

**IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE**

**BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER AND
SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER**

IT(TP)A No.1722/Bang/2017
Assessment years : 2013-14

Texport Overseas Private Limited, #86, D-1, 2 nd Stage, Industrial Suburb, Yeshwantpur, Bengaluru – 560 022. PAN : AAACC 7385 F	Vs.	Deputy Commissioner of Income Tax, Circle (1)(1), Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Tata Krishna, Advocate
Revenue by	:	Ms. Neera Malhotra, CIT-DR

Date of hearing	:	22.11.2017
Date of Pronouncement	:	22.12.2017

ORDER

Per Sunil Kumar Yadav, Judicial Member

This appeal is preferred by the assessee against the order of AO passed consequent to the direction of the DRP, *inter alia*, on following grounds:

1. *The order of the Deputy Commissioner of Income Tax is against law and facts and circumstances of the case.*
2. *The order of the Deputy Commissioner of Income Tax passed in pursuance of the directions issued by the Dispute Resolution Panel (DRP) is against the principles of natural justice and without appreciation of material facts.*
3. *The Dispute Resolution Panel (DRP) ought to have noted that it has no power to enhance the disallowance without affording an opportunity to the appellant to argue and submit its reasons and objections.*
4. *The DRP failed to appreciate that the Deputy Commissioner of Income Tax has initiated proceedings without applying his mind as to the reasonableness or otherwise of the extent of expenditure incurred in respect of remuneration to*

directors.

5. *The DRP failed to note that in respect of the earlier assessment year, the remuneration paid to the directors to an extent of Rs.9 Crores has been fully allowed by the Assessing Authority and no portion has been considered to be excessive or unreasonable under the provisions of Section 40A(2)(b).*
6. *The DRP ought to have appreciated that the limitation of remuneration payable under the provisions of Companies Act, 1956 is applicable only in respect of public limited companies and inasmuch as your appellant being a private limited company, the limitation provisions are not applicable.*
7. *The DRP failed to appreciate the fact that the shareholders of the appellant company are the sole persons to decide the extent of remuneration payable and as the shareholders have approved the payment after the company having achieved substantial profitability over the past 3 years and under no circumstances, could it be considered as unreasonable requiring disallowance.*

For these reasons and for any other reason that may be adduced at the time of hearing, it is prayed that the Hon'ble Tribunal may be pleased to direct the Assessing Authority to delete the enhanced disallowance and allow the appellant's appeal.

2. During the course of hearing, the learned counsel for the assessee has moved an application for the admission of the additional grounds with a request that since the additional grounds goes to the root of the case it should be admitted and be disposed off at the threshold. The admission of the additional grounds were strongly objected by the learned DR on the premise that these grounds were never raised before the DRP nor were they raised in the original grounds of appeal. Therefore, it cannot be admitted.

3. The learned counsel for the assessee has further contended that AO has made a reference under section 92CA, having observed that the assessee has entered into specified domestic transaction as this case is covered under section 92BA of the IT Act but later on there was amendment in section 92BA by the Finance Act, 2017 w.e.f. 01.04.2017 whereby clause (ii) of section 92BA relating to any expenditure in respect of which payment has been made or is to be made to a person referred to clause (b) of sub section 2 of section 40A was omitted and on account of its omission, the impugned transaction would not fall within the definition of specified domestic transaction. Therefore, it has become necessary for the assessee to raise this additional ground before the Tribunal.

4. The learned counsel for the assessee has further invited our attention that provision of section 92BA was brought on statute by the Finance Act, 2012 w.e.f. 01.04.2013 relevant to assessment year 2013-14. Therefore, it is the first year when the transactions are to be examined in the light of provision of section 92BA of the Act. Since the transactions under clause (i) exceeded the prescribed limit, the AO considered it to be specified domestic transaction and made a reference to TPO for computation of ALP. Accordingly, TPO has computed the ALP which was objected to by the assessee before the DRP and DRP disposed off the objections with certain findings/directions.

5. The learned counsel for the assessee further contended that sub clause (i) of section 92BA under which assessee has undertaken the transactions which has exceeded the prescribed limit, was omitted by the Finance Act, 2017 w.e.f. 01.04.2017. Since clause (i) has been omitted from the statute by virtue of the amendment, this particular sub clause shall be deemed not to be on the statute since the beginning. In support of his contention, the learned counsel for the assessee has placed a heavy reliance upon the judgment of the Apex Court in the case of Kolhapur Cane Sugar Works Ltd., Vs. Union of India in Appeal (Civil) 2132 of 1994 vide judgment dated 01.02.2000 in which the constitution bench has held 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 as a Rule. It was further clarified by the Apex Court that in such a case the court is to look to the provisions in the rule which has been introduced after omission of the previous rule to determine whether a pending proceeding will continue or lapse. If there is a provision therein that pending proceedings shall continue and be disposed of under the old rule as if the rule has not been deleted or omitted then such a proceeding will continue. If the case is covered by Section 6 of the General Clauses Act or there is a pari-materia provision in the statute under which the rule has been framed in that case also the pending proceeding will not be affected by omission of the rule. A further reliance was also placed upon the judgment of the Apex Court in the case of General Finance Co. Vs. Assistant Commissioner of Income-tax 257 ITR 338 (SC) in which the Apex Court has held that the principle underlying section 6 as saving the right to initiate proceedings for liabilities incurred during the currency of the Act will not apply to omission of a provision in an Act but only to repeal, omission being different from repeal as held in the aforesaid decisions. Reliance was also placed upon the order of the Tribunal in

the case of CIT Vs. GE Thermometrics India Pvt. Ltd., in ITA No. 876/2008 in which while dealing the omission sub-section (9) of Section 10B the Hon'ble High Court has held that 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, the AO was not justified in taking note of a provision which was not in the statute book and denying benefit to the assessee. Therefore, in the light of these judicial pronouncements, sub-section (i) of section 92BA shall be deemed to be not on the statute since beginning.

6. The learned DR on the other hand has contended that even if it is held that the clause (i) of section 92BA relating to expenditures in respect of which payment has been made or is to be made to person referred to in clause (b) of sub section 2 of section 40A of the Act is not on the statute since beginning in view of the amendment and in the light of various judicial pronouncements the reference made by AO to TPO is bad in law, the AO is required to examine the claim of the assessee in the light of other provisions of the Act.

7. Having carefully examined the orders of authorities below in the light of rival submissions and relevant provisions and various judicial pronouncements, we find that by virtue of the insertion of section 92BA on the statute as per clause (i), any expenditure in respect of which payment has been made or is to be made to person referred to in clause (b) of sub section 2 of section 40A exceeds the prescribed limit, it would be a specified domestic transaction for which AO is required to make a reference to TPO under section 92CA of the Act for determination of the ALP. In the instant case, since the transaction exceeds the prescribed limit it becomes the specified domestic transaction for which reference was made by the AO to the TPO under section 92CA for determination of the ALP. Consequently, the TPO submitted a report which was objected to by the learned counsel for the assessee and filed a objection before the DRP. Having adjudicated the objections, the DRP has issued certain directions and consequently the AO passed an order. Subsequently, by Finance Act, 2017 w.e.f. 01.04.2017, clause (i) of section 92BA was omitted from the statute. Now the question arises as to whether on account of omission of clause (i) from the statute, the proceedings already initiated or action taken under clause (i) becomes redundant or otiose. In this regard, our attention was invited to

judgment of the Apex Court in the case of Kolhapur Cane Sugar Works Ltd., (supra) in which the impact of omission of old rule 10 and 10A was examined.

Having carefully examined the issue in the light of provisions of section 6 of the General Clauses Act, their Lordship has observed "that in such a case, the court is to look to the provisions in the rule which has been introduced after omission of the previous rule to determine whether a pending proceeding will continue or lapse. If there is a provision therein that pending proceedings shall continue and be disposed of under the old rule as if the rule has not been deleted or omitted then such a proceeding will continue. If the case is covered by Section 6 of the General Clauses Act or there is a pari-materia provision in the statute under which the rule has been framed in that case also the pending proceeding will not be affected by omission of the rule. In the absence of any such provisions in the statute or in the rule, the pending proceeding will lapse under rule under which the notice was issued or proceeding being omitted or deleted".

8. In the case of General Finance Co., Vs. ACIT, their Lordship of the Apex Court has again examined the issue and held that the principle underlying section 6 as saving the right to initiate proceedings for liabilities incurred during the currency of the Act will not apply to omission of a provision in an Act but only to repeal, omission being different from repeal as held in different cases. Following the aforesaid judgments, the jurisdictional High Court has also expressed the same view in the case of CIT Vs. GE Thermometrics India Pvt. Ltd. The relevant observation of the jurisdictional High Court is extracted hereunder:

"8. Admittedly, in the instant case, there is no saving clause or provision introduced by way of an amendment while omitting sub-section (9) of Section 10B. Therefore, once the aforesaid 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. The whole object of such omission is to extend the benefit under Section 10B of the Act irrespective of the fact whether during the period to which they are entitled to the benefit, the ownership continues with the original assessee or it is transferred to another person. Benefit is to the undertaking and not to the person who is running the business. We do not see any merit in these appeals. The substantial question of law is answered in favour

of the assessee and against the revenue. Accordingly, the appeals are dismissed."

9. From the aforesaid judgments, it has become abundantly 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.

10. 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 been on the statute. While omitting the clause (i) of section 92BA, nothing was specified whether the proceeding initiated or action taken on this continue. Therefore, the proceeding initiated or action taken under that clause would not survive at all. In this legal position, the cognizance taken by the AO under section 92B(i) and reference made to TPO under section 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.

11. Under these circumstances, where this clause (i) is omitted from the statute since its inception, the AO ought have required to frame the assessment in normal course after making necessary enquiries of particular claim of expenditure in accordance with law. But this exercise could not have been done on account of provisions of section 92BA Clause (i) of the Act. Now when this clause (i) has been omitted from the statute by virtue of the aforesaid amendments, the AO is required to adjudicate the issue of claim of expenditures in accordance with law after affording opportunity of being heard to the assessee. We therefore set aside the orders of the AO and the DRP and restore the matter to the AO with the direction to readjudicate the issue of claim of expenditure incurred in respect of which payment has been made or is to be made to person referred to in clause (b) of sub section 2 of section 40A of the Act. Accordingly, since we have restored the matter to the AO, we find no justification to deal with the other issues on merit. Accordingly, appeal of the assessee stand allowed for statistical purposes.

12. In the result, appeal of the assessee is allowed for statistical purposes.

Pronounced in the open court on 22nd December, 2017.

Sd/-
(INTURI RAMA RAO)
Accountant Member

Sd/-
(SUNIL KUMAR YADAV)
Judicial Member

Place : Bangalore
Dated : 22/12/2017
/NS/*

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| 1 | Appellant | 2 | Respondent |
| 3 | CIT(A)-II Bangalore | 4 | CIT |
| 5 | DR, ITAT, Bangalore. | 6 | Guard file |

By order

Sr. Private Secretary,
ITAT, Bangalore.