INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I": NEW DELHI

BEFORE
SHRI M BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI VIMAL KUMAR, JUDICIAL MEMBER

ITA No. 807/DEL/2021
Asstt. Year: 2016-17

Panacea Boitec Ltd. G-3/B-1 Extension, Mohan Coop. Indl Estate, Mathura Road New Delhi – 110044 PAN AAACP5335J	Vs.	Addl. CIT, National Assessment Centre, New Delhi.
(Appellant)		**(Respondent)**

Assessee by:	Shri Salil Aggarwal, Sr. Advocate Mr. Madhur Aggarwal, Advocate, Mr. Uma Shankar, Advocate
Department by:	Shri Rajesh Kumar, CIT(DR)
Date of Hearing:	09.05.2024
Date of pronouncement:	22.05.2024

O R D E R

PER VIMAL KUMAR, JM

The appeal is against Learned Assessing Officer's order dated 30.04.2021 making addition of Rs. 7,47,40,000/- on account of TP adjustment.

2. Brief facts of the case are that on 29.11.2016 assessee e-filed the return of income. The case was selected for complete scrutiny and statutory notice under section 143(2) of the Income Tax Act, 1961 (the "Act") dated 12.07.2017 was issued. Notices under section 142(1) of the Act along with questionnaires were

issued to the assessee from time to time. Assessee company filed requisite details. Reference to the Transfer Pricing Officer ("TPO") was made to determine Arm's Length Price under section 92CA(3) of the Act after obtaining prior approval of the Commissioner of Income Tax, Delhi. After considering the objections, the Learned TPO passed order dated 31.10.2019. Assessee preferred objections to the draft order. Dispute Resolution Panel-2, New Delhi passed order dated 24.03.2021. After incorporation directions of Learned Dispute Resolution Panel ("DRP") dated 24.03.2021 Learned Assessing Officer ("Learned AO") passed order dated 30.04.2021.

3. Appellant / assessee preferred present appeal and sought permission to raise additional grounds of appeal in extension of ground No. 1.

4. Learned Representative for appellant / assessee submitted that Learned TPO and Learned DRP failed to appreciate that the provisions of section 92BA(i) of the Act were "omitted" by Finance Act 2017 and as a result of the said omission, the adjustment so made with regards to domestic transaction is without jurisdiction and is liable to be deleted. Hon'ble High Court of Karnataka in the case of Principal Commissioner of Income Tax vs Texport Overseas (P.) Ltd. reported in 271 Taxman 170 has held that "it is clearly noticeable that Clause (1) 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 as an issue which is no more res intigra 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 as under:-

> *"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."*

5. Learned representative for appellant / assessee submitted that Hon'ble ITAT Delhi Bench in ITA No. 635/Del/2021 titled as Yorkn Tech Pvt. Ltd. vs DCIT vide order dated 18.08.2021 has observed that "Clause (i) of Section 92BA which has been omitted from 01.04.2017 and there is no re-enactment with modification or any Saving Clause in any other Sections of the Act. Thus, without any Saving Clause or similar enactment, then it has to be held that Clause (i) of Section 92BA did not come into operation whenever any action has been taken especially after such omission. Accordingly, we hold that no Transfer Pricing Adjustment can be made on a domestic transaction which has

been referred to by the Assessing Officer after the omission of the said clause by the Finance Act, 2017 even though transaction has undertaken in the Assessment Year 2016-17." Similar is position in Hon'ble ITAT Delhi Bench in ITA No. 2078/Del/2022 titled as DCIT vs DLF Urban Pvt. Ltd. decided on 8.4.2024. So appeal may be accepted.

6. Learned representative for department submitted that the assessee has raised additional ground in his appeal on 04.05.2023. Assessee has raised an issue with regard to TP adjustment under Specified Domestic Transactions and claimed as clause (i) of section 92BA has been omitted by Finance Act 2017 w.e.f 01.04.2017, accordingly, the assessee has stated that once this clause is omitted by amendment, it would be deemed that clause (1) had never existed in the statute and all the proceedings ever made prior to its omission, gets nullified and become invalid. Ground of retrospective application/omission of clause (i) of section 92BA has been dealt in detail by the DRP. The amendment has been made in section 92BA by Finance Act, 2017 which is applicable with effect from 01.04.2017. Hon'ble apex court's recent landmark decisions PCIT V/s Wipro Ltd. (2022) 140 taxmann.com 223, Commissioner V/s Dilip Kumar & Co. 2018 (9) SCC 1(SC) FB & CIT V/s GM Knitting Industries (P) Ltd.(2015) 376 ITR 456 (SC) have settled the law that the relevant provisions in the Act ought to be put to stricter interpretation only. Hon'ble Supreme Court decision in the case of Fiber Boards Pvt. Ltd. vs. CIT Bangalore in 62 taxmann.com 135/376 ITR 596(SC). Hon'ble Supreme Court, after duly considering all the decisions, came to a conclusion that the ratio of the decisions

in Rayala Corporation, Kolhapur Canesugar etc cannot be said to be ratio decidendi at all and it is really in nature of obiter dicta. It has also been held by Hon'ble Apex Court that these decisions don't have binding effect. In Shree Bhagwati Steel Rolling Mills vs Commissioner of Central Excise in Civil Appeal No. 4280 of 2007 prayer was made to reconsider earlier decision in the case of Fibre Boards P. Ltd.(2015) 52 taxmann.com. In order of Hon'ble Mumbai Tribunal in the case of Firemenich Aromatics (India) Pvt. Ltd vs ACIT Circle 4(2), Mumbai in ITA No.348 and ITA No.732/Mumbai/2014 analyzing decision of Hon'ble Supreme Court in the case of Kolhapur Cane Sugar Works Ltd. vs. Union of India (2000) 2SCC536 and held that the decision in the case of Texport overseas by Hon'ble Karnataka High Court lacks any binding value as it was rendered without considering the Hon'ble Supreme Court decision in the case of Fibre Boards and Shree Bhagwati Steel. The earlier decision of Hon'ble Apex Court in the case of Kolhapur Cane Sugar and Rayala Corporation are also not binding and their observation are in nature of obiter dicta after the decision of Hon'ble Supreme Court in the case of Fibre Board and Shree Bhagwati Steel. The decision rendered by Hon'ble Supreme Court in the case of Fibre Board and Shree Bhagwati Steel have binding precedent on all courts in India including this Tribunal. Thus in view of the above discussion, it is proved beyond doubt that the reigning decision on the issue of effect of omission of an Act/Rule are the decisions of Hon'ble Supreme Court in the case of Fibre Boards and Shree Bhagwati Steel wherein it is held that the omission of an Act/Rule would not invalidate or annul any proceedings

instituted or continuing when the enactment was there in the statute books. Hon'ble Supreme Court decision in the case of Kolhapur Canesugar Works Ltd. on which the decision of Hon'ble Karnataka High Court in the case of Texport is based, has already been overruled by the Hon'ble Supreme Court in the case of Fiber Boards Pvt. Ltd, and Shree Bhagwati Steel Rolling Mills Ltd. Further this position of law with regard to omission/repeal of a particular section in law has been addressed at length by the Hon'ble Mumbai Tribunal in the case of Fire Menich Aeromatics India Ltd. in ITA No. 348/Mum/2014 and ITA No. 1732/Mum/2014 for A.Y. 2009-10.

7. Learned representative for department submitted that the assessee has also relied on the order of ITAT Delhi in the case of Yorkn Tech Pvt. Ltd. vs. DCIT in ITA No. 635/del/2021 wherein the Hon'ble Bench has considered the decisions of the Hon'ble Supreme Court in the case of Shree Bhagwati Steel Rolling Mills Ltd. and Fiber Boards Pvt. Ltd. Bangalore vs. CIT and came to the conclusion that no TP adjustment can be made on a domestic transaction which has been referred to by the AO after the omission of the said clause by Finance Act 2017 even though transaction has undertaken in the A.Y. 2016-17. It is also fairly considered that this issue has again raised in the case of DLF Urban Pvt. Ltd. vs. DCIT in ITA No. 1962 & 2078/Del/2022 for A.Y. 2016-17. The issue of effect of omission of a particular section in the Act ha been decided by the Hon’ble Mumbai ITAT in the case of Firemenich Aeromatic India Pvt. Ltd. (Supra) and other Tribunals in different/conflicting ways. The decisions of Hon'ble ITAT Mumbai in the case of Firemenich Aeromatic India

Pvt. And Hon'ble ITAT Delhi decisions in the case of Yorkn Tech Pvt. Ltd., it is seen that both the Tribunals have discussed Hon'ble Supreme court decision in the cases of Shree Bhagwati steel and Fiber Boards (cited supra) but interpreted the ratio of the decisions in totally different way and also came to a totally different conclusion.

Therefore either appeal may be dismissed or the matter may be referred to special bench.

8. From examination of record in light of aforesaid rival contentions it is crystal clear that regarding the assessment year 2016-17, Learned Assessing Officer has made addition of Rs. 7,47,40,000/- on account of TP adjustment under section 92CA(3) of Income Tax Act, 1961.

9. As per ratio of judgment in Principal Commissioner of Income Tax vs. Texport overseas (P) Ltd.'s case (supra) it is well settled principle of law that once this section is omitted w.e.f. 1.4.2017 the resultant effect is that it had never been passed to be considered as a law and never been existed.

10. A Co-ordinate Bench of Hon'ble ITAT Delhi in ITA No. 2078/Del/2022 titled as "DCIT vs. DLF Urban Pvt. Ltd." decided on 8.4.2024 has observed:-

"27. Coming to merits of the additional ground, having given a thoughtful consideration to the matter on record and the submissions we observe that the ld. DR could not dispute the fact that the Hon'ble Karnataka High Court in case of Texport Overseas Pvt. Ltd. (supra) and the coordinate Benches of this Tribunal in several cases, as referred by the ld. AR has held that once this section is omitted w.e.f. 01.04.2017, the resultant effect is that it had never been passed to be considered as a law and never been existed. However, in

the light of the Explanatory Notes to the Finance Act, 2017 relied by the ld. DR along with the judgement of the Hon'ble Supreme Court in the case of Fiber Boards Pvt. Ltd. (supra) and Shree Bhagwati Steel Rolling Mills (supra) which have been considered by the Mumbai Bench in the case of Firemenich Aromatics (India) Pvt. Ltd. (supra) we need to decide the impact of the judgement of the Hon'ble non-jurisdictional High Court in a situation in which these decisions canvassed a view contrary to what has been decided by another non-jurisdictional High Court.

28. In this context, without much indulgence on our part, we would like to rely on the order of the Mumbai Bench of the Tribunal in the case of Siro Slimpharma Pvt. Ltd. vs. ITO in ITA No.847/Mum/2016, order dated 09.09.2021 wherein while dealing with somewhat similar question of law, the Mumbai Tribunal has indicated that in the absence of judgment of Jurisdictional High Court, the non-jurisdictional High Court judgment has persuasive value and should be generally followed. The relevant part of the decision in paras 7 and 8 is as follows:

> *"7. While on this issue, we may usefully take note of the observations of Hon'ble Supreme Court in the case of ACCE v. Dunlop India Ltd. [(1985) 154 ITR 172 (SC)], wherein the Their Lordships quoted, with approval, from the decision of House of Lords to the effect that "We desire to add and as was said in Cassell & Co. Ltd. v. Broome [1972] AC 1027 (HL), we hope it will never be necessary for us to say so again that "in the hierarchical system of courts" which exists in our country, "it is necessary for each lower tier", including the High Court, "to accept loyally the decision of the higher tiers". "It is inevitable in hierarchical system of courts that there are decisions of the Supreme appellate Tribunal which do not attract the unanimous approval of all members of the judiciary... But the judicial system only works if someone is allowed to have the last word, and that last word, once spoken, is loyally accepted" and observed that. . . "the better wisdom of the Court below must yield to the higher wisdom of the Court above. That is the strength of the hierarchical judicial system." The principle is thus unambiguous. As a rule, therefore, judicial discipline warrants that the wisdom of a lower tier in the judiciary has to make way for higher wisdom of the tiers above. Unlike the decisions of Hon'ble jurisdictional High Court, which bind us in letter and in spirit on account of the binding force of law, the decisions of Hon'ble non-jurisdictional High Court are followed by the lower authorities on account of the persuasive effect of these decisions and on account of the concept of judicial propriety. In the case of CIT Vs Godavari Devi Saraf [(1979) 113 ITR 589 (Bom)], Hon'ble jurisdictional High Court took note of a non-jurisdictional High Court and held that the Tribunal, outside the jurisdiction of that Hon'ble High Court and in the absence of a jurisdictional High Court decision to the contrary, could not be faulted for following the same. Their Lordships observed that, "It should not be overlooked that the Income-tax Act is an All-India statute……. Until a contrary decision is given by any other competent High Court, which is binding on a Tribunal in the State of*

Bombay, it has to proceed on the footing that the law declared by the High Court, though of another State, is the final law of the land". Of course, these observations were in the context of a provision being held to be unconstitutional, an issue on which the Tribunal could not have adjudicated anyway, as evident from the observation "Actually, the question of authoritative or persuasive decision does not arise in the present case because a Tribunal constituted under the Act has no jurisdiction to go into the question of constitutionality of the provisions of that statute" but nevertheless the respect for the higher judicial forum was unambiguous. In Tej International Pvt Ltd Vs DCIT [(2000) 69 TTJ 650 (Del)], a coordinate bench has, on this issue, observed that "In the hierarchical judicial system that we have, better wisdom of the Court below has to yield to higher wisdom of the Court above and, therefore, one a authority higher than this Tribunal has expressed an opinion on that issue, we are no longer at liberty to rely upon earlier decisions of this Tribunal even if we were a party to them. Such a High Court being a non-jurisdictional High Court does not alter the position…". . There can, however, be exceptions to this situation on account of a variety of reasons, and these exceptions come into play only when the views are of non-jurisdictional High Court which, do not, legally speaking, bind the lower tiers of judiciary. In our considered view, so far as the precedence value of a non-jurisdictional High Court's judgment is concerned, the position has been very well summed up by a coordinate bench decision, in the case of Bank of India (supra), wherein, speaking through one of us (i.e. the Vice President), the coordinate bench has observed as follows:

> *While dealing with judicial precedents from non-jurisdictional High Courts, we may usefully take of observations of Hon'ble jurisdictional High Court in the case of CIT Vs Thana Electricity Co Ltd [(1994) 206 ITR 727 (Bom)], to the effect "The decision of one High Court is neither binding precedent for another High Court nor for the courts or the Tribunals outside its own territorial jurisdiction. It is well-settled that the decision of a High Court will have the force of binding precedent only in the State or territories on which the court has jurisdiction. In other States or outside the territorial jurisdiction of that High Court it may, at best, have only persuasive effect". Unlike the decisions of Hon'ble jurisdictional High Court, which bind us in letter and in spirit on account of the binding force of law, the decisions of Hon'ble non-jurisdictional High Court are followed by the lower authorities on account of the persuasive effect of these decisions and on account of the concept of judicial proprietyfactors which are inherently subjective in nature. Quite clearly, therefore, the applicability of the non-jurisdictional High Court is never absolute, without exceptions and as a matter of course. That is the principle implicit in Hon'ble Supreme Court's judgment in the case of ACIT Vs Saurashtra Kutch Stock Exchange Ltd [(2008) 305 ITR 227 (SC)] wherein Their Lordships have upheld the plea that "non-consideration of a*

decision of Jurisdictional Court or of the Supreme Court can be said to be a mistake apparent from the record". The decisions of Hon'ble non-jurisdictional High Courts are thus placed at a level certainly below the Hon'ble High Court, and it's a conscious call that is required to be taken with respect to the question whether, on the facts of a particular situation, the non-jurisdictional High Court is required to be followed. The decisions of non-jurisdictional High Courts do not, therefore, constitute a binding judicial precedent in all situations. To a forum like us, following a jurisdictional High Court decision is a compulsion of law and absolutely sacrosanct that way, but following a non-jurisdictional High Court is a call of judicial propriety which is never absolute, as it is inherently required to be blended with many other important considerations within the framework of law, or something which cannot be, in deserving cases, deviated from.

[Emphasis, by underlining, supplied by us]

8……. At one place, this decision, inter alia, states that "To a forum like us, following a jurisdictional High Court decision is a compulsion of law and absolutely sacrosanct that way, but following a non-jurisdictional High Court is a call of judicial propriety…..-which can…be, in deserving cases, deviated from". Implicit in this observation is the fact that not following non-jurisdictional High Court decision is more of an exception than the rule. There have to be very strong and good reasons not to follow even non jurisdictional High Court decisions…."

29. On the basis of the aforesaid principles of law of precedents and taking into consideration the fact that in a coordinate bench decision dated 20.07.2023 here in Delhi, in the case of Relaxo Footwear Ltd., Versus Assessing Officer, National e-Assessment Centre, New Delhi, ITA No.590/Del/2021, wherein one of us (the Judicial member) was on the Bench we had followed the decision of the Hon'ble Karnataka High Court in the case of Texport Overseas Pvt. Ltd (supra), we are of the considered view that the indulgence sought by ld. DR to accept the view of Mumbai Tribunal in Firemenich Aromatics (India) Pvt. Ltd., is not sustainable.

30. We have also taken into consideration the order relied by ld. DR of Mumbai Tribunbal in the case of Firemenich Aromatics (India) Pvt. Ltd. (supra) and the order of coordinate Bench of Delhi in the case of Yorkn Tech Pvt, Ltd. (supra) relied by ld. AR and there is no doubt the coordinate Bench at Delhi has distinguished the Mumbai Bench order in the case of Firemenich Aromatics (India) Pvt. Ltd. (supra) and held that even after the judgement of the Hon'ble Supreme Court in the case of Shree Bhagwati Steel Rolling Mills (supra) and Fiber Boards Pvt. Ltd. (supra) clause (i) of section 92BA which has been omitted from 01.04.2017 has to be considered to have never been part of the statute and, accordingly, no transfer pricing adjustment can be made on a domestic transaction.

31. We will also like to distinguish the Mumbai Tribunal order in Firemenich Aromatics (India) Pvt. Ltd. (supra) by observing that in that case the issue was with regard to omission of sub-section (2A) of section 253 of the Act which was initially inserted by Finance Act, 2014 with retrospective effect from 01.06.2013 and which was then omitted by Finance Act, 2016 from 01.06.2016. The said provisions related to right to file appeal and in that case, the AO had filed the appeal during the currency of section 253(2A) of the Act and for that reason, the Mumbai Bench had considered the issue of repeal/omission made in a statute and the consequences thereof. Since right to appeal is a substantive and, certainly, if it was there in the statute when the appeal was filed and, subsequently, if the statute had omitted the provision, the substantive right of appeal vested in a party would not be taken away by holding the repeal to be retrospective. However, in the case in hand, a substantive provision, being infact a charging provision, has been omitted/deleted and consequently benefit of the same has to be given to the assessee. Thus, we are inclined to follow the Hon'ble Karnataka High Court judgement and, on that basis, the additional ground raised by the assessee deserves to be allowed and consequently the whole exercise done by ld. AO to bench mark the transaction of purchase of development right, stands being void."

11. From above observation, it is evident that the request/submission of learned departmental representative for reference to the President, ITAT to constitute Special Bench because ITAT Mumbai and Delhi Benches of equal strength have given conflicting judgments has been considered and not granted. Therefore the request of Learned departmental representative for reference to the President, ITAT is declined.

12. In view of above material facts and well settled principle of law, no transfer pricing adjustment can be made on account of domestic transaction which has been referred by the Learned Assessing Officer, after omission of Clause (i) of section 92BA of the Act by Finance Act 2017. Therefore, the impugned order is not legal and deserves to be set aside.

13. No other point was argued.

14. In the result, the appeal of the assessee is allowed. The impugned order is set aside.

Order pronounced in the open court on 22nd May, 2024.

sd/-	**sd/-**
(M BALAGANESH) **ACCOUNTANT MEMBER**	**(VIMAL KUMAR)** **JUDICIAL MEMBER**

Dated: 22/05/2024

Veena

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ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
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Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
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Date of dispatch of the Order	