

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH KOLKATA

**BEFORE SHRI SONJOY SARMA, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.1942/Kol/2019
Assessment Year: 2015-16**

Softel Overseas Pvt. Ltd. 224, AJC Bose Road, 9 th Floor, Suite 912, Kolkata- 700017. (PAN: AAICS7132A)	Vs.	Assistant Commissioner of Income Tax, Circle-7(2), Kolkata.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Pratyush Jhunjhunwala, Advocate
Respondent by : Shri Kallol Mistry, JCIT, Sr. DR

Date of Hearing : 06.09.2023
Date of Pronouncement : 08.09.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld. ACIT, Circle-7(2), Kolkata dated 15.07.2019 passed against the directions of the Dispute Resolution Panel u/s. 144C(5) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) dated 24.04.2019 for AY 2015-16.

2. Assessee has taken 13 ground of appeal in its appeal memo in Form No. 36B. It has also raised additional grounds twice. First time, the addition grounds were raised vide application dated 09.06.2023. Second time, additional grounds have been taken in this last hearing held on 06.09.2023. Ld. Counsel asserted that the latest additional grounds taken on 06.09.2023 be dealt in first as it goes to the root of the matter, being jurisdictional in nature. On confrontation of this submission to the Ld. DR, he did not object on the same and,

therefore, we proceed to first adjudicate on the latest additional ground taken by the assessee, which is reproduced as under:

1. For that the authorities below erred in not considering that clause (i) of section 92BA have been omitted by the Finance Act, 2017, no adjustment could have been made to the transactions between the appellant and its associates enterprises under the said provision.

2. For that the authorities below erred in not considering that clause (i) of section 92BA having been omitted by the Finance Act, 2017, the reference made under section 92CA of the Act to the Transfer Pricing Officer, the adjustment proposed under section 92CA of the Act and the adjustment made to the purchase price in the Assessment Order are erroneous and contrary to law.”

3. Through these additional grounds, ld. Counsel has asserted that pursuant to the omission of clause (i) of section 92BA, the proceedings initiated and action taken in the said clause do not survive at all, rendering the adjustment made by the Ld. TPO and adopted by the Ld. AO as invalid and contrary to law.

4. According to him, the primary issue involved in the present assessment is in respect of valuation of Arms Length Price (ALP) of the Specified Domestic Transactions (SDT) between the assessee and its Associated Enterprises (AEs) for purchase of trading goods. Ld. AO had made a reference to Transfer Pricing Officer u/s. 92CA of the Act to determine ALP with respect to SDT u/s. 92BA(1) of the Act.

4.1. The adjustments made by the Ld. AO (TPO) while completing the assessment for the SDTs is tabulated as under:

Name of the person with whom SDT has been entered into	Transaction	Amount involved	Method adopted
DPP Securities Pvt. Ltd.	Trading of goods	498995683	Resale price method
Matadi Tradecom Pvt. ltd.	Trading of goods	108498042	Resale price method
Softel Associates Pvt. ltd.	Trading of goods	3421800	Resale price method

5. To corroborate the nature of transactions and AEs of the assessee, ld. Counsel referred to Form 3CEB furnished by the assessee to the department. He referred to clause 21 and clause 22 of Form 3CEB to demonstrate that the transactions in respect of which adjustments have been made are all SDTs, carried out with its AEs who are common shareholders and directors.

5.1. Ld. Counsel thus, submitted that once clause (i) of section 92BA has been omitted by the Finance Act, 2017 from the statute, the resultant effect is that the said provision had never existed and as such in the present case the reference and adjustment proposed u/s. 92CA and addition made in the assessment order are erroneous and contrary to the law.

5.2. Ld. Counsel submitted that the position of law with regard to omission of a provision from a statute is settled, which is 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 existed. 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.

5.3. He further submitted that the said view has been settled by the Hon'ble Supreme Court in the cases of Kolhapur Canesugar Works Ltd. v. Union of India, [2000 (119) E.L.T. 257] and General Finance Co. v. ACIT, [2002] 257 ITR 338]. The said view has been reaffirmed by the Hon'ble Karnataka High Court in PCIT v. Texport Overseas (P.) Ltd., [[2020] 271 Taxman 170] and also by the Coordinate Bench of ITAT, Kolkata in various cases including ACIT v. Rahee Jharjharia in I.T.A. No. 1125/Kol/2019 dated July 2, 2022.

6. Ld. DR placed reliance on the orders of the authorities below.

7. We have duly considered this fold of contention raised by the ld. Counsel for the assessee. We are of the view that Coordinate Benches have taken a view that since clause (i) of section 92BA stands omitted from the provision and omission of such is to be construed as if it never existed in the Statute Book and if it never existed in the Statute Book, then, no Arm's Length Price is required to be determined for a transaction with specified persons in section 40A(2)(b) of a domestic transaction. If no Arm's Length Price is required to be determined, then, no reference was required to be made.

7.1. To buttress our views, we find force from the decision of Hon'ble High court of Karnataka in the case of PCIT Vs. T export Overseas Pvt. Ltd. (2020) 114 taxmann.com 568 (Kar). The finding arrived at by the Hon'ble Court in this respect in para 6 and 7 is reproduced as under:

"6. In fact, Coordinate Bench under similar circumstances had examined the effect of omission of sub-section (9) to section 10B

of the Act w.e.f. 01.04.2004 by Finance Act, 2003 and held that there was no saving clause or provision introduced by way of amendment by omitting sub-section (9) of section 10B. In the matter of General Finance Co. Vs. ACIT., which judgment has also been taken note of by the tribunal while repelling the contention raised by revenue with regard to retrospectivity of section 92BA(i) of the Act. Thus, when clause (i) of section 92BA having been omitted by the Finance Act, 2017, with effect from 01.07.2017 from the Statute the resultant effect is that it had never been passed and to be considered as a law never been existed. Hence, decision taken 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.”

7.2. Therefore, respectfully considering the above, impugned order is not sustainable. Considering the above facts and circumstances in their setting as a whole, we allow this appeal and quash the impugned order.

8. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 08.09.2023

Sd/-

(SonjoySarma)
Judicial Member

Sd/-

(Girish Agrawal)
Accountant Member

Dated: 8th September, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent:
 3. CIT
 4. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata