आयकर अपीलीय अधिकरण न्यायपीठ, नागपुर में ।
IN THE INCOME TAX APPELLATE TRIBUNAL BENCH, NAGPUR

(At e-Court, PUNE)

BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI PARTHA SARATHI CHAUDHURY, JUDICIAL MEMBER

आयकर अपील सं. / ITA No. 88/NAG/2020
निर्धारण वर्ष / Assessment Year : 2015-16

M/s. S. B Cotgin Pvt. Ltd.
Nr. Shyam Talkies, Nagina Masjid Road,
Wani-445 304, Maharashtra,
PAN : AATCS0617B

.....अपीलार्थी / Appellant

बनाम / V/s.

The Pr. Commissioner of Income Tax-2,
Nagpur.

.....प्रत्यर्थी / Respondent

Assessee by : Shri Abhay N. Agarwal
Revenue by : Shri Pradeep Hedaoo

सुनवाई की तारीख / Date of Hearing : 23.06.2021
घोषणा की तारीख / Date of Pronouncement : 05.07.2021

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM:

This appeal preferred by the assessee emanates from the order of the Ld. Pr. Commissioner of Income Tax-2, Nagpur dated 28.02.2020 passed u/s. 263 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') for the assessment year 2015-16 as per the following grounds of appeal on record.

"1. Whether on the facts and circumstances, the learned CIT has erred in coming to the conclusion that assessment order passed by learned AO

u/s 143(3) dated 18.12.2017 is erroneous and prejudicial to the interests of the revenue and in setting aside the assessment order with a direction to the learned AO to refer the case to TPO and examine the issues afresh.

Order is neither erroneous

2. Whether on the facts and circumstances, the learned CIT erred in not appreciating the fact that, the learned AO had examined the issue as per reasons recorded for scrutiny selection (i.e mismatch in amount paid to related persons u/s 40A(2)(b) reported in audit report and ITR) vide Point 4 of show cause notice dated 23/11/2017 and hence, the order cannot be termed as erroneous.

3. Whether on the facts and circumstances, the learned CIT erred in not appreciating that, as on the date when the assessing officer was seized with the matter, the provision of section 92BA(i) stood omitted and hence, did not warrant reference to TPO vide Texport Overseas Pvt Ltd v. DCIT (ITA No.1722/Bang/2017) (Bangalore ITAT), quoted before learned CIT by assessee vide submission dated 17/02/2020.

4. Whether on the facts and circumstances, the learned CIT erred in not appreciating that, directing learned AO to refer the matter to TPO even when the related provision [i.e 92BA(i)] stood omitted w.e.f 01/04/2017 was bad in law vide Swastik Coal Corporation Pvt Ltd v. Pr. CIT-2 (ITA No.486/lnd/2018) (Indore ITAT), quoted before learned CIT by assessee vide submission dated 17/02/2020.

Order is nor prejudicial to interests of revenue

5. Whether on the facts and circumstances, the learned CIT erred in not appreciating that the assessee had demonstrated with documentary evidences that the transactions with specified parties were carried out at market rates and the payments were neither excessive nor unreasonable and hence, no prejudice was caused to the interests of the revenue.

6. Whether on the facts and circumstances, the learned CIT erred in not making any enquiry on his own but simply directed the learned AO to make reference to TPO and further verification thereby, rendering the order passed u/s.263 bad in law which deserves to be set aside.

7. The appellant craves leave to alter, amend, modify or substitute any ground/grounds and to add any new ground or grounds on or before the appeal is disposed off."

2. In this case, there is a delay of 58 days in filing of the appeal before the Tribunal. The Ld. Counsel for the assessee had filed an affidavit as well as petition for condonation of the delay of 58 days. That on perusal of the reasons enshrined in these documents it is found that the delay was caused because of circumstances which cannot be attributed to any deliberate conduct of the assessee neither it can be said that the delay was caused by the assessee with mala-fide intentions. The Ld. DR also conceded to these

facts and did not raise any objection for the condonation of delay. After hearing the parties, we therefore, condone the delay and proceed to hear this appeal on merits. We further take note of the present pandemic situation where the movement of people are restricted and because of such practical situation, it is always not possible to follow the time of limitation regarding filing of appeal before various Forums. This fact was also observed and taken cognizance of by the Hon'ble Supreme Court of India, in **Civil Original Jurisdiction, Suo Moto Writ Petition (Civil) No.3 of 2020 dated 8th March, 2021.**

3. Coming to the merits in this case, assessment order dated 18.12.2017 was passed by the Assessing Officer u/s.143(3) of the Act. That from the records, it is an undisputed fact that the scrutiny assessment did not pertain to a limited scrutiny. In fact, the case was selected for complete scrutiny after examining the issues i.e. low income shown by large contractors, mismatch in sales turnover reported in Audit report and ITR and mismatch in amount paid to related persons u/s. 40A(2)(b) of the Act reported in Audit report and ITR. The Assessing Officer while completing the assessment u/s.143(3) of the Act for the assessment year 2015-16 accepted the return of income of the assessee.

3.1 The Ld. Pr. Commissioner of Income Tax on verification of the assessment records noted as per Column No. 23 of 3CA/3CD report dated 05.09.2015 that the assessee has done transactions with related parties and reported the various transactions u/s.40A(2)(b) of the Act. The transactions relating to purchase of goods was amounting to Rs.22,48,39,938/-. All the parties are in similar line of business and the value of domestic transaction exceeds the limit of Rs.5 Crore. As per Section 92BA of the Act, since these were domestic transactions and as per Rule 10E, the assessee was required

to obtain and furnish audit report from a Chartered Accountant in Form No.3CEB before the due date of filing of return of income which was not done by the assessee. Hence, the Assessing Officer was supposed to report these transactions to the Transfer Pricing Officer for determination of Arm's Length Price. The same was not done by the Assessing Officer. Further, the Pr. Commissioner of Income Tax also observed in his order u/s.263 of the Act that the issues regarding payments made to related persons u/s.40A(2)(b) of the Act, whether such payments are genuine or reasonable was not examined during assessment proceedings. There is no definite finding by the Assessing Officer with regard to his satisfaction obtained regarding genuineness of these payments. That for non-filing of 3CEB report, penalty u/s.271BA of the Act is attracted. This was also not initiated by the Assessing Officer.

4. That before the Ld. Pr. Commissioner of Income Tax during the proceedings u/s.263 of the Act, it was contended by the Ld. Counsel for the assessee that the applicability of Section 92BA of the Act to SDT transactions was earlier increased to 20 crores vide Finance Act 2015 w.e.f. 01.04.2016. Thus, if transactions with parties at Sr. No.5 & 6 viz. Priti Dinesh Agarwal and Monica Vijay Agarwal are excluded then the limit of 20 crores will not be crossed. The Ld. Pr. Commissioner of Income Tax observed that this argument of the assessee does not hold good since the Ld. Counsel himself has submitted that the limit of 20 crores was increased from 5 crores by Finance Act, 2015 w.e.f. 01.04.2016 i.e. applicable from assessment year 2016-17 whereas assessee's case pertains to assessment year 2015-16. Therefore, the limit of 5 crores in case of specified domestic transaction was applicable in the case of the assessee. Therefore, the Assessing Officer was also supposed to refer the matter to the Transfer Pricing Officer having regard to the fact that a specialized cell was created by the Revenue Department to

deal with the complicated and complex issues arising out of the transfer pricing mechanism.

4.1 The Ld. Pr. Commissioner of Income Tax in his order held the assessment was completed by the Assessing Officer without conducting proper enquiry and verification, without assigning any reasons for his satisfaction on the issues relating to Section 40A(2)(b) of the Act and further the case was also not referred to the TPO thus making the assessment order erroneous so as to be prejudicial to the interest of the revenue.

4.2 The Ld. Pr. Commissioner of Income Tax had relied on the decision of the Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Ltd. Vs. The Commissioner of Income Tax dated 18.11.2011 (2011) 16 taxman.com 418 (Delhi) relating to the issue of determination of ALP where aggregate value of international transaction exceeds Rs.5 crores which was in respect of Section 92CA of the Act. It was observed as Sections 92, 92BA ,92C and 92CA are pari-materia to each other, the implications of the order of the Hon'ble High Court (supra.) would also squarely apply to the specified domestic transactions exceeding Rs.5 Crores in respect of Section 92BA of the Act.

4.3 The Ld. Pr. Commissioner of Income Tax in his order also observed that Explanation (2) to Section 263 of the Act, wherein it has been enshrined that for the purpose of this section, the order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interest of the revenue, if, in the opinion of the Ld. Pr. Commissioner of Income Tax or Commissioner of Income Tax –

> a) The order is passed without making inquiries or verification which should have been made;
>
> b)……

c) The order has not been made in accordance with any order direction or instruction issued by the Board under section 119.

4.4 The Ld. Pr. Commissioner of Income Tax further examined that the Assessing Officer has not raised any question in respect of specified domestic transactions done with related parties by the assessee at the time of scrutiny assessment. He has simply accepted the documents in respect of the assessee without verification and judicial reasoning.

5. At the time of hearing, the Ld. Counsel for the assesse submitted that during scrutiny assessment proceedings for the assessment year 2015-16, the Assessing Officer had issued notice u/s.142(1) of the Act to the assessee dated 23.11.2017 and therein at Clause -4, read as follows :

> *"4. Please submit the copies of account of the parties in respect of payments to persons specified u/s.40A(2)(b) of the Act along with PAN, address and justification for such payments."*

The Ld. Counsel, therefore, submitted that the issue with regard to payments made to related persons u/s.40A(2)(b) of the Act was duly verified by the Assessing Officer and though not expressly spelled out in the assessment order, however, it can be implied that the Assessing Officer has recorded his satisfaction since he has called for all the details at the time of scrutiny assessment proceedings.

5.1 The Ld. Counsel for the assessee also submitted that even though the provisions of section 92BA of the Act was not followed by the Assessing Officer that does not makes the order erroneous since he had examined the transactions and payments made to the related persons u/s.40A(2)(b) of the Act. Once he was satisfied regarding genuineness, there was no requirement

for the Assessing Officer to refer the matter further to Transfer Pricing Officer. It was further submitted by the Ld. Counsel that the said provision of Section 92BA(i) of the Act got omitted vide Finance Act 2017 w.e.f.01.04.2017 and therefore, the provision was omitted before the assessment order dated 18.12.2017 was passed and also before the revisionary jurisdiction order dated 28.02.2020 passed u/s.263 of the Act by the Ld. Pr. Commissioner of Income Tax.

6. The very basis of the order passed u/s.263 of the Act by the Ld. Pr. Commissioner of Income Tax stating that the order of Assessing Officer to be erroneous so as to be prejudicial to the interest of the Revenue is in respect to the applicability of Section 92BA(i) of the Act which on the date when the order was passed by the Ld. Pr. Commissioner of Income Tax, had been omitted by the Finance Act, 2017 (supra.) and therefore, such order does not hold good in the realm of taxation laws. The resultant effect is that when a provision has been repealed /omitted without any saving clause or provision then it has to be construed that such provision had never been passed and to be considered as law which never existed. For this proposition, the Ld. Counsel for the assessee placed strong reliance on the decision of Hon'ble Karnataka High Court in the case of **Principal Commissioner of Income Tax-7 Vs. Texport Overseas (P) Ltd. (2020) 114 taxmann.com 568 (Karnataka).**

7. The Ld. Counsel for the assessee has also referred to the Department's Instruction No.3/2016 (F. NO.500/9/2015-APA-II) dated 10.03.2016 wherein at Para 3.4 of the said Instruction, it is stated that not in every case, the Assessing Officer shall refer the matter to the Transfer Pricing Officer but before referring such matter, the Assessing Officer must record his

satisfaction that there is a need arisen for determination of ALP of specified domestic transactions for referring the matter to Transfer Pricing Officer.

8. The Ld. Counsel for the assessee submitted that in this case, the Assessing Officer was satisfied regarding genuineness of the transactions pertaining to Section 40A(2)(b) of the Act and hence, did not feel the requirement for reference to the Transfer Pricing Officer.

9. Finally, the Ld. Counsel for the assessee relied on the decision of the Co-ordinate Bench of the Tribunal, Mumbai in the case of **Narayan Tatu Rane Vs. Income Tax Officer (2016) 70 taxmann.com 27 (Mumbai)** for the proposition that the Ld. Pr. Commissioner of Income Tax before holding the assessment order to be erroneous should conduct necessary enquiry or verification in order to show that the findings given by the Assessing Officer was erroneous and prejudicial to the interest of the revenue and that the view of the Assessing Officer was unsustainable in law.

10. Per contra, the Ld. DR submitted that we are dealing a case where the assessment order passed erroneously so as to be prejudicial to the interest of the revenue in respect of the assessment year 2015-16. It is also to be taken note of that the assessment order dated 18.12.2017 passed u/s.143(3) of the Act for the assessment year 2015-16 was in respect of complete scrutiny. Firstly, during the relevant assessment year 2015-16 Section 92BA of the Act was very much in existence which got omitted only vide Finance Act, 2017 w.e.f. 01.04.2017. Therefore, it was incumbent on the part of the Assessing Officer to follow the said provision and should have referred the matter to the Transfer Pricing Officer who would subsequently taken a call. This was not

done by the Assessing Officer which itself makes the assessment order erroneous so as to be prejudicial to the interest of the Revenue.

10.1 Further, with regard to the payments made to the related persons u/s.40A(2)(b) of the Act, the Ld. DR bringing to our notice the assessment order submitted that the Assessing Officer in his order has not recorded any specific findings regarding his satisfaction being arrived at in respect of the documents/evidences submitted by the assessee pertaining to Section 40A (2)(b) of the Act. The Assessing Officer has simply accepted the submissions of the assessee without recording his satisfaction which again makes the assessment order erroneous so far as prejudicial to the interest of the Revenue. The Ld. DR in his submissions placed strong reliance on the findings of the Ld. Pr. Commissioner of Income Tax at Paras 2 and 4 of his order.

11. We have perused the case records and heard the rival contentions and analyzed the facts and circumstances in this case. We have also considered the judicial pronouncements placed on record. That even before going into the merits of the order passed u/s.263 of the Act, we find that the assessee has challenged the legality of the said order by submitting that when the Assessing Officer ceased with the matter, the provision of Section 92BA(i) of the Act stood omitted and hence, did not warrant reference to the Transfer Pricing Officer placing reliance on the decision of the Texport Overseas Pvt. Ltd. Vs. DCIT (supra.). The assessee also contended that referring the matter by Assessing Officer to the Transfer Pricing Officer when the provision of Section 92BA(i) of the Act stood omitted w.e.f.01.04.2017, such reference was not legally warranted placing reliance on the decision of Swastik Coal Corporation Pvt. Ltd. Vs. Pr. CIT, ITA No.486/Ind/2018.

12. The assessee had relied on the decision of the Hon'ble Karnataka High Court in the case of **Pr. Commissioner of Income Tax Vs. Texport Overseas (P) Ltd. (supra.)** wherein in similar set of facts and circumstances, the assesse therein had entered into specific domestic transactions and it was covered u/s.92BA of the Act. The Ld. DRP passed an order and being aggrieved, the assessee therein had preferred an appeal before the Income Tax Appellate Tribunal, Bangalore Bench in the case of Texport Overseas (P) Ltd. Bs. Dy. CIT in IT (TP) A No.1722 (Bang.) of 2017 for the assessment year 2013-14. Likewise, for the assessment year 2014-15, the assessee therein preferred an appeal in Texport Overseas (P) Ltd. Vs. Dy. CIT in IT (TP) No.2213 (Bang.) of 2018. The Tribunal had passed order dated 22.12.2017 and held that Clause (i) of Section 92BA of the Act had been omitted by the Finance Act 2017 w.e.f.01.04.2017 and as such it came to be held that proceeding would lapse. Accordingly, appeals of the assesse were allowed.

13. Being aggrieved, the Revenue preferred an appeal before the Hon'ble High Court of Karnataka. The contention of the Revenue before the Hon'ble High Court was that Section 92BA of the Act was repealed w.e.f. 01.04.2017 i.e. financial year 2017-18 relevant to assessment year 2018-19. That however, the case of the assesse pertains to the assessment years 2013-14 and 2014-15 and the Tribunal was not correct in holding that the repealment of the said provision would even be applied retrospectively for the assessment years 2013-14 and 2014-15 in respect of the assesse.

14. The Hon'ble High Court of Karnataka while adjudicating this issue had referred to the authoritative pronouncement of the Hon'ble Apex Court in the case of Kolhapur Canesugar Works Ltd. Vs. Union of India, AIR 2000 SC 811 wherein the Hon'ble Apex Court had examined the effect of repealment of a statute vis-à-vis deletion/addition of provision in an enactment and its effect

thereof. The import of Section 6 of General Clauses Act had also been examined and it was held as follows:

> *"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."***

15. The Hon'ble Karnataka High Court thereafter held that once Clause (i) of Section 92BA of the Act having been omitted by the Finance Act 2017 w.e.f. 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. We find in an old judgment of the Hon'ble Supreme Court in the case of **Rayala Corporation (P). Ltd., 1970 AIR 494 (SC),** the effect of a rule being omitted was analysed and it was held that once the Rule was omitted altogether, no new proceeding by way of prosecution could be initiated even though it might be in respect of an offence committed earlier during the period when the rule was in force. The Hon'ble Supreme Court also observed that the general rule in respect of a statute is that in the absence of special provision to the contrary, proceedings which are being taken against a person under it will ipso-facto terminate as soon as the statute expires.

16. The Hon'ble Supreme Court in the case of **General Finance Company (2002) 124 Taxman 432 (SC)** held that Section 6 of the General Clauses Act,

1857 as saving the right to initiate proceedings for liabilities incurred during the currency of the Act would not apply to omission of a provision in an Act. The Supreme Court in this case had referred the decision in the case of **Kolhapur Canesugar Works Ltd. Vs. Union of India** (supra.).

17. In this case, Section 92BA(i) of the Act was omitted w.e.f.01.04.2017 and after its omission, the Ld. Pr. Commissioner of Income Tax passed order u/s.263 dated 28.02.2020. Since Section 92BA(i) of the Act was unconditionally omitted without a saving clause in favour of pending proceedings, therefore, the Ld. Pr. Commissioner of Income Tax ought not to have proceeded u/s.263 of the Act. Since such omission in Section 92BA(i) of the Act is unconditional i.e. it does not say that pending proceedings under clause (i) of Section 92BA would continue in future even after its omission on 01.04.2017. Therefore, the Ld. Pr. Commissioner of Income Tax erred in exercising jurisdiction u/s.263 of the Act, in so far as clause (i) of Section 92BA is concerned, the reason being in the eyes of law after omission of clause (i) of Section 92BA of the Act, it would be treated as if it never existed in the statute book. Similar views have been taken by the Co-ordinate Benches of the Tribunal in the following decisions :

i) Swastik Coal India Pvt. Ltd. Vs. Pr. CIT, ITA No.486/Ind/2018 for the assessment year 2014-15

ii) M/s. Raipur Steel Casting India Pvt. Ltd. Vs. Pr.CIT, ITA No.895/Kol/2019 for the assessment year 2014-15

iii) M/s. Bhartia- SMSIL (JV) Vs. ITO, ITA No.117/Gau/2019 for the assessment year 2014-15

18. Therefore without even going into the merits of the order passed u/s.263 of the Act, on this legal ground itself, we hold that the exercise of jurisdiction u/s.263 of the Act by the Ld. Pr. .Commissioner of Income Tax

was void and not legally valid and hence, the impugned order is hereby quashed.

19. In the result, **appeal of the assessee is allowed.**

Order pronounced on 05th day of July, 2021.

Sd/-	Sd/-
INTURI RAMA RAO	**PARTHA SARATHI CHAUDHURY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 05th July, 2021
SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The Pr. CIT-2, Nagpur.
4. The Jt. CIT, Wardha Range, Wardha.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, नागपुर / DR, ITAT, Nagpur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

		Date	
1	Draft dictated on	23.06.2021	Sr.PS/PS
2	Draft placed before author	05.07.2021	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		