।आयकर अपीलीय अधिकरण "सी" न्यायपीठ पुणेमें।
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCHES "C" :: PUNE

BEFORE DR.DIPAK P. RIPOTE, ACCOUNTANT MEMBER
AND SHRI VINAY BHAMORE, JUDICIAL MEMBER

आयकर अपील सं. / ITA No.2033/PUN/2019
निर्धारण वर्ष / Assessment Year: 2015-16

Uttam Energy Limited, Mahendra Chamber, Mayfair Co-op Housing Society, A-4, Dhole Patil Road, Pune – 411001. PAN: AABCU4100H	V s	The ACIT, Circle-12, Pune.
Appellant/ Revenue		Respondent /Assessee

Assessee by	Shri CH Naniwadekar & Kiran Sanmane – AR;s
Revenue by	Shri Deepak Garg – CIT
Date of hearing	16/05/2024
Date of pronouncement	30/05/2024

आदेश/ ORDER

PER DR. DIPAK P. RIPOTE, AM:

This appeal has been filed by the assessee against the final assessment order of the learned ACIT, Circle-12, Pune passed u/sec. 143(3) r.w.s. 144C(13) of the of the Income Tax Act, 1961 (in short "the Act") after giving effect to the learned DRP's order dated 24.09.2019.

1.1 The assessee has raised the following grounds of appeal :

"1. The learned Assessing Officer acting under directions of leaned Dispute Resolution Panel erred both on facts and in law in making adjustment under section 92C as the section 92BA (i) of the IT Act has been omitted by Finance Act 2017, w.e.f. 01.04.2017 without a saving clause, thereby implying that such law never existed in the statute book Hence, the transaction pertaining to payments made by the Appellant Company to persons referred to in section 40A(2)(b) is not a specified domestic transaction under section 92BA of the IT Act.

2. Without prejudice to the Ground No.1, the reference to the TPO under section 92CA (1) by the Learned Assessing Officer is in defiance to Instruction Nos. 15 of 2015, 3 of 2016 and against the principles of natural justice is bad in law and that the reference under section 92CA (1) of the IT Act being bad is void-ab-initio, the draft Assessment Order passed by the Learned Assessing Officer is invalid rendering all the subsequent proceedings as bad.

That as the reference under section 92CA (1) being bad void-ab-initio, the impugned Assessment Order passed by the Learned Assessing Officer is barred by limitation in terms of section 153 (1) of the IT Act.

3. The learned Assessing Officer acting under directions of leaned Dispute Resolution Panel erred both on facts and in law in confirming the addition of Rs.4,00,00,000 by holding that the appellant's specified domestic transactions relating to procurement of drawing and design services, erection and commissioning charges and purchase of raw material by the assessee from its related parties does not satisfy the arm's length principle as envisaged under the Income Tax Act, 1961.

4. The learned Assessing Officer acting under directions of leaned Dispute Resolution Panel erred both on facts and in law in rejecting the segmental profitability as certified by the Statutory Auditor of the company based on erroneous contentions.

5. Without prejudice to the above grounds, the learned Assessing Officer acting under directions of leaned Dispute Resolution Panel erred both on facts and in law in adding 2 new companies into set of comparable companies without appreciating the fact that these companies are not at all comparable with the assessee company during application of external transactional net margin method.

6. The learned Assessing Officer acting under the direction: of learned Dispute Resolution Panel erred both on facts and in law in using Profit Level Indicator (PLI) calculated by aggregating Related as well as Unrelated party transactions. He failed to ***appreciate*** *the*

fact that, the assessee has used the segmental PLI i.e. PLI of only Related Party transactions for benchmarking which is also a settled position in law.

1.3 The Ld.AR submitted the additional ground of appeal as under :

"1. The learned Assessing Officer erred on facts and in law in passing the final assessment order beyond the time limits prescribed for the same u/s 153(1) r.w.s 153(4) OF THE Act thereby making the said order invalid and bad-in-law."

Brief facts of the case :

2. In this case the assessee filed return of Income on 30/09/2015, then revised it on 26/03/2016. Assessee's case was selected for scrutiny. Since one of the reasons for selection of the case for scrutiny was "Large Specified Domestic Transactions", the Assessing Officer (AO) referred the case to the Transfer Pricing Officer (TPO) on 18/09/2017 for determination of Arm's length Price of Specified Domestic Transactions. The TPO passed the order on 30/10/2018 suggesting adjustment of Rs.4 crores. The Assessee filed an appeal before the Dispute resolution Panel (DRP). The Assessee had taken a legal ground of jurisdiction of the TPO before the DRP. The Assessee relied on the decision of ITAT Bangalore in the case of Texport Overseas Pvt Ltd.However,

the DRP dismissed the said legal ground raised by the assessee without discussing the case law relied by the assessee. Then the AO passed Assessment Order on 15/10/2019. Aggrieved by the Final Assessment Order, the assessee has filed appeal before this tribunal.

Submission of ld.Authorised Representative(ld.AR) :

3. The Ld.Authorised Representative of the Assessee (ld.AR) made elaborate arguments and also submitted written submission. The relevant part of the written submission is reproduced here under :

> Quote'*The aforementioned ground pertains to the determination of the arm's length price of the Specified Domestic Transaction under clause (i) of section 92BA of the Act. The Appellant has contended in the grounds of appeal that since clause (i) of section 92BA of the Act was 'omitted' from the Income Tax Act, 1961 ('the Act') w.e.f. 1 April 2017, without any savings clause it shall be deemed to be omitted since inception. Hence, the transactions of the appellant with persons covered under section 40A(2)(b) cannot be treated as 'Specified Domestic Transaction'.*
>
> *In this regard, the appellant has relied upon the decision of the Hon'ble ITAT Bangalore in case of Texport Overseas Ltd. v. DCIT ITA No. 1722/Bang/2017 dated 22.12.2017 wherein it has been held that once a particular provision of a 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. It was held that by the Finance Act, 2017, clause (i) of section 92BA has been omitted w.e.f. 01.04.2017 and that once this clause is omitted by subsequent amendment, it would be deemed that the said clause (i) was never been on the statute. The Hon'ble ITAT held that while omitting the clause (i) of section 92BA, nothing was specified whether the proceeding initiated or action taken on this would continue. Therefore, it was held that the proceeding initiated or action taken under that clause would not survive at all. This view has been subsequently upheld by the Hon'ble Karnataka High Court in Texport Overseas Pvt. Ltd. ITA No. 392/2018, order dated 12.12.2019 [313 CTR 485 (Kar)]."

3.1 The ld.AR for the assessee relied on the following case laws :

- *The DCIT, Circle-4, Nagpur vs. Vivek Vinayak Vaidya - ITAT Nagpur Bench - ITA No.33/NAG/2020 dated 22.11.2023*

- *S. B. Cotgin Pvt Ltd vs. The Pr. CIT-2, Nagpur - ITAT Nagpur Bench - ITA NO.88/NAG/2020 dated 05.07.2021*

- *Shree Shai Smelters (I) Ltd. vs. ACIT - ITAT Gauhati - ITA No.228/GAU/2019 dated 31.07.2020*

- *M/s Cauvery Aqua Pvt Ltd vs. DCIT - ITAT Bangalore - ITA No. 2021/Bang/2019 dated 17.02.2021*

- *Sobha City vs. ACIT - ITAT Bangalore - ITA No. 2936/Bang/2018 dated 22.04.2021 Mahindra Two Wheelers Ltd vs. DCIT - ITAT Mumbai - ITA No.519/MUM/2018 dated 28.04.2022*

- *Raipur Steel Casting India Pvt Ltd vs. The Pr. CIT - ITAT Kolkata - ITA No.895/KOL/2019 & 1035/KOL/2019 dated 10.06.2020*

Submission of ld.Departmental Representative(ld.DR) for the Revenue :

4. The Ld.Departmental Representative submitted written submissions as under :

> Quote *"2. It is humbly submitted that the crux of the issue in the instant appeal pertains to the applicability of the provisions of clause (i) of section 92BA of the Act to the case of the assessee for AY 2015-16 in the given facts and circumstances of the case and in law. It is to state that, it is not in doubt that there was an amendment to section 92BA by The Finance Act, 2017 w.e.f 01.04.2017 whereby the said clause (i) is stated to be omitted by Finance Act, 2017 w.e.f 1-4-2017. The case of the assesses that are mentioned in the decisions in the table in para-1.4 above (except at sr. no 5 therein) was that omission of the said clause (i) without a saving clause meant that it never existed on the statute from the very beginning and therefore any action initiated even during the currency of the said provision was ab initio void. Reliance in this regard has been placed mainly on the decision of M/s Texport Overseas Pvt Ltd [ITA 1772/Bang/2017] that came to be affirmed by the Karnataka High Court. The various decisions of the various tribunals have taken this decision as the base and have dealt with the issue of "repeal" & "omission" as discussed/held by the various apex court decisions which have been mentioned in the table in para-1.4 above. The decisions referred to are not mentioned here again for the sake of brevity.*
>
> *2.4 As can be seen from para-2.3 above, the apparent and explicit reason and therefore the legislative intention for taking clause (i) of section 92BA off the statute was basically to ease the compliance & reporting burden of the assessees in terms of obtaining the chartered accountant's certificate in Form 3CEB, providing the details such as*

list of related parties, nature and value of specified domestic transactions (SDTs), method used to determine the arm's length price of the SDTs, etc. Consequential amendment to section 40A(2)(b) of the Act was also accordingly made. It is humbly submitted that the SDTs were brought on to the statute by The Finance Act, 2012 in order to give effect to the apex court decision in CIT v. Glaxo Smith Kine Asia (P.) Ltd.

3. With regard to the words 'repeal' and 'omission' with respect to the apex court decisions referred in M/s Texport Overseas Private Limited [ITA 1722/Bang/2017] and other decisions mentioned in the table at para-1.4 above, it is to humbly submit as under:

3.1 The words 'repeal', 'substitute' and 'omission' have different tenor in a literal sense but tend to denote a similar meaning when used in the context of any amendment of law. While the words themselves may not cause a conflict, it is the consequences of the amendment on the rights and liabilities of the parties that have led to the courts differentiating between these terms. It is to humbly submit that the Supreme Court has dealt with these three terms used by the legislature while amending any law in the afore-mentioned backdrop,.

3.2 It is to submit that, one of the earliest authorities which brought up the question of 'at odds interpretation' between 'repeal' and 'omission' is the five- Judge Bench judgment of the Supreme Court in ***Rayala Corporation (P) Ltd. v. Director of Enforcement, New Delhi****[(1969) 2 SCC 412]. The question which arose for consideration before the Supreme Court in this case was if Rule 132- A of the Defence of India Rules, 1952 (the Dl Rules) was omitted by a notification of the Ministry of Home Affairs dated 30th March 1965, can a prosecution in respect of an offence punishable under that Rule be instituted on 17th March, 1968 when the Rule itself had ceased to*

exist?

The Court brought to the fore Section 6 of the General Clauses Act, 1897 (the GC Act) for the purpose of distinguishing between the terms 'repeal' and 'omission', since Section 6 saves the power of prosecution and punishment for acts committed in a repealed legislation. The Court while differentiating the two terms held that:

> *"Section 6 of the General Clauses Act cannot obviously apply on the omission of Rule 132-A of the Dl Rules for the two obvious reasons that Section 6 only applies to repeals and not to omissions, and applies when the repeal is of a Central Act or Regulation and not of a Rule."*
>
> *(emphasis supplied)*

The Supreme Court in the above judgment did not discuss the two terms 'repeal' and 'omission' before coming to the said conclusion. There is no discussion on how the two terms are separate and whether they can be used interchangeably.

***3.3 Rayala Corporation case** came for consideration before the five-Judge Bench of Supreme Court in **Kolhapur Canesugar Works Ltd. v. Union of India** [(200) 2 SCC 536]. In this case the Court dealt with the definitions of 'Central Act', 'enactment', 'regulation', 'rule' as defined in Sections 3(7), 3(19), 3(50) and 3(51) respectively in the General Clauses Act and held that Section 6 only applies to Central Act and regulations. The Court further stated that —*

> *"When the Legislature by clear and unambiguous language has extended the provision of Section 6 to cases of repeal of a 'Central Act' or 'regulation', it is not possible to apply the provision to a case of repeal of a*

'rule'....Secf/o/7 6 is applicable where any Central Act or Regulation made after commencement of the General Clauses Act repeals any enactment It is not applicable in the case of omission of a "rule

(emphasis supplied)

3.6 It is humbly submit that the matter was however finally dealt in length in a ***two-Judge Bench judgment of*** *Fibre Boards (P) Ltd., Bangalore v. Commissioner of Income Tax, Bangalore* ***[(2015) 10 SCC 333], where the*** *Court* ***stated that the view in*** *Rayala Corporation* ***needs a reconsideration, for omission of a provision results in abrogation or obliteration of that provision in the same way as it happens in repeal. The Court discussed the two terms and concluded that*** *"it is clear that repeals may take any form and so long as a statute or part of it is obliterated, such obliteration would be covered by the expression "repeal" in Section 6 of the General Clauses Act."*

The Court then went ahead and nullified the effect of the above five-Judge Bench judgment with respect to difference between repeal and omission. The Court held that:

"31 ...once it is found that Section 6 itself would not apply, it would be wholly superfluous to further state that on an interpretation of the word "repeal", an "omission" would not be included. We are, therefore, of the view that the second so-called ratio of the Constitution Bench in Rayala Corporation (P) Ltd.*[(1969) 2 SCC 412]* ***cannot be said to be a ratio decidendi at all and is really in the nature of obiter dicta."****[(2015) 10 SCC 333 at p. 354]*

The Court even declared that the two five-Judge Bench decisions ***(.Rayala Corporation*** *and* ***Kolhapur Canesugar)*** *were* ***per incuriam*** *as they did not consider Section 6-A of the GC Act. The Court with*

this effect held that:

"33. A reading of this section would show that a repeal by an amending Act can be by way of an express omission. This being the case, obviously the word "repeal" in both Section 6 and Section 24 would, therefore, include repeals by express omission. The absence of any reference to Section 6-A, therefore, again undoes the binding effect of these two judgments on an application of the 'per incuriam' principle."*[Fibre Boards (P) Ltd. vs CIT, (2015) 10 SCC 333 at p. 355]*

3.7 ***It is to humbly submit that, the same two-Judge Bench of*** *Fibre Boards case,* ***once again after a month decided the said issue in detail in*** *Shree Bhagwati Steel Rolling v. Commissioner of Central Excise* ***[(2016) 3 SCC 643] and held that 'delete' and 'omit' are used interchangeably, so that when the expression 'repeal' refers to 'delete', it would necessarily take within its ken an 'omission' as well. The Court further observed that all these expressions only go to form and not to substance. It also reiterated its stand in*** *Fibre Boards case* ***and held that*** *"This again does not take us further as this statement of the law in Rayala Corporation* ***[(1969) 2 SCC 412]*** *is no longer the law declared by the Supreme Court after the decision in the Fibre Boards case."* ***[Fibre Boards (P) Ltd. vs CIT, (2015) 10 SCC 333 at p. 658]."***

"*In this regard, the appellant has relied upon the decision of the Hon'ble ITAT Bangalore in case of Texport Overseas Ltd. v. DCIT ITA No. 1722/Bang/2017 dated 22.12.2017 wherein it has been held that once a particular provision of a 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. It was held that by the Finance Act, 2017, clause (i) of section 92BA has been omitted w.e.f. 01.04.2017 and that once this clause is omitted by subsequent amendment, it would be deemed that the said clause (i) was never been on the statute. The Hon'ble ITAT held that while omitting the clause (i) of section 92BA, nothing was specified whether the proceeding initiated or action taken on thiswould continue. Therefore, it was held that the proceeding initiated or action taken under thatclause would not survive at all. This view has been subsequently upheld by the Hon'bleKarnataka High Court in Texport Overseas Pvt. Ltd. ITA No. 392/2018, order dated 12.12.2019 [313 CTR 485 (Kar)]."

4.1 The ld.DR for the Revenue relied on the following case law:

- *Firemenich Aromatics (I)(P) Ltd., Vs. ACIT of ITA Nos.348, 1732/MUM/2014 dated 15.07.2020 [2020] 118 taxmann.com 3 (Mumbai Tribunal).*

Findings &Analysis :

5. We have heard both the parties at length, perused the records.

In this case certain admitted basic facts are as under :

	Date
Date of filling Return of Income	30/09/2015
Date of filling revised return	26/03/2016
Date of issue of Notice u/s 143(2)	18/03/2016
Date of Amendment Omitting Specified Domestic Transaction u/s.92BA(i)	01/04/2017
Date of Reference to Transfer Pricing Officer u/s 92CA for Specified Domestic transaction by ACIT	18/09/2017
Date of Transfer Pricing Officer's Order making adjustments to Specified Domestic Transactions	30/10/2018

5.1 Before proceeding further we will reproduce the unamended Section 92BA (prior to 1/4/2017) as under :

Meaning of specified domestic transaction.

92BA. *For the purposes of this section and sections 92, 92C, 92D and 92E, "specified domestic transaction" in case of an assessee means any of the following transactions, not being an international transaction, namely:—*

(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;

(ii) any transaction referred to in section 80A;

(iii) any transfer of goods or services referred to in sub-section (8) of section 80-IA;

(iv) any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA;

(v) any transaction, referred to in any other section under Chapter VI-A or section 10AA, to which provisions of sub-section (8) or sub-section (10) of section 80-IA are applicable; or

(vi) any other transaction as may be prescribed,

*and where the aggregate of such transactions entered into by the assessee in the previous year exceeds a sum of **[**five**]** crore rupees.*

5.2 The said Section 92BA was amended by Finance Bill 2017 with effect from 1/04/2017and the amended Section is as under :

Meaning of specified domestic transaction.

92BA. *For the purposes of this section and sections 92, 92C, 92D and 92E, "specified domestic transaction" in case of an assessee means any of the following transactions, not being an international transaction, namely:—*

*(i) [38]**[***]***

(ii) any transaction referred to in section 80A;

(iii) any transfer of goods or services referred to in sub-section (8) of section 80-IA;

(iv) any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA;

(v) any transaction, referred to in any other section under Chapter VI-A or section 10AA, to which provisions of sub-section (8) or sub-section (10) of section 80-IA are applicable; or

(vi) any other transaction as may be prescribed,

and where the aggregate of such transactions entered into by the assessee in the previous year exceeds a sum of twenty crore rupees.

*(38. Omitt. by Act No. 7 of 2017 (w.e.f. **1-4-2017**). Prior to its omission, clause (i) 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;")

5.3 Thus, as it can be seen that the Finance Bill, 2017 omitted the sub-clause (i) of Section 92BA of the Act.

5.4 Ld.AR of the Assessee has pleaded that since the sub clause (i) of Section 92BA was omitted, the Assessing Officer had no jurisdiction to make a reference to TPO for Specified Domestic Transaction on 19/09/2017 and the TPO had no jurisdiction to pass an order for the specified domestic transaction. The LD.AR demonstrated that the specified Domestic Transaction in the case of the assessee were 'the expenditure in which payment has been made to persons specified in section 40A(2)(b) of the Act.' Therefore, the Ld.AR pleaded that the reference and the Transfer Pricing order was void ab initio. The Ld.AR relied mainly on the decision of Hon'ble Karnataka High Court in the case of M*/s.Texport Overseas Pvt Ltd.,* 271 Taxman 170 (Karnataka).

5.5 The Hon'ble Karnataka High Court in the case of *M/s.Texport Overseas Pvt Ltd., held as under :*

> Quote, *" …….. Thus, when clause(i) of Section 92BA having been omitted by the Finance Act, 2017, with effect from 01.07.2017 from the Statute the resultant effect is that it had never been passed and to be considered as a law never been existed. Hence, decision taken by the Assessing Officer under the effect of section 92BA 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 unsustainablein 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-ordinateBench of this Court in the matter of M/s. GE Thermometrias India Private Ltd., stated supra. As such we areof the considered view that first substantial question of law raised in the appeal by the revenue in respectiveappeal memorandum could not arise for consideration particularly when the said issue being no more resintegra."*Unquote.

5.6 Thus, the Hon'ble Karnataka High Court held that once the section 92BA(i) was omitted with effect from 01/04/2017, it means it never existed on the statute. Further the Hon'ble Karnataka High Court held that for this reason the Order passed by TPO for earlier year is unsustainable in law.

5.7 The ITAT Nagpur Bench in the case of DCIT Vs. Vivek Vinayak Vaidya ITA No.33/NAG/2020 has followed the decision of Hon'ble Karnataka High Court (supra) and decided the appeal in favour of the assessee. The Hon'ble Accountant Member is the author of the said order of the ITAT Nagpur Bench.

5.8 The Hon'ble Bombay High Court has explained the Rule of precedence in the case of Smt.Godavaridevi Saraf *Vs.* CIT, 113 ITR 589(Bom), as under :

> Quote, "*Until 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. When the Tribunal set aside the order of penalty it did not go into the question of intra vires or ultra vires. It did not go into the question of constitutionality of section 140A(3). That section was already declared ultra vires by a competent High Court in the country and an authority like an Income-tax Tribunal acting anywhere in the country has to respect the law laid down by the High Court, though of a different State, so long as there is no contrary decision of any other High Court on that question.*" Unquote.

5.8.1 Thus, until a contrary decision of the Hon'ble Jurisdictional High Court is not available on the impugned issue, the ITAT has to follow the decision of non-Jurisdictional Hon'ble High Court.

5.9 In this case the Ld.DR has not brought to our notice any contrary decision of Hon'ble Jurisdictional High Court, rather the Ld.DR accepted that as on date there is no contrary decision of Hon'ble Jurisdictional High Court. The Ld.DR mainly relied on

the decision of the Hon'ble Supreme Court which explains the meaning of the words 'repeal' 'omission'.

5.9.1 We have considered the elaborate submission of the Ld.DR but unable to agree to the proposition laid down by him as the Hon'ble Karnataka High Court has considered the decision of Hon'ble Supreme Court and other decisions and concluded that once the Section 92BA(i) was omitted w.e.f 01/04/2017, it means it never existed on statute . We have already quoted the decision of Hon'ble Bombay High Court on the rule of precedence. In these facts and circumstances, as per the rule of precedence, we have to follow the decision of Hon'ble Karnataka High Court in the case of Texport Overseas P Ltd (supra). In this case the reference to TPO was made on 18/09/2017, i.e. after the section 92BA(i) was omitted, also the Transfer Pricing Order was passed on 30/10/2018 i.e. after the section 92BA(i) was omitted, respectfully following the Hon'ble Karnataka High Court's decision (supra) we hold that the Transfer Pricing Order dated 30/10/2018 for A.Y.2015-16 is unsustainable in law. Accordingly, the AO/TPO is directed to delete the adjustment made of Rs.4,00,00,000/-. Accordingly, the Ground Number 1 of the Assessee is allowed.

5.10 The Ld.DR has also argued that without prejudice the impugned transaction may be set aside to the AO for de-novo consideration under section 40A(2)(b) of the Act. However, it is observed that the AO has no where invoked the section 40A(2)(b) of the Act for the impugned payments in the Assessment Order. Rather it is observed that the DRP has held **"*we are of the view that without prejudice this transaction is also covered under Section 40A(2)(b), the payments made to the related parties to be disallowed.*"**However, in the Assessment Order u/s 143(3) r.w.s 144C(13) dated 15/10/2019, the Assessing Officer has not mentioned anything about the without prejudice disallowance u/s.40A(2)(b) of the Act. Once the AO has not invoked the relevant provisions of the Act in the assessment order the Ld.CIT(DR) cannot improve the Assessment Order at this stage. The Special Bench of ITAT Mumbai in the case of Mahindra & Mahindra vs DCIT[2010] 122 ITD 216 held as under :

> *"In our considered opinion the learned Departmental Representative has no jurisdiction to go beyond the order passed by the Assessing Officer. He cannot raise any point different from that considered by the Assessing Officer or CIT(A). His scope of arguments is confined to supporting or defending the impugned order. He cannot set up an altogether different case. If the learned D.R. is allowed to take up a new contention de hors the view taken by the Assessing Officer that*

would mean the learned A.R. stepping into the shoes of the CIT exercising jurisdiction under section 263. We, therefore, do not permit the learned D.R. to transgress the boundaries of his arguments."

5.11 Thus, respectfully following the ITAT Mumbai Special Bench's decision(supra), once AO has not invoked section 40A(2)(b) of the Act in the assessment order, ld.DR cannot raise the issue at this stage. Therefore, the contention raised by Ld.DRis rejected. In these facts and circumstances of the case, the Ground Number 1 of the assessee is allowed.

Ground Number 2-7 of the assessee:

6. Since, we have decided the ground number 1 of the assessee in favour of the assessee, the ground number 2-7 becomes academic in nature. Accordingly, these grounds are dismissed as unadjudicated.

Additional Legal Ground :

7. The Assessee has raised additional legal ground vide letter dated 06/12/2023 that the Final Assessment Order passed u/s 143(3) r.w.s 144C was passed beyond the time limit specified u/s 153(1) r.w.s 153(4) of the Act hence the Final Assessment Order was bad in law.

7.1 We have decided the Ground Number 1 of the Assessee in favour of the Assessee. Once we have decided the ground number 1 of the assessee in favor of the assessee, no prejudice will be caused to the assessee if we do not adjudicate the legal ground. Therefore, we leave the Legal question unanswered. Ld.AR had agreed for this.

8. Accordingly, appeal of the Assessee is partly allowed.

Order pronounced in the open Court on 30th May, 2024.

Sd/-	**Sd/-**
(VINAY BHAMORE)	**(DR. DIPAK P. RIPOTE)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

पुणे / Pune; दिनांक / Dated : 30th May, 2024/ *SGR**

आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, "सी" बेंच, पुणे / DR, ITAT, "C" Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// TRUE COPY //

Senior Private Secretary
आयकर अपीलीय अधिकरण, पुणे/ITAT, Pune.