

making above said transfer pricing adjustment. The assessee has filed this appeal before the Tribunal challenging the above said addition.

3. The Ld A.R, at the outset, submitted that the provisions of Sec. 92BA(i) of the Act provided for making transfer pricing adjustment in respect of Specified Domestic Transaction. However, said provision was omitted by Finance Act, 2017 w.e.f. 1.4.2017. He submitted that the effect of omission of a provision has been examined by the Bangalore bench of Tribunal in the case of Texport Overseas (P) Ltd vs. DCIT (IT(TP)A 1772/Bang/2017 and the same has been affirmed by Hon'ble Karnataka High Court, vide its order dated 12-12-2019 reported in 114 taxmann.com 568 (Kar). It has been held in the above said cases that the proceedings in respect of omitted provisions cannot be continued. Accordingly, the Ld. A.R contended that the transfer pricing adjustment relating to Specified Domestic Transactions is liable to be deleted on account of omission of provisions of sec. 92BA(i) of the Act.

4. On the contrary, the Ld D.R submitted that the Mumbai bench of Tribunal has held in the case of Firemenich Aromatics (I) (P) Ltd (2020)(118 taxmann.com 3)(Mumb) has taken contrary view by holding that the view expressed by the Bangalore bench of Tribunal in the case of Texport Overseas (P) Ltd (supra) is not good law. Accordingly, he submitted that the AO was justified in making the addition towards transfer pricing adjustment towards specified domestic transaction.

5. We heard rival contentions and perused the record. We notice that the decision rendered by Bangalore bench of Tribunal in the case of Texport Overseas (P) Ltd (supra) has since been upheld by the Hon'ble Karnataka High Court in the very same case, referred supra. For the sake of convenience, we extract below the decision rendered by Hon'ble Karnataka High Court in the above said case:-

**“2.** We have heard the arguments of Sri. Jeevan J. Neeralagi and Sri. E.I. Sanmathi, learned Advocates appearing for revenue in respective appeals

and Sri. Sharath, learned counsel appearing on behalf of Sri. Chythanya K.K. for respondent/assessee.

**3.** It is the contention of learned Advocates appearing for revenue that tribunal was not justified in arriving at a conclusion that Clause (i) of section 92BA of the Act, which had been omitted w.e.f. 01.04.2017 would be applicable retrospectively by presuming the retrospectivity, particularly when the statute itself explicitly stated it to be prospective in nature. As such they have sought for formulating substantial questions of law and have sought for answering the same in favour of revenue and against the assessee.

**4.** Sri. E.I. Sanmathi, learned counsel appearing for revenue/appellant in ITA No.170/2019 would contend that even the disallowance made by the AO under section 14A r/w section 8(2)(iii) of Income Tax Rules for a sum of Rs. 14,88,870/- by holding that there was no exempted income and as such disallowance could not have been made even though said provision was rightly invoked by AO, and as such setting aside the disallowance is erroneous. Hence, he prays for substantial question of law as formulated in the appeal memorandum (ITA 170/2019) be formulated, adjudicated and answered in favour of assessee.

**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 92BI 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*."

Even though the co-ordinate bench of Mumbai, in the case of Firemenich Aromatics (I) (P) Ltd (*supra*) has expressed its doubt on the correctness of the decision rendered by the Bangalore bench of Tribunal in the case of Texport Overseas (P) Ltd (*supra*), yet the fact remains that the said decision of Bangalore bench has since been upheld by Hon'ble Karnataka High Court. Accordingly, we prefer to follow the decision rendered by Higher Court of Wisdom and accordingly hold that the transfer pricing adjustment made in respect of Specified Domestic Transaction on the basis of omitted provision is liable to be deleted.

6. We notice that the Bangalore bench of Tribunal in the case of Texport Overseas (P) Ltd (*supra*) has further held as under:-

"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 readjudicate 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.”

7. We notice that the Bangalore bench of Tribunal has expressed the view that the transactions with Associated Enterprises need to be examined u/s 40A(2)(b) of the Act after omission of sec.92BA(i). Accordingly, the matter has been restored to the file of AO. Following the said decision, we set aside the order passed by Ld CIT(A) on the impugned transfer pricing issue and direct the AO to delete the addition made towards the transfer pricing adjustment. Since the said specified domestic transactions are required to be examined u/s 40A(2)(b) of the Act, we restore the same to the file of AO for carrying out such examination. The assessee is also directed to furnish all the information that may be called for by the AO in this regard. After affording adequate opportunity of being heard, the AO may take appropriate decision in accordance with law.

8. In the result, the appeal filed by the assessee is treated as allowed for statistical purposes.

Pronounced in the open court on 24.2.2023.

Sd/-  
(RAHUL CHAUDHARY)  
Judicial Member

Sd/-  
(B.R. BASAKARAN)  
Accountant Member

Mumbai; Dated : 24/02/2023

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