आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"B" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयंतभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 394/JP/2022
निर्धारण वर्ष/Assessment Year : 2014-15.

Worship Infraprojects Pvt. Ltd., Om Tower, M.I. Road, Church Road, Jaipur.	बनाम Vs.	The DCIT Circle-2, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AABCO 2837 M		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 431/JP/2022
निर्धारण वर्ष/Assessment Year : 2014-15.

The DCIT Circle-2, Jaipur.	बनाम Vs.	Worship Infraprojects Pvt. Ltd., Om Tower, M.I. Road, Church Road, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AABCO 2837 M		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Vijay Goyal, CA &
Shri Gulshan Agarwal, CA

राजस्व की ओर से/ Revenue by : Shri A.K. Bhardwaj, CIT &
Shri James Kurian, CIT

सुनवाई की तारीख/ Date of Hearing : 26/04/2023
उदघोषणा की तारीख/Date of Pronouncement: 22/05/2023

आदेश/ ORDER

PER BENCH :

These two cross appeals filed by the assessee and revenue are directed against the order dated 22.09.2022 of ld. CIT (A), Delhi-44 passed under section

250 of the IT Act for the assessment year 2014-15. The grounds raised by the assessee as well as revenue are as under :-

ITA NO. 394/JP/2022 (Assessee)

1. That the ld. AO grossly erred on law and facts in referring the matter with TPO by invoking section 92CA of I.T. Act, 1961 and the ld. CIT (A) also erred in not considering the legal issue & have not accepted the ground of the assessee.

2. That the ld. CIT (A) grossly erred in fixing the rate of profit 3% which was applied 4.50% by the ld. AO and thereby sustained the part addition of Rs. 1,62,42,947/-.

3. That the ld. CIT (A) grossly erred in applying the G.P. rate of 3% and thereby sustained the part addition also ignored external comparable.

4. That appellant craves to leave, add, alter the ground of appeal.

ITA NO. 431/JP/2022 (Revenue)

1. Whether the order of ld. CIT (A) is perverse in including the JV agreement between SMS Paryavaran Limited and the assessee as a comparable by ignoring the fact that the data is not contemporaneous in that the said comparable agreement pertained to 2013 whereas the subject agreement between the assessee and its AE pertained to 2010 ?

2. Whether the order of ld. CIT (A) is perverse in including the JV agreement between SMS Paryavaran Limited and the assessee as a comparable by ignoring the fact that the agreements in question were functionally incomparable in that the agreement with SMS Paryavaran Limited had a limited scope (i.e. replacement of worn out machinery and equipment) whereas the agreement with the AE was a full fledged civil construction project ?

3. Whether the order of ld. CIT (A) is perverse in including the JV agreement between SMS Paryavaran Limited and the assessee as a comparable by ignoring the fact that the said comparable agreement was in fact a controlled transaction, being a transaction between the SPV formed inconsequence of a JV agreement and one of its participating companies (i.e. the assessee)?

2. The brief facts of the case are that the assessee M/s. Worship Infraprojects Private Limited was formerly known as M/s. Om Metals – SPML Infraprojects Private Ltd. The copy of ROC certificate is placed at paper book page 1. The appellant is SPV (Special Purpose Vehicle) formed as a joint venture company of M/s Om Metals Infra Projects Ltd. & M/s Subhash Projects & Marketing Ltd. now known as SPML Infraprojects Ltd). The originally the tender was awarded by Water Resources Department, Government of Rajasthan on turnkey basis in name of M/s Subhash Projects & Marketing Ltd in association with MOU partner M/s Om Metal & Infra Projects Ltd. (PB page 76). The creation of SPV was one of the requirement of the tender document by the Water Resource Department, Government of Rajasthan (last para of letter at PB page 76). The qualifying party Om Metals Infraprojects Ltd. had vast experience in Hydro- mechanical construction and SPML Infraproject Ltd was qualifying party with respect to Civil Construction whereas the assessee company was incorporated on 10/05/2010 just after the allotment of work tender vide letter dated 30/04/2010. The incorporation of the assessee company was made with the main object to carry on the business of construction of infrastructure projects on turnkey basis as a special purpose vehicle (SPV) with the understanding that on allotment of contract, respective company will undertake the work on back-to-back basis.

2.1. During the year under consideration, it was engaged in irrigation project of Kalisindh Dam in Distt-Jhalawar (Raj.), the company transferred the work to Om Metals Infraproject Ltd. on back-to-back basis being a partner in joint venture. The

appellant had filed its return of income on 30th September 2014 declaring total income of Rs. 90,51,790/- (PB page 2-5). The case of the assessee was selected for scrutiny under CASS. During the course of assessment proceedings the Assessing Officer had made a reference under section 92CA to determine the Arms-length price in respect of the specified domestic transactions undertaken by the Appellant. The Transfer Pricing Officer ("Ld. TPO") had passed the order on 19th September 2017 by computing the arm length price at Rs. 95,75,17,030/- as against the transaction value shown by the Appellant of Rs. 98,93,88,204/-. The Ld. TPO for determining arms-length price considered 4.5% of contract revenue (being retention percentage of one of the comparable considered by the Appellant in its Transfer Pricing ("TP") Report) and accordingly made adjustment by computing the retention profit @ 4.5% of the contract value thereby making an addition of Rs. 3,18,71,174/- disallowing certain expenses debited to profit and loss statement of the appellant, being royalty expense, labour, cess, VAT composition tax and entry tax to achieve the said retention percentage.

2.2. Basis the order passed under section 92CA, the AO had completed the assessment under section 143(3) by passing an order dated 11th December 2017 by making total addition amounting to Rs. 3,18,71,174/- as per the adjustments made by Ld. TPO in his order and determined the total income of the appellant at INR 4,09,22,960/- under the normal provisions of the Act. While passing the assessment order, the AO had placed reliance on the TPO's Order wherein Ld. TPO had rejected the external comparables selected by the appellant stating that the appellant has not submitted details of database on which this search has been conducted, details of

filters applied on search and FAR analysis of comparables. Further, it was also stated that appellant had not submitted copy of sub-contracts allocated by comparables, and therefore the requirements of comparability are not met. Similarly, out of the two internal comparables, the Ld. TPO had considered only one internal comparable being M/s Jain & Rai Construction Co. where 4.5% margin was retained. The Ld. TPO had rejected the other comparable being Joint Venture Agreement between M/s SMS Paryavaran Limited and M/s SPML Infra Ltd wherein 1.5% margin was retained stating that the sub-contract was between SPV and one of its participating company therefore it was controlled transaction. Further, there was a time difference of three years and this contract was for electrical contract whereas in the case of assessee the contract is for civil construction.

2.3. Aggrieved by the order of AO, the assessee filed an appeal u/s 246A before CIT (A). The assessee has challenged the action of the AO in referring the impugned domestic transaction in view of omission of clause (i) of section 92BA by Finance Act 2017, without saving clause for the pending proceedings. The ld. CIT (Appeals) rejected the assessee's ground on the basis of findings in Para 7.4 to 7.10 at pages 13-14 of his order. As regard the determination of arm's length price, he held that the TPO has rightly rejected the external comparables on the basis of his findings in para 8.2 to 8.3. As regard, internal comparables, the ld CIT(A) made his findings in para 9 to 9.4 and held that the AO/TPO was not justified in rejecting the agreement with SMS Paryavaran Ltd on the sole ground related party. He held that SMS Paryavaran Lad is independent party and not related with the group. He directed to include Joint Venture Agreement in between SMS Paryavaran Ltd and SPML Ltd

wherein 1.5% was retained by SPML Ltd. The average of two comparables comes to 3% and the said 3% of contract revenue shall be considered as the Arm's Length Retention percentage as against 4.5% applied by the TPO.

3. Being aggrieved by the order of ld CIT(A), now the assessee as well as department both are in appeal before the Tribunal.

4. Before us, the ld. A/R of the assessee has reiterated his submissions as submitted before the lower authorities. The assessee has submitted its written submissions as under :-

" **Issues Involved:**

Omission of transactions covered under-section 40A(2)(b) of the Act from the ambit of Specified Domestic Transactions.

1. We submit 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"

We submit that section 92BA was inserted by Finance Act 2012 with effect from 1.4.2013. However clause (i) referred above was omitted by the Finance Act 2017 with effect from 01.04.2017. Accordingly we submit that the Transfer pricing adjustment made in the instant case is liable to be deleted, since clause (i) of section 92BA shall be deemed to be never existed in the Statute.

Further, it did not contain saving clause or nothing was specified whether the proceeding initiated or action taken as regards the same shall continue. 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 from the ACT, it would be deemed that clause (i) was never there in the statute. Therefore, the proceeding initiated, or action taken under the said section would not survive.

We further wish to place our reliance on the following judgement wherein it has been held that when clause (i) of Section 92BA has been omitted from the statute the resultant effect is that it would be deemed that it had never been passed and to be considered as a law never been existed.

(i) Hon'ble Supreme Court decision in the case of KOBLAPUR CANESUGAR WORKS LTD. vs. UNION OF INDIA reported in AIR 2000 SC 811 (Case law Paper Book page 1-12) In this case Hon'ble 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 without saving clause in favour of pending proceedings. The findings of Hon'ble Supreme Court is in para 38 and 39 of the order (Case law Paper Book page -10).

"38. 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 proceeding shall not continue bu a fresh proceeding for the same purpose may be initiated under the new provision.

39. In the present case, as noted earlier, Section 6 of the General Clauses Act has no application. There is no saving provision in favour of pending proceeding. Therefore action for realisation of the amount refunded can only be taken under the new provision in accordance with the terms thereof."

(ii) Hon'ble Supreme Court decision in the of GENERAL FINANCE CO. AND ANOTHER VERSUS ASSISTANT COMMISSIONER OF INCOME-TAX 002 (3) TMI 3-SUPREME COURT Other Citation (2002) 257 (TH 338 (9C) AIR 2002 SC 3125 2002 (2) Supel SCR 106 2002 (7) SCC 1 2002 (6) JT 426, 2002 (6) SCALE 198.

(Case law Paper Book page 13-16)

Held that section 276DD stood omitted from the Act but not repealed and hence, a prosecution could not have been launched by invoking section 6 of the General Clauses Act after its omission.

(iii) Hon'ble Karnataka High Court in the case of The Commissioner of Income Tax Versus M/S. GE Thermometrics India Pvt., Ltd., 2019 (12) TMI 1312- KARNATAKA HIGH COURT

(Case law Paper Book page 17-19)

The decision in KOLHAPUR CANESUGAR WORKS LTD., VS. UNION OF INDIA 2000 (2) TMI 823- Supreme Court of India was relied upon the effect of deletion of a provision in the statute is dealt with and held that 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 there is no saving clause or provision introduced by way of an amendment while omitting sub- section (9) of Section 108 therefore, once the 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.

(iv) Hon'ble Karnatak High Court in the case of Principal Commissioner of Income-Tax-7 Versus Texport Overseas (P.) Ltd. 2019 (12) TMI 1312- KARNATAKA HIGH COURT

(Case law Paper Book page 60-63)

In this case Hon'ble High Court relied upon principles enunciated by the Hon'ble Supreme Court in Kolhapur Canesugar Works Ltd and in case of GE Thermometrias India Pvt Ltd and held that tribunal has rightly held that the order passed by the TPO and DRP is unsustainable in the eyes of law.

This case relates to TP Adjustment - AO made a reference to TPO u's 92CA to determine arms length price as the assessee had entered into specified domestic transaction and on the ground it was covered u/s 92HA -contention for revenue that tribunal was not justified in arriving at a conclusion that Clause (i) of section 92BA which had been omitted w.e.f. 01.04.2017 would be applicable retrospectively by presuming the retrospectively, particularly when the statue itself explicitly stated it to be prospective in nature - HELD THAT:- On perusal of records in general and order passed by tribunal in particular it is clearly noticeable that Clause (1) of section 92BA of the Act came to be omitted w.e.f. 01.04.2017 by Finance Act, 2017. Thus, when clause (i) of Section 92BA having been omitted by the Finance Act, 2017, with effect from 01.04.2017 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 92BA and reference made to the order of Transfer Pricing Officer TPO under section 92CA could be invalid and bad in law.

(v) ITAT Bangalore in the case of M/S Nava Karnataka Steels Pvt. Ltd. Versus The Dy. Commissioner of Income Tax, Circle-5 (1) (1), Bengaluru 2022 (6) TMI 179-ITAT Bangalore

(Case law Paper Book page 21-27)

TP Adjustment - AO made a reference to TPO u/s 92CA to determine arms length price as the assessee had entered into specified domestic transaction Reference to the TPO in respect of specified domestic transactions - claim of expenditure in terms of the provisions of sec. 40A(2)(b) as submitted provisions of section 92BA of the income-tax Act 1961 have been amended vide Finance Act 2017 to exclude specified domestic transactions which are contained under section 92BA read with 40A(2)(b) from the purview of transfer pricing regulations-HELD THAT:- Considering the binding effect of the decision rendered in TEXPORT OVERSEAS (P.) LTD. [2019 (12) TMI 1312 KARNATAKA HIGH COURT] we respectfully follow the same and 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 is omitted since inception. Accordingly, we direct the AO to delete the additions relating to specified domestic transactions made u/s 92CA of the Act.

(vi) ITAT Bangalore in the case of M/S. Cauvery Aqua Pvt. Ltd. Versus Deputy Commissioner of Income-Tax Central Circle-2 (3) Bangalore: 2021 (10) TMI 791-ITAT Bangalore

(Case law Paper Book page 28-37)

Assessment year 2013-14. TP Adjustment in respect of Specified Domestic Transactions - Reference to the TPO in respect of specified domestic transactions claim of the expenditure in accordance with provisions of section 40A(2) HELD THAT:- As consistent with the view taken by the Tribunal in AY 2015-16 [2021 (2) TMI 793-ITAT BANGALORE], we hold that the reference to the TPO in respect of specified domestic transaction mentioned in section 92BA(i) of the Act is not valid as the said provision has been omitted.

(vii) M/s. Sobha City vs. ACIT Circle 1(2)(2) Bangalore (ITA No.2936/Bang/20180) AY 2014-15

(Case law Paper Book page 38-53)

Hon'ble Tribunal relied upon the decision in the case of M/S. Cauvery Aqua Pvt. Ltd., decision of Hon'ble Karnatak High Court in the case of Texport Overseas (P.) Ltd, and several other decisions mentioned in the order and held as under:-

Para 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.

(viii) ITAT Visakhapatnam in the case of 3F Industries Limited Versus The Assistant Commissioner of Income Tax, Circle-1, Andhra Pradesh I.T.A. No.54/Viz/2019 Dated: 15-12-2022 2022 (12) TMI 846 ITAT VISAKHAPATNAM.

(Case law Paper Book page 64-70)

TP Adjustment-provisions of section 92BA(i) relating to expenditure referred in section 40A(2)(b) - As argued since clause (i) of section 92BA of the Act was omitted, payments made by the assessee U/s. 40A(2)(b) of the Act cannot be considered as specified domestic transaction -As stated since the provisions of clause(i) to section 92BA of the Act has been omitted by the Finance Act, 2017 w.e.f 1/4/2017 and hence it would be deemed that clause (1) of section 92BA of the Act was never in the statute - HELD THAT: Where a particular provision in a statute is omitted with a saving clause in favour of the pending proceedings, then it can be reasonably inferred that the intention of the Legislature is that pending proceedings shall not continue. Therefore, the omission of clause (i) of section 92BA w.e.f 1/42017 shall render the pending proceedings invalid.

(ix) ITAT Kolkata in the case of Asstt. Commissioner of Income Tax, Circle-33, Kolkata Versus Rahee Jhajharia E To E JV And Vice- Versa 1.T.A. No. 1125/Kol/2019 1.T.A. No. 343/Kol/2019 Dated: 12-7-2022 2022 (7) TMI 790-ITAT KOLKATA

(Case law Paper Book page 71-81)

TP Adjustment - ALP determination qua domestic transactions entered into by the assessee with its partner u/s 92BA(i) of the Act-TP Adjustment of transactions falling u/s 40A(2)(b) - HELD THAT: We find that though all these arguments have been duly considered by the ITAT in the orders for the earlier years, particularly in the case of M/s. Raipur Steel Casting India (P) Ltd. [2020 (6) TMI 629 - ITAT KOLKATA] but after taking note the issue was decided in favour of the assessee. In the case of M/s. DVC Emta Coal Mines Ltd. (2019 (5) TMI 1709 ITAT KOLKATAJ ITAT Kolkata as reproduced the finding of the ITAT Bangalore and thereafter held that effect of Finance Act, 2017 for omission of sub-clause to Section 92BA is that it would be deemed that such clause was never been on the statute book and, therefore, no Transfer Pricing adjustment can be examined with regard to the transactions falling us 40A(2)(b)

We are of the view that the transactions of the assessee referred to the TPO for determination of ALP could not be made subject to TP adjustment after the Finance Act, 2017, as discussed above. Consequently, no addition on account of TP Adjustment is sustainable because it has been categorically held that omission of a provision would mean that it was never on the statue book-It has to be deemed

that it was not in existence in A.Y. 2014-15 and if there was no such provision for recommending the transactions u/s 40A(2)(b) for determination of ALP, there cannot be any adjustment in the income of the assessee on the ground of TP adjustment. Accordingly these grounds of the assessee are allowed. The additions made in the income of the assessee on account of TP adjustment in the domestic transaction are deleted.

(x) ITAT Mumbai in the case of Mahindra Two Wheelers Ltd Versus The Dy. Commissioner of Income Tax, 2 (2) (2), Mumbai ITA No. 519/Mum/2018 Dated: -28-4-2022 2022 (8) TMI 482-ITAT MUMBAI

(Case law Paper Book page 82-98)

TP adjustment made in pursuance of Section 92BA (1) - specified domestic transactions- HELD THAT: In the present case there is an adjustment made to the income of the assessee by determining arm's-length price of specified domestic provisions by invoking the provisions of Section 92BA (i) of the act. The impugned assessment year before us is assessment year 2013-14. The above provision i.e. 92BA (i) of the act was inserted by The Finance Act, 2012 with effect from 1/4/2013 and is omitted by The Finance Act, 2017 with effect from 1/4/2017. The issue whether the adjustment can be made to the total income of the assessee by invoking the provisions of Chapter X of The Income Tax Act to the transactions covered by provisions of Section 92BA (i) for assessment year 2013-14 till it was omitted.

This issue has been dealt with by the honourable Karnataka High Court in case of Texport overseas [2019 (12) TMI 1312 KARNATAKA HIGH COURT] in favour of the assessee holding that as the provisions of Section 92BA (i) has been omitted from the Income Tax Act without any saving clause therefore the natural corollary would be that it did not exist at all in the statute book. Accordingly, we allow the additional ground of appeal and hold that the impugned transfer pricing adjustment made by the learned assessing officer is not sustainable.

(xi) ITAT Delhi in the case of M/S SMR Automotive Systems India Ltd. Versus Addl. CIT Special Range-8, Delhi LTA No.6614/Del/2017 Dated:- 3-4 2021 reported in 021 (6) TMI 449-ITAT DELHI.

(Case law Paper Book page 105-112)

Determination of the Arm's Length Price - reference u/s 92CA - HELD THAT: The undisputed fact is that as per sub-clause (1) of section 92BA the assessee has undertaken the transaction which has exceeded the prescribed limit. It is also not in dispute that vide Finance Act, 2017 w.e.f. 01.04.2017 the said sub-clause (1) of section 92BA has been omitted. We find that the AO has made a reference u/s 92CA having observed that the assessee has entered into specific domestic transaction as the case is covered u/s 92BA of the Act.

We have no hesitation to hold that the cognizance taken by the AO u/s 92B clause (1) and reference made to TPO u/s 92CA is invalid and bad in law. Therefore, the consequential order passed by the TPO and DRP is also not sustainable in the eyes of law. Additional ground is accordingly allowed.

(xii) Similar view was taken by ITAT Ahmedabad in case of Ammann India Pvt. Ltd Vs ACIT Mehsana ITA No 2262/Ahd/2018 order dated 31-01-2022 reported in 2022 (1) TMI 411 ITAT Ahmedabad.

(Case law paper book page 99-104)

1.1 Ld. CIT(A) rejected the assessee's ground on this issue by relying the decision of Govinddas Vs ITO [1976] 103 ITR 123 and CIT Vs Vatika Township (P) Ltd [2014] 49 Taxmann.com 249/227 Taxman 121. In this regard we submit that both the decisions are not relevant to the issue in hand. The present issue is omission of law without saving clause for pending proceedings. In CIT vs. Vatika Township (P) Ltd the issue was retrospective applicability of S. 113 Proviso inserted by Finance Act 2002 w.e.f. 01.06.2002 to impose surcharge in search assessments. Here the issue was relating to insertion of new law which is totally different than the omission of law without saving clause for pending proceedings

Further, in para 7.9 the Id CIT(A) rejected the assessee's contention that this issue was not raised during assessment. In this regard we submit that this issue is purely legal issue and there is no dispute over the facts relevant to this issue. The legal issue can be raised at any stage of the proceedings. There is no estoppels against the law. Even Hon'ble

ITAT Delhi in the case of M/S SMR Automotive Systems India Ltd. (Supra) allowed the additional ground on this issue.

In para 7.8 of the order, Ld CIT(A) has rejected the reliance made by the assessee on the decision of Hon'ble Karnataka High Court in the case of PCIT Vs M/s. Texport Overseas Pvt Ltd by holding that Hon'ble Supreme Court has admitted the SLP against the decision of Hon'ble Karnataka High Court in the case of PCIT vs M/s Texport Overseas Pvt Ltd so the issue has not become final. In this regard we submit that mere admission of a special leave petition without passing speaking order could, by itself, cannot be construed as stay on operation of the decision of Hon'ble High Court nor cannot be construed as the verdict of Apex Court on the correctness of the decision of Hon'ble High Court.

1.2. From the plethora of judgments as mentioned above, it is 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. 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 there in the statute.

In view of the above, it is prayed to hold that the reference made to TPO u's 92CA is invalid and bad in law. Therefore, the consequential order passed by the Id TPO and Id AO is also not sustainable in the eyes of law and that addition made /sustained by ld CIT(A) deserves to be deleted.

1.3. The assessee company was a SPV (Special Purpose Vehicle). The work executed by the participating principle party is not

sub contract and out of preview of specific domestic transaction with related party (RP):-

The assessee was merely a conduit company formed as SPV which was created full fill requirement of the tender document by the Water Resource Department, Government of Rajasthan. The assessee company never participated in the tender bid. The assessee was not a qualifying party for the tender. Even the assessee company was not in existence at the time of bidding of the tender as it was formed on 10/05/2010.

1.4. Tender was invited by Water Resources Department, Government of Rajasthan for construction of Kalisindh Dam on Engineering Procurement & Construction ("EPC) turkey basis, M/s Subhash Projects & Marketing Ltd (now known as SPML Infraprojects Ltd) and M/s Om Metals Infra Projects Ltd bid for the said tender (Tender documents at Paper Book page 77-109) and these companies were jointly awarded the work by Government of Rajasthan with a condition to form a Special Purpose Vehicle ("SPV") to execute the said project. Copy of approval of Tender in name of M/s Subhash Projects & Marketing Ltd in association with MOU Partner M/s Om Metals Infra Projects Ltd is placed at PB page 76. The total contract value was approx. Rs. 457 crores. The tender was awarded on 30/04/2010 whereas the assessee company came into existence on 10/05/2010.

1.5. The qualifying party in respect to Hydro-mechanical construction was Om Metals Infra Projects Ltd as it had vast experience in Hydro- mechanical construction and M/s Subhash Projects & Marketing Ltd (now known as SPML Infraprojects Ltd) was qualifying party with respect to Civil Construction.

1.6. The creation of SPV was one of the requirement of the tender document by the Water Resource Department, Government of Rajasthan. The Appellant is a joint venture company of two companies formed as Conduit Company by M/s Subhash Projects & Marketing Ltd (now known as SPML Infraprojects Ltd) and its MOU partner Om Metals Infra Projects Limited ("Om

Infra"). The copy of MOU entered by M/s. Subhash Projects & Marketing Ltd (now known as SPML Infraprojects Ltd) and its MOU partner Om Metals Infra Projects Limited ("Om Infra") is at PB page 69-75.

1.7. The entire project of Dam Construction was awarded jointly to M/s Subhash Projects & Marketing Ltd (now known as SPML Infraprojects Ltd) and M/s Om Metals Infra Projects Ltd and being the qualifying party of the contract, for complete execution of work was made on Turnkey Basis as OM INFRA has vast experience in the field of turnkey execution from Design, Detailed Engineering, Manufacture, Supply, Installation, Testing & Commissioning of complete range of Hydro mechanical equipment for Hydroelectric Power & Irrigation projects, PHED, PWD etc.

1.8. Therefore, in real sense it was not a sub contract in between assessee company M/s Om Metal- SPML Infra Projects Pvt Ltd (Now known as Worship Infra Projects Pvt Ltd) and M/s Om Metal Infra Projects Ltd as mentioned in para 6 of Assessment order. **The dictionary meaning of sub contract is -**

(i) employ a firm or person outside one's company to do (work) as part of a larger project.

(ii) to engage a third party to perform under a subcontract all or part of (work included in an original contract).

(iii) a contract between a party to an original contract and a third party that assigns part of the performance (as building a house) of the original contract to the third party.

(iv) Contract between a party to an original contract and a third party that assigns part of the performance (as building a house) of the original contract to the third party.

In the case of the assessee company it was merely SPV specially formed as conduit for distribution and execution of work awarded to participating companies. It is not a case where work was given to third party.

1.9. The assessee company was not in existence at the time of approval of tender, it has no experience, no infrastructure, and no funds to execute the work. In addition to above, the reason for low margin is also because of the fact that the parent company i.e. OM Infra Limited has furnished the bank guarantee on behalf of the assessee company. The same would have been approx. 10% of the contract value ie INR 42.98 Crores. Considering the above factors the profit margin of Rs. 1,45,77,730/- retained by the assessee company for meeting administrative expenses was most reasonable us the assessee company did nothing for the contract but got this profit just for name sake only.

1.10. As per the prevalent industry practice, a Memorandum of Understanding was entered into between OM SPML (Now Worship Infra), assessee and OM INFRA. qualifying party in May 2010 as per which 5% of the Contract value was to be retained by OMSPML, assessee company. During the year under consideration, i.e., FY 2013-14 i.e. Rs. 98,93,88,204/- (being 95% of Rs. 104,14,46,032) was given to OM INFRA by OM SPML and 5% was retained by OM SPML for meeting administrative and other expenses. Accordingly, OM SPML has passed Rs. 98,93,88,204 out of total amounting to Rs. 104,14,46,032/- to meet out contract expense by Om Infra and the assessee company retained 5% of the contract revenue for the year under consideration amounting to Rs. 5.20.57,828/-[104,14,46,0321-minus 98,93,88,204/-] and after meeting out the all expenses on labour cess, royalty expenses, vat Composition tax, entry tax, administrative and finance cost the net resulted net profit before tax 90,48,708/- giving earning per share Rs. 624.90/- (PB page 018) **which is most reasonable.**

1.11. Rule 10B prescribes the method for Determination of arms length price under section 92C. The relevant applicable rule under Income Tax Rules is as under :-

10B. (1) For the purposes of sub-section (2) of section 92C, the arms length price in relation to an international transaction or a specified domestic transaction] shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely:-

(a) comparable uncontrolled price method, by which, -

(i) the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified;

(ii) such price is adjusted to account for differences, if any, between '[the international transaction or the specified domestic transaction] and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market;

(iii) the adjusted price arrived at under sub-clause (if) is taken to be an arm's length price in respect of the property transferred or services provided in [the international transaction or the specified domestic transaction];

As per clause (ii) of Rule 10B such price is to be adjusted for difference. No appropriate adjustment was made by TPO/AO for basic difference i.e. the assessee company was not in existence at the time of approval of tender, It was merely conduit company, it has no experience, no infrastructure, and no funds to execute the work and even the parent company i.e. OM Infra Limited has furnished the bank guarantee on behalf of the assessee company.

2. **Rejection of External Comparable.**

(i) **External Comparable :-** The percentage of contract revenue retained by OM SPML has also been compared with the percentage of contract revenue retained by other companies engaged in sub-cont6racting of infrastructure construction projects. As per the comparability analysis, the

average percentage retained by comparable companies for sub-contracting is 2.75% (or 3.44%, if company retaining zero percentage of contract revenue on account of sub-contracting is ignored).

Name	Sub-contract Revenue (1)	Sub-Contract Expense (2)	Amount of contract revenue retained by the Company in respect of Sub-contracting activities (3)=(1)-(2)	% of Sub-contract Revenue retained (4)=(3)/(1)	Reasons of Rejection by TPO
Anubhav Infrastructure Ltd.	141.63	140.27	1.36	0.96%	For the want of strict comparability
Gammon India Ltd.	15.23	15.23	-	0.00%	Persistent losses
P V V Infra Ltd	3.25	3.10	0.15	4.62%	For the want of strict comparability
Silverpoint Infratech Ltd.	167.89	166.76	1.13	0.67%	For the want of strict comparability
Skil Infrastructure Ltd.	377.58	349.24	28.34	7.51%	Persistent losses

As mentioned above, the Ld. TPO had rejected three external comparables being Anubhav Infrastructure Ltd., PVV Infra Ltd. and Silverpoint Infratech Ltd. for the want of strict comparability and had also rejected the other two comparables being Gammon India Ltd, and Skill Infrastructure Ltd as the companies were in persistent losses.

Further, even if we ignore the Gammon India Ltd. and Skill Infrastructure Lad on account of persistent losses (as done by the Ld. TPO in his order). The average revenue retention percentage of the remaining comparables would stand at 2.08% which will go down to 0.815 (being the average of 0.67% - Silverpoint Infratech Ltd. and 0.96% - Anubhav Infrastructure Ltd) as the third comparable i.e., P. V V Infra Limited may not be suitable for comparison as the company is engaged majorly in trading activity. The said company has started construction activity on the sub-contracting model in the relevant assessment year only and the revenue from

sub- contracting is comparatively low as compared to the revenue of the Appellant. Further, almost 90% of revenue of the company is from trading and construction contracts only form a very small part of the same.

Perusal of Annual report of Silverpoint Infratech Ltd. and prospectus document of Anubhav Infrastructure Ltd shows that both the comparables are engaged in construction business by sub-contracting the project to the third parties and accordingly FAR of comparables are same as Appellant's. Appellant was therefore able to provide substantial documents for the said comparables and the arguments taken by appellant has been considered. Hence both the companies are to be retained as comparables. (Copy of the public documents available for all the three comparables selected by the Appellant were filed before TPO)

In addition to above, the reason for low margin is also because of the fact that the parent company i.c. OM Infra Limited has furnished the bank guarantee on behalf of the Appellant. The same would have been approx. 10% of the contract value i.e INR 42.98 Crores.

Based on the above information and detailed qualitative analysis, it is submitted that two suitable comparables namely Silverpoint Infratech Limited and Anubhav Infrastructure Limited have retained only 0.67% and 0.96% of the contract value respectively. This implies that as regards to the suitable external comparables, where taxes are borne by the sub-contracting parties, the average retention rate is less than 1 % of the contract value. In the instant case of Appellant, Ld TPO has compute adjusted percentage retained by the Appellant at 1.399% of the total receipts. Thus even if the adjustments made by the Ld. TPO is considered, the retention of net of expenses is higher in case of the Appellant than that of comparables. This, the transaction between the assessee company and Om Infra, can be considered to be at arm's length and no addition should be made in regard to the same.

However, the lower authorities have rejected the external comparables one the following grounds-

- The assessee failed to submit the details of database on which this search was conducted;
- The assessee did not submit keywords and details of filters applied;
- From Prowess database it cannot be found that whether the comparable companies were undertaking product on its own or sub-contracting the entire project. Even if the contract is given on sub-contract them whether the sun-contract was on turnkey project basis or in parts. It is not ascertainable fun comparative analysis of the assessee and Prowess database whether several contracts were awarded by the comparable company or a single contact. It is also not ascertainable that how much margin has been kept by these companies on contract,
- The assessee failed to submit the nature of work undertaken by the comparable company. Whether the comparable companies were engaged mining work, road construction work, dam projects or something else Therefore, these comparables cannot be chosen;
- The assessee failed to submit that whose assets were used in the case of these comparables which were chosen through Prowess database. Whether these comparables have employed their own assets (plant & machinery construction activity or the sub-contractor was utilising its assets;
- Risk factors of contracting company and sub-contracting company were furnished;
- The TPO observed for application of CUP strict comparability is required. As the assessee failed to submit complete details, the TPO concluded that these comparables cannot be taken into consideration as their terms of agreements could not be verified.

  The assessee has submitted detailed reply on these issues to TPO vide letter dated 24/08/2017 (copy enclosed with the WS) which has not been considered in judicial perception by the lower authorities.

3. Rejection of Internal Comparable JV Agreement between SMS Paryavaran Limited and SPML:-

Internal Comparable: The aforesaid percentage retained by OM SPML has been compared with the percentage retained by SPML on account of sub-contracting the execution of similar projects to unrelated parties. The details of the internal comparables are as under:

Agreement	Percentage of Revenue retained for sub-contracting the work
JV Agreement between SMS Paryavaran Limited and SPML	1.5% of the contract revenue retained by SPML
Agreement between Jain & Rai Construction Co. and SPML	4.5% of the contract revenue retained by SPML
Average Mean	**3%**

The ld CIT(A) applied the average mean of 3% for the profit to be retained by the assessee company. However, as per clause (ii) of Rule 10B such price is to be adjusted for difference. No appropriate adjustment was made by lower authorities for basic difference i.e. the assessee company was not in existence at the time of approval of tender, It was merely conduit company, it has no experience, no infrastructure, and no funds to execute the work and even the parent company i.e. OM Infra Limited has furnished the bank guarantee on behalf of the assessee company.

4. **Without prejudice to the above submission, and in alternative arguments, we submit as under:-**

4.1 that the lower authorities failed to consider the second proviso to section 92C(2) which is as under:-

Provided further that if the variation between the arm's length price so determined and price at which the [international transaction or

specified domestic transaction] has actually been undertaken [does not exceed such percentage not exceeding three per cent of the latter, as may be notified] by the Central Government in the Official Gazette in this behalf] the price at which the "[international transaction or specified domestic transaction] has actually been undertaken shall be deemed to be the arm's length price.]

The difference in the arm's length price and price actually taken may be seen as under:-

As per findings of AO			**As per findings of CIT (A)**	
% of profit to be retained by assessee	4.50%		3%	
Contract Revenue including escalation (@ 4.5% of Rs. 104,18,81,809)	4,68,84,681		3% of Rs. 104,18,81,809	3,12,56,454
Less Rebate	-4,35,777	4,64,48,904		-4,35,777
Other Income		1,59,946		1,59,946
Total Income		4,66,08,850		3,09,80,623
Expenses				
Employee Cost		24,71,155		24,71,155
Financial Cost		29,16,785		29,16,785
Other expenses		68,614		
Audit fees	50,000			50,000
Preliminary expenses written off	5,440			5,440
Misc. Expenses	13,174			13,174
Depreciation		2,32,414		2,32,414
Total Expenses		56,88,968		56,88,968
Adjusted Profit		4,09,19,882		2,52,91,655

before tax (A)				
Profit before tax as reported (B)		90,48,708		90,48,708
Adjustment (A-B)		3,18,71,174		1,62,42,947
Actual Price undertaken by Assessee		98,93,88,204		98,93,88,204
Arm's length price after TP adjustment		95,75,17,030		97,31,45,257
Difference		3,18,71,174		1,62,42,947
Difference in percentage		3.22%		1.64%

Since the difference in between the Arm's length price and actual price is within the limit prescribed in the second proviso to section 92C(2) of Income Tax Act, the difference should be ignored.

4.2 **No disallowance can be made by applying the provisions of Section 40A(2)(b) as there is no question of diversion of profit to evade tax liability.**

The transfer pricing adjustment has been made in pursuance of provisions of clause (i) of sec. 92BA of the Act, which is in relation to 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. We submit that the provision of Section 40(A)(2)(b) are to be applied to check evasion of tax as has been clarified by the CBDT Circular dated 6-7-1968. In the case of recipient company M/s Om Metal Infra Projects Ltd is paying tax at the highest rate on the income with levy of surcharge, therefore, there is no case of evasion of tax by paying the revenue against contract expenses Rs. 98,93,88,204/- as against Arm's length price of Rs. 95,75,17,030/- determined by the AO to the related parties. The assessee company M/s Worship Infra Projects Pvt. Ltd and parent company M/s Om Metal Infra Projects Limited are under same tax bracket but the fact remains that the

assessee company is not liable to pay surcharge (PB page 03-04) whereas the parent company M/s Om Metal Infra Project Ltd has additional liability of surcharge @ 10% of tax (PB page 034). Therefore, no disallowance can be made by applying the provisions of Section 40A(2)(b) as there is no question of diversion of profit to evade tax liability.

We rely upon the following decisions:-

(i) Hon'ble Bombay High Court in the case of CIT Vs. Indo Saudi Services (Travel) P. Ltd., reported in [2009] 310 ITR 306 (Bom.)

(ii) CIT Vs. V.S. Dempo & Co. (P.) Ltd., reported in [2011] 196 TAXMAN 193.

Hon'ble High Court has held that when the assessee as well as its subsidiaries were in the same tax bracket and paid the same rate of tax, there was no question of diversion of funds by paying higher rate to subsidiary companies and, therefore, no disallowance could be made under Section 40A(2)(b).

(iii) ITAT Mumbai in Indo Bearing Traders Vs. ACIT 19(1), Mumbai, ITA No. 7119/Mum/2011 dated 10.10.2012 (Copy at case law Paper book page 145-152)

> *2.4 It is clear that the objective of Section 40A(2) is to check evasion of tax through excessive or unreasonable payments to the associates concern and therefore, this provision should not be applied in a manner which will create hardship in bonafide cases. The assessee has claimed and filed details before us showing that the recipient of the interest are paying the income tax at the highest rate and equivalent to the rate of tax at which the assessee's paying tax. To substantiate the contention, the learned AR of the assessee has relied upon the decision of the Hon'ble jurisdictional High Court in the case of CIT Vs. Indo ITA No.7119/2011 Saudi Services (Travel) P. Ltd. (supra), wherein the Hon'ble High Court has observed in para 5 as under :-*
>
> > *"5. In view of the aforesaid admitted facts we are of the view that the Tribunal was correct in coming to the conclusion that the Commissioner of Income-tax (Appeals) was wrong in disallowing half per cent commission to the sister concern of the assessee during the assessment years 1991-92 and 1992-93. The learned advocate appearing for the appellant is also not in a*

position to point out how the assessee evaded payment of tax by the alleged payment of higher commission to its sister concern since the sister concern was also paying tax at higher rate and copies of the payment orders of the sister concern were taken on record by the Tribunal."

2.5 Similarly, in the case of CIT Vs. V.S. Dempo & Co. (P.) Ltd (supra), the Hon'ble High Court has held in para 4 as under-

"4. Clause (a) of sub-s (2) of 404 of the income-tax provides that where the assessee incurs any expenditure in respect of which payment has been or is to be made to any person referred to in cl. (b) of the sub- section and the A0 is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods, services or facilities for which the payment is made or the legitimate needs of the business or profession of the assessee or the benefit derived by or accruing to him therefrom, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction. Clause (b) of sub-s. (2) of s. 40A of the income-tax mentions the class of persons in respect of whom cl. (a) is attracted. Learned counsel for the respondent submits that M/s Dempo Mining Corporation (P) Ltd. (hereinafter referred to as "the subsidiary company") from which the assessee purchased the iron ore is not one of the persons mentioned in cl. (b) of sub-s (2) of 2 40A and therefore, sub-s. 2(a) was not attracted. In the alternative he submitted that the finding recorded by the CIT(A) as well as the Tribunal that the assessee had paid a little higher than the usual rate taking into consideration the fact that the assessee was assured a huge quantity of supply, as well as the quality of supply that it cannot be said that the rate was unjustified, was a finding of fact. In the absence of any perversity, the finding of fact recorded by the CIT(A) and confirmed by the Tribunal cannot be interfered with in an appeal under s. 260A of the Act. He further submitted that both the assessee as well as the subsidiary were registered companies under the Companies Act, 1956 liable to pay the income-tax at the same rate. Therefore, there was no question of diversion of any funds. He invited our attention to the CBDT Circular No. 6-P dt. 6th July 1968, which states that no disallowance is to be made under s. 404/2) in respect of 3. the payments made to the relatives and sister concerns where there is no attempt to evade tax. He submitted that the CIT(A) as well as the Tribunal have also recorded a finding of fact that there was no attempt of evasion of tax and therefore, in view of the CBDT circular de 6 July, 1968, s.

404(2) was not attracted and ITA No.7119/2011 should not have been applied by the AO. The circular is binding on the Department and on this ground also the appeal should be dismissed"

2.6 Following the decision of the Hon'ble jurisdictional High Court we are of the view that if the assessee is able to establish that the recipient of interest are paying tax at the highest rate on the income and at least on the income to the extent of interest received, then no disallowance is called for under Section 40A(2) for want of motive of evasion of tax Accordingly on principle, we accept the contention of the learned AR however, the Assessing Officer to directed to verify the rate of tax at which the recipient of interest have paid tax and if the rate of tax paid by the recipient is equivalent to the rate of sax paid by the assessee, the assessee's claim should be allowed"

5) **Departmental Appeal:-**

SUBMISSION OF ASSESSEE:-

(i) **JV agreement was not in between the assessee and SMS Paryavaran Limited.**

The department has raised Ground No 1 to 3 presuming the JV agreement was in between the assessee and SMS Paryavaran Limited in the internal comparables submitted by the assessee, which is factually wrong, as the JV agreement was in between SMS Paryavaran Limited and SPML Infra Ltd (para 7.2 (a) of Assessment Order).

(ii) **Further, JV Agreement in between M/s SMS Paravaran Ltd and M/s SPML Infra Ltd is dated 10th Jan 2013, which falls very nearer to FY 2013-14.** The Arm's length price under the question is for FY 2013-14 (AY 2014-15), therefore, this comparables cannot be rejected on this ground.

(iii) **Further, the Contract in between M/s SMS Paravaran Ltd and M/s SPML Infra Ltd was not merely electrical work** but for water resource and civil construction, i.e. replacement of worn out

pumping machineries, electric equipment including civil work, tube well, and Central Pumbing station of Jammu Water Supply Scheme. The principal qualifying party in the contract i.e. M/s Om Metal Infra Projects Ltd was also executing work in respect to Construction of civil, Hydro- mechanical and electrical work (kindly see PB page 76), which is more and less similar to internal comparables.

(iv) M/s SMS Paravaran Ltd and M/s SPML Infra Ltd are not related party. The factual findings of Id CIT(A) is in para 9.3 and 9.4 is as under:-

" 9.3 It is observed that the sole reason of rejection of SMS Paryavaran Limited by the AO/ TPO is that it was a related party. It is observed that SMS Paryavaran Limited is an independent company and is not related in any manner with the appellant company or its group. The information about the company as available on the website of the company is as follows:

> *SMS Paryavaran has vast experience in the field of public health works such as Water transmission treatment, storage & distribution: Sewerage system, treatment, recycle & disposal and Industrial effluent collection, treatment & disposal. We are proud of establishing the eco-friendly facilities on a turnkey project basis, executing the projects to its final stage of commissioning.*
>
> *With the expertise and exposure in the field of environmental technologies in India & abroad, incorporation of SMS Paryavaran provided new dimensions & horizon to the creative concepts and innovative professional approaches to our founders, helping us to associate & work with various reckoned firms of private & public sectors which has placed SMS in the selected top group of professionals within a short span of time.*
>
> *Today at SMS, we design, manufacture undertake consultancy and offer complete turnkey profetes from concept to commissioning with expertise.*
>
> *Its promoters/ directors are Manimay Sengupta, Munendra Kumar Singh and Sudhir Narayan Rao Modak.*

9.4 It appears that the TPO got confused with the name of the company (SMS) in inferring that the same is a related party of SPML.

The TPO has not given any reason or basis for forming the view that SMS Paryavaran Limited was a related party. As SMS Paryavaran Limited was an unrelated party, the TPO was not justified in rejecting this comparable on the sole basis that it is a related party...".

The department has not brought any positive material to show that M/s. SMS Paryavaran Ltd and SPML has common director, common shareholders and common management."

4.1. In addition to the above written submissions submitted by the ld. A/R of the assessee on 20.04.2023, he further submitted the following submissions in support of his case :

" The assessee has filed detailed submission on the hearing of the case on 20/04/2023. The assessee in addition to what has been submitted on 20/04/2023 further submits as under for your kind perusal and consideration.

1. The assessee has submitted 5 external comparables and 2 internal comparables. The ld TPO, Ld AO and Id CIT(A) has rejected the external comparables on technical grounds like not furnishing the sub contract agreement etc. The ld AO rejected the internal comparable being JV/Sub contract agreement in between SPML Ltd and SMS Paryavarn Ltd which show retention of profit margin @ 1.5% of contract receipt on the basis of his findings in para 13.2 at page 10 of Assessment Order. The Id AO found the JV/sub contract agreement in between SPML. Ltd and M/s Jain & Rai Construction Company Ltd which shows the retention of profit margin @ 4.5% as comparable case. For this purpose he made comparison of Function, Assets and Risk (FAR) tabulated in para 8.1 and 9.2. In table 8.1 he mentioned some wrong facts/wrong data which leads to conclude that this case cannot be held as comparable case. In this regard we submit as under :-

1) Bidding for the contract :-

The ld TPO mentioned **"Yes"** in column 2 of this table in para 8.1 meaning thereby he presumed that the assessee participated in the bidding for the contract. This is against the facts. The assessee never participated in the bid for the contract as it came into existence on 10/05/2010 after approval of the contract. Tender was invited by Water Resources Department, Government of Rajasthan for construction of Kalisindh Dam on Engineering Procurement & Construction ("EPC") turnkey basis. M/s Subhash Projects & Marketing Ltd (now known as SPML. Infraprojects Ltd) and M/s Om Metals Infra Projects Ltd participated in the bid for the said tender (Tender documents at Paper Book page 77-109) and these companies were jointly awarded the work by Government of Rajasthan 30/04/2010 (PB Page 76) with a condition to form a Special Purpose Vehicle ("SPV") to execute the said project. Copy of approval of Tender in name of M/s Subhash Projects & Marketing Ltd in association with MOU Partner M/s Om Metals Infra Projects Ltd is placed at PB page 76. Thus, the tender was awarded on 30/04/2010 whereas the assessee company came into existence on 10/05/2010.

Whereas, M/s SPML Ltd and M/s Jain and Rai Construction Co. both participated in the contract bid as mentioned by ld TPO in Table in Para 8.1 in column 4 and 5. This is a major factor, which reduce the retention of profit margin by the assessee.

2) Project management control and monitoring of the project :-

The ld. TPO mentioned "Yes" in column 2 of this table in para 8.1 meaning thereby he presumed that the assessee participated in management control and project. Whereas, the assessee was new in

the line, it have no experience, It was not involved in management control and monitoring the project.

Whereas in the case of SPML Ltd & Jain & Rai Construction co (comparable case) M/s SPML. Ltd and M/s Jain & Rai Construction co both participated in the project management and monitoring the project. As stated earlier that SPML Ltd is a listed company and it has vast experience in civil construction, incorporated on 27/08/81 whereas the assessee has no experience, it was formed on 10/05/2010 as SPV just as a conduit to full fill the requirement of the contract agreement.

This factor alone reduce the retention of profit margin by the assessee.

3) Functional difference in JV in between the assessee and Om Metals Infraprojects Ltd and JV in between SPML Ltd and Jain & Rai construction Co.

As mentioned in Para 7.2 (b) of Assessment order, agreement in between SPML Ltd and M/s Jain and Rai Construction co dated 20/08/2010 was regarding work of providing Strom Water Drainage System whereas the agreement in between the assessee and M/s Om Metals Infra Project Ltd was for Civil, Hydro Mechanical and Electric Work of Kalisindh Dam across River Kalisindh.

The ld. TPO himself has mentioned in Para 13.1.7 that for application of CUP strict comparability is required. The above difference clearly shows that the agreement in between M/s SPML and Jain & Rai Construction co is not comparable and it should also be rejected.

4) OWN HISTORY OF THE ASSESSEE:-

Asstt. Year	% of contract receipt retained by assessee (before	% of contract receipt retained by assessee (After Expenses)	Assessment Status	Supporting Enclosure at Page No.

	Expenses)			
2011-12	5%	0.02%	143(1)	E-1 to E-4
2012-13	5%	1.79%	143(3)	E-5 to E-8
2013-14	5%	1.54%	143(3)	E-9 to E-12
2014-15	5%	1.40%	143(3)	
2015-16	5%	1.17%	143(1)	E-13 to E-18
2016-17	5%	1.05%	143(1)	E-19 to E-23
2017-18	5%	1.50%	143(1)	E-24 to E-29

The detailed chart to support the above calculation is enclosed herewith. The assessee came in existence on 10/05/2010 and an agreement in between OM SPML (Now Worship Infra), assessee and OM INFRA, qualifying party was executed in May 2010 as per which 5% of the Contract value was to be retained by OM SPML. assessee company. This provisions of domestic transfer pricing came into statue by Finance Act 2012 w.e.f. 01-04-2013. Therefore, an enforceable agreement was in existence much before the applicability of provisions of domestic transfer pricing.

Further, the Assessment of the Assessee for AY 2012-13 and AY 2013-14 was completed w/s 143(3) wherein retention margin of 5% before expenses and 1.79% and 1.54% (after labour cess, royalty, vat composition and entry tax) respectively was accepted as genuine and most reasonable by the ld AO. Even for next years AY 2015 16 to 2017-18 the retention margin of 5% before expenses and profit margin ranging in between 1.5% to 1.05% (after labour cess, royalty, vat composition and entry tax) was accepted by the department.

Hon'ble Rajasthan High Court in the case of CIT Vs Bhawan Va Path Nirman (Bohra) & Co (No. 1) 258 ITR 431 has held that the past history of the assessee is best guiding factor. In this case net profit rate was fixed on the basis of past history. Hon'ble ITAT Jaipur Bench in the case of M/s Asian Construction Co. Vs ITO 34 Tax World 89 has

also held that the past history of assessee's case is the best reflector of the true trade results.

Therefore, the humble assessee prays kindly to delete the addition sustained by Ld CIT(A) and dismiss the appeal filed by the revenue which is listed at ITA 431/JPR/2022 and allow the appeal filed by the assessee which is listed at ITA No.394/JPR/2022."

5. On the other hand, the ld. D/R relying on the orders of the revenue authorities, submitted that the order of the AO be sustained.

6. We have heard the rival contentions, perused the material on record and gone through the orders of the revenue authorities. After appreciating the facts of the case, we noticed that the transfer pricing adjustment was made in the present case in pursuance of provisions of clause (i) of section 92BA of the Act which reads 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"*

We noticed that section 92BA was inserted by the Finance Act, 2012 with effect from 01.04.2013. However, clause (i) referred above was omitted by the Finance Act, 2017 with effect from 01.04.2017. According to ld. A/R, the Transfer Pricing Adjustment made in the instant case was liable to be deleted because clause (i) of section 92BA shall be deemed to be **never existed in the Statute.** We noticed that while omitting clause (i) of section 92BA, there is no saving clause or nothing

was specified in the Act as to whether the proceedings initiated or action taken as regards the same shall continue or not. As per the facts of the present case, undisputedly, by the Finance Act, 2017 clause (i) of section 92BA has been omitted with effect from 01.04.2017. Therefore, once this clause is omitted, it would be deemed that **clause (i) was never there in the Statute.** Therefore, the proceedings initiated or action taken under the said section would also not survive. In this regard, we wish to place our reliance on the judgment of Hon'ble Supreme Court in the case of Kolhapur Canesugar Works Ltd. vs. Union of India, AIR 2000 SC 811 which is at paper book pages 1-12, wherein the 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 **without saving clause in favour of pending proceedings.** The relevant portion of the finding of the Hon'ble Supreme Court is at para 38-39 of the order, which is reproduced below :-

> *"38. 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 proceeding shall not continue bu a fresh proceeding for the same purpose may be initiated under the new provision.*

39. In the present case, as noted earlier, Section 6 of the General Clauses Act has no application. There is no saving provision in favour of pending proceeding. Therefore action for realisation of the amount refunded can only be taken under the new provision in accordance with the terms thereof."

Further, the Hon'ble Supreme Court in another case of General Finance Co and Another vs. ACIT (2002) 257 ITR 338 (SC) has held ***that section 276DD stood omitted from the Act but not repealed and hence, a prosecution could not have been launched by invoking section 6 of the General Clauses Act after its omission.***

In this regard, we further place reliance on the following case laws :-

Hon'ble Karnataka High Court in the case of The Commissioner of Income Tax vs. M/s. GE Thermometrics India Pvt. Ltd. (2019)(12) TMI 1312-Karnataka High Court):

The decision in KOLHAPUR CANESUGAR WORKS LTD., VS. UNION OF INDIA 2000 (2) TMI 823- Supreme Court of India was relied upon the effect of deletion of a provision in the statute is dealt with and held that 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 there is no saving clause or provision introduced by way of an amendment while omitting sub- section (9) of Section 108 therefore, once the 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.

Hon'ble Karnatak High Court in the case of Principal Commissioner of Income-Tax-7 Versus Texport Overseas (P.) Ltd. 2019 (12) TMI 1312- KARNATAKA HIGH COURT

(Case law Paper Book page 60-63)

In this case Hon'ble High Court relied upon principles enunciated by the Hon'ble Supreme Court in Kolhapur Canesugar Works Ltd and in case of GE Thermometrias India Pvt Ltd and held that tribunal has rightly held that the order passed by the TPO and DRP is unsustainable in the eyes of law.

This case relates to TP Adjustment - AO made a reference to TPO u's 92CA to determine arms length price as the assessee had entered into specified domestic transaction and on the ground it was covered u/s 92HA -contention for revenue that tribunal was not justified in arriving at a conclusion that Clause (i) of section 92BA which had been omitted w.e.f. 01.04.2017 would be applicable retrospectively by presuming the retrospectively, particularly when the statue itself explicitly stated it to be prospective in nature - HELD THAT:- On perusal of records in general and order passed by tribunal in particular it is clearly noticeable that Clause (1) of section 92BA of the Act came to be omitted w.e.f. 01.04.2017 by Finance Act, 2017. Thus, when clause (i) of Section 92BA having been omitted by the Finance Act, 2017, with effect from 01.04.2017 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 92BA and reference made to the order of Transfer Pricing Officer TPO under section 92CA could be invalid and bad in law.

ITAT Bangalore in the case of M/S Nava Karnataka Steels Pvt. Ltd. Versus The Dy. Commissioner of Income Tax, Circle-5 (1) (1), Bengaluru 2022 (6) TMI 179-ITAT Bangalore

(Case law Paper Book page 21-27)

TP Adjustment - AO made a reference to TPO u/s 92CA to determine arms length price as the assessee had entered into specified domestic transaction Reference to the TPO in respect of specified domestic transactions - claim of expenditure in terms of the provisions of sec. 40A(2)(b) as submitted provisions of section 92BA of the income-tax Act 1961 have been amended vide Finance Act 2017 to exclude specified domestic transactions which are contained under section 92BA read with 40A(2)(b) from the purview of transfer pricing regulations-HELD THAT:- Considering the binding effect of the decision rendered in TEXPORT OVERSEAS (P.) LTD. [2019 (12) TMI 1312 KARNATAKA HIGH COURT] we respectfully follow the same and 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 is omitted since inception. Accordingly, we direct the AO

to delete the additions relating to specified domestic transactions made u/s 92CA of the Act.

ITAT Bangalore in the case of M/S. Cauvery Aqua Pvt. Ltd. Versus Deputy Commissioner of Income-Tax Central Circle-2 (3) Bangalore: 2021 (10) TMI 791-ITAT Bangalore

(Case law Paper Book page 28-37)

Assessment year 2013-14. TP Adjustment in respect of Specified Domestic Transactions - Reference to the TPO in respect of specified domestic transactions claim of the expenditure in accordance with provisions of section 40A(2) HELD THAT:- As consistent with the view taken by the Tribunal in AY 2015-16 [2021 (2) TMI 793-ITAT BANGALORE], we hold that the reference to the TPO in respect of specified domestic transaction mentioned in section 92BA(i) of the Act is not valid as the said provision has been omitted.

M/s. Sobha City vs. ACIT Circle 1(2)(2) Bangalore (ITA No.2936/Bang/20180) AY 2014-15

(Case law Paper Book page 38-53)

Hon'ble Tribunal relied upon the decision in the case of M/S. Cauvery Aqua Pvt. Ltd., decision of Hon'ble Karnatak High Court in the case of Texport Overseas (P.) Ltd, and several other decisions mentioned in the order and held as under:-

Para 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.

ITAT Visakhapatnam in the case of 3F Industries Limited Versus The Assistant Commissioner of Income Tax, Circle-1, Andhra Pradesh I.T.A. No.54/Viz/2019 Dated: 15-12-2022 2022 (12) TMI 846 ITAT VISAKHAPATNAM.

(Case law Paper Book page 64-70)

TP Adjustment-provisions of section 92BA(i) relating to expenditure referred in section 40A(2)(b) - As argued since clause (i) of section 92BA of the Act was omitted, payments made by the assessee U/s. 40A(2)(b) of the Act cannot be considered as specified domestic transaction -As stated since the provisions of clause(i) to section 92BA of the Act has been omitted by the Finance Act, 2017 w.e.f 1/4/2017 and hence it would be deemed that clause (1) of section 92BA of the Act was never in the statute - HELD THAT: Where a particular provision in a statute is omitted with a saving clause in favour of the pending proceedings, then it can be reasonably inferred that the intention of the Legislature is that pending proceedings shall not continue. Therefore, the omission of clause (i) of section 92BA w.e.f 1/42017 shall render the pending proceedings invalid.

ITAT Kolkata in the case of Asstt. Commissioner of Income Tax, Circle-33, Kolkata Versus Rahee Jhajharia E To E JV And Vice- Versa 1.T.A. No. 1125/Kol/2019 1.T.A. No. 343/Kol/2019 Dated: 12-7-2022 2022 (7) TMI 790-ITAT KOLKATA

(Case law Paper Book page 71-81)

TP Adjustment - ALP determination qua domestic transactions entered into by the assessee with its partner u/s 92BA(i) of the Act-TP Adjustment of transactions falling u/s 40A(2)(b) - HELD THAT: We find that though all these arguments have been duly considered by the ITAT in the orders for the earlier years, particularly in the case of M/s. Raipur Steel Casting India (P) Ltd. [2020 (6) TMI 629 - ITAT KOLKATA] but after taking note the issue was decided in favour of the assessee. In the case of M/s. DVC Emta Coal Mines Ltd. (2019 (5) TMI 1709 ITAT KOLKATAJ ITAT Kolkata as reproduced the finding of the ITAT Bangalore and thereafter held that effect of Finance Act, 2017 for omission of sub-clause to Section 92BA is that it would be deemed that such clause was never been on the statute book and, therefore, no Transfer Pricing adjustment can be examined with regard to the transactions falling us 40A(2)(b)

We are of the view that the transactions of the assessee referred to the TPO for determination of ALP could not be made subject to TP adjustment after the Finance Act, 2017, as discussed above. Consequently, no addition on account of TP Adjustment is sustainable because it has been categorically held that omission of a provision would mean that it was never on the statue book-It has to be deemed that it was not in existence in A.Y. 2014-15 and if there was no such

provision for recommending the transactions u/s 40A(2)(b) for determination of ALP, there cannot be any adjustment in the income of the assessee on the ground of TP adjustment. Accordingly these grounds of the assessee are allowed. The additions made in the income of the assessee on account of TP adjustment in the domestic transaction are deleted.

ITAT Mumbai in the case of Mahindra Two Wheelers Ltd Versus The Dy. Commissioner of Income Tax, 2 (2) (2), Mumbai ITA No. 519/Mum/2018 Dated: -28-4-2022 2022 (8) TMI 482-ITAT MUMBAI

(Case law Paper Book page 82-98)

TP adjustment made in pursuance of Section 92BA (1) - specified domestic transactions- HELD THAT: In the present case there is an adjustment made to the income of the assessee by determining arm's-length price of specified domestic provisions by invoking the provisions of Section 92BA (i) of the act. The impugned assessment year before us is assessment year 2013-14. The above provision i.e. 92BA (i) of the act was inserted by The Finance Act, 2012 with effect from 1/4/2013 and is omitted by The Finance Act, 2017 with effect from 1/4/2017. The issue whether the adjustment can be made to the total income of the assessee by invoking the provisions of Chapter X of The Income Tax Act to the transactions covered by provisions of Section 92BA (i) for assessment year 2013-14 till it was omitted.

This issue has been dealt with by the honourable Karnataka High Court in case of Texport overseas [2019 (12) TMI 1312 KARNATAKA HIGH COURT] in favour of the assessee holding that as the provisions of Section 92BA (i) has been omitted from the Income Tax Act without any saving clause therefore the natural corollary would be that it did not exist at all in the statute book. Accordingly, we allow the additional ground of appeal and hold that the impugned transfer pricing adjustment made by the learned assessing officer is not sustainable.

ITAT Delhi in the case of M/S SMR Automotive Systems India Ltd. Versus Addl. CIT Special Range-8, Delhi LTA No.6614/Del/2017 Dated:- 3-4 2021 reported in 021 (6) TMI 449-ITAT DELHI.

(Case law Paper Book page 105-112)

> **Determination of the Arm's Length Price -** reference u/s 92CA - HELD THAT: The undisputed fact is that as per sub-clause (1) of section 92BA the assessee has undertaken the transaction which has exceeded the prescribed limit. It is also not in dispute that vide Finance Act, 2017 w.e.f. 01.04.2017 the said sub-clause (1) of section 92BA has been omitted. We find that the AO has made a reference u/s 92CA having observed that the assessee has entered into specific domestic transaction as the case is covered u/s 92BA of the Act.
>
> We have no hesitation to hold that the cognizance taken by the AO u/s 92B clause (1) and reference made to TPO u/s 92CA is invalid and bad in law. Therefore, the consequential order passed by the TPO and DRP is also not sustainable in the eyes of law. Additional ground is accordingly allowed.

6.1. Considering all these case laws and the settled position of law, we follow the view of Hon'ble Supreme Court wherein it has categorically been examined with regard to the effect of deletion of a provision in the Statute and it was held that 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. In case there is no saving clause or provision introduced by way of an amendment while omitting the provision, therefore, the result is that the said provision had never been passed and we consider it as a law that never existed. Therefore, we have no hesitation to hold that the cognizance taken by the AO under section 92BA(i) are reference made to TPO under section 92CA is invalid and bad in law in view of the deletion of provision (i) of section 92BA from the enactment.

6.2. Although, the ld. CIT (A) rejected the assessee's ground on this issue by relying upon the decisions in the case of Govinddas vs. ITO (1976) 103 ITR 123 and CIT vs. Vatika Township P. Ltd. (2014) 49 Taxmann.com 249/227 Taxman 121. In

this regard, we are of the view that both the decisions as referred to and relied upon by the ld. CIT (A) are not relevant to the issue in hand. In the present case, we have dealt with the issue of **" omission of law without saving clause for pending proceedings".** However, in case of CIT vs. Vatika Township Pvt. Ltd. (supra), the issue was with regard to the retrospective applicability of section 113 proviso inserted by Finance Act, 2002 with effect from 01.06.2002 to impose surcharge in search assessments. Therefore, the issue was relating to insertion of new law which in our view is totally different from that of omission of law without saving clause for pending proceedings. Therefore, paramateria contained in the judgment referred to in the order of ld. CIT (A) is different from the paramateria contained as per facts of the present case. Therefore, the same are distinguishable.

6.3. Apart from the above, we also noticed that in para 7.9 of ld. CIT (A)'s order, the plea of the assessee was rejected on the ground that this legal issue was not raised during the assessment proceedings. In this regard, we are of the firm view that the present issue under discussion is purely legal issue and there is no dispute over the facts relevant to this issue. In our considered view the legal issue which is beneficial for the parties can be raised at any step of proceedings even before the Appellate Authorities and there is no estoppels against the law. Even the Coordinate Bench of the ITAT Delhi in the case of M/s. SMR Automotive Systems India Ltd. (supra) allowed the additional ground on this issue.

6.4. Further, in para 7.9 of the order, the ld. CIT (A) rejected the reliance made by the assessee on the decision of Hon'ble Karnataka High Court in the case of PCIT vs. M/s. Texport Overseas Pvt. Ltd. by holding that Hon'ble Supreme Court has admitted

the SLP against the decision of Hon'ble Karnataka High Court in the case of PCIT vs. M/s. Texport Overseas Pvt. Ltd. so the issue has not become final. On this aspect, after considering the case laws and factual position in the present case, we are of the view that mere admission of SLP without passing speaking order could, by itself, cannot be construed as stay on operation of the decision of Hon'ble High Court nor the same be construed as the verdict of Apex Court on the correctness of the decision Hon'ble High Court.

6.5. From the plethora of judgments as mentioned and discussed by us above and also considering the facts of the present case, it is clear that once a particular provision of section is omitted from the Statute, it shall be deemed to be omitted from its inception **until and unless there is some saving clause or provision to make it clear that action taken or proceedings initiated under that provision or section would continue and would not be left on account of omission.**

6.6. Since in the instant case, undisputedly, by the Finance Act, 2017, clause (i) of section 92BA has been omitted with effect from 01.04.2017, therefore, once this clause is omitted by subsequent amendment then it would be deemed that clause (i) was never there in the Statute. Therefore, we hold that the reference made to TPO under section 92CA is invalid and bad in law and hence consequential order passed by the TPO and AO is also not sustainable in the eyes of law and the addition so made/sustained by ld. CIT (A) too deserves to be deleted.

6.7. As we have decided the appeal of the assessee on legal issue, other grounds taken by the assessee needs no adjudication.

7. In the result of the appeal of the assessee is allowed.

ITA No. 431/JP/2022 (Department):

8. Since we have decided the appeal of the assessee on legal issue and held that the reference made to TPO under section 92CA is invalid and bad in law and hence the impugned order passed by the ld. CIT (A) is also not sustainable, therefore, the departmental appeal has no legs to stand. Hence the appeal of the department is dismissed.

9. In the result, this appeal of the assessee is allowed and the departmental appeal is dismissed.

Order pronounced in the open court on 22/05/2023.

Sd/-	Sd/-
(राठौड़ कमलेश जयंतभाई)	(संदीप गोसाई)
(RATHOD KAMLESH JAYANTBHAI)	(SANDEEP GOSAIN)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur

दिनांक / Dated:- 22/05/2023.

Das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Worship Infraprojects P. Ltd., Jaipur.
2. प्रत्यर्थी / The Respondent- The DCIT, Circle-2, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.

6. गार्ड फाईल / Guard File {ITA No. 394 & 431/JP/2022}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar