IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-2" NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER
AND SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

आ.अ.सं/.I.T.A No.6614/Del/2017
निर्धारणवर्ष/Assessment Year:2013-14

M/s SMR Automotive Systems India Ltd., F-7, Block-B-I, Mohan Cooperative Industrial Estate, Mathura Road, New Delhi.	**बनाम Vs.**	**Addl. CIT Special Range-8, Delhi.**
PAN No. AAFCS0021D		
अपीलार्थी Appellant		**प्रत्यर्थी/Respondent**

निर्धारितीकीओरसे **/Assessee by**	**Sh. Ajit Tolani, Adv.**
राजस्वकीओरसे **/Revenue by**	**Sh. Sunil Kumar, CIT DR**

सुनवाईकीतारीख/ Date of hearing:	03.06.2021
उद्घोषणाकीतारीख/Pronouncement on	03.06.2021

आदेश /O R D E R

PER N.K. BILLAIYA, A.M.

1. With this appeal the assessee has challenged the validity of the order dated 28.09.2017 passed u/s 143(3) read with section 144C of the Act.

2. The grievance of the assessee read as under:

   1. *"That on the facts and circumstances of the case and in law, Assessing Officer ("Ld. AO") erred in assessing the income of the Appellant at INR 23,80,23,611/- as against the returned income of INR 19,07,01,250/-.*
   2. *That the order of the Ld. Transfer Pricing Officer, New Delhi (hereinafter referred to as the 'Ld. Transfer Pricing*

Officer, "Ld. TPO") passed u/s 92CA of the Act and the subsequent directions of the Hon'ble Dispute Resolution Panel (hereinafter referred to as 'Hon'ble Panel') in respect of Assessment Year 2013-14, to the extent detrimental to the Appellant is bad in law and arbitrary, contrary to facts, law and circumstances of the case and liable to be quashed.

3. *That in law and on facts and circumstances of the case, the ld. TPO/Ld. AO did not discharge his/her statutory onus by establishing that the conditions specified in clause (a) to (d) of Section 92C(3) of the Act have been satisfied before disregarding the arm's length price determined by the Appellant and proceeding to determine the arm's length price himself and the Hon'ble DRP erred by largely concurring with the views of the Ld. TPO/Ld. AO on the same.*
4. *That the Ld. TPO/Ld. AO/Hon'ble DRP, while making transfer pricing adjustment erred in law and on facts and circumstances of the case in rejection of the economic analysis undertaken by the Appellant in the Transfer Pricing documentation in accordance with the provisions of the Act read with rules, thereby confirming the economic analysis adopted by the Ld. TPO substantially.*
5. *The Ld. AO/Ld. TPO/Hon'ble DRP erred in enhancing the income of the Assessee by Rs. 4,73,22,361/- holding that the specified domestic transactions undertaken by Assessee do not satisfy the arm's length principle envisaged under the Act and in doing so, have grossly erred in:*

5.1 *Disregarding multiple year/prior years' data as used by the assessee in the TP documentation and holding that current year [i.e. FY 2012-13] data for comparable companies should be used;*

5.2 *Rejecting segmental accounts of related parties ('RPs'), certified by independent Chartered Accountant, backed-up by division-wise ledger accounts, trial balance etc., on ad-hoc reasons without appreciating the scientific basis of drawing segments, and proceeded to re-compute the margins for RPs considering entity level financials.*

6. *Without prejudice to above contentions, the assessee wishes to state that appellant and its RPs are under highest tax bracket and subject to tax under normal provisions or minimum alternate tax (whichever is higher). Thus, there is no motive of the taxpayer to shift profits and the transactions are revenue neutral. Considering the same, applicability of provisions of domestic Transfer*

Pricing to transactions with parties covered u/s 40a(2)(b) of Income Tax Act, 1961, has been omitted by Finance Act, 2017.

7. *Without prejudice to appellant's contentions, we request Hon'ble Bench to allow appellant to submit additional analysis with respect to benchmarking of impugned transactions with the most appropriate method and selection of tested party along with necessary comparability adjustment, if any.*
8. *Ld. AO has erred in initiating penalty proceedings u/s 271(1)(c) of the Act.*
9. *Ld. AO has erred, in charging interest u/s 234A and 234B of the Act.*

The above grounds are without prejudice to each other. The Appellant craves to leave to add, withdraw, alter, modify, amend or vary the above grounds of appeal before or at the time of hearing."

3. Vide application dated 21.02.2018 the assessee raised an additional ground which reads as under:

"That as section 92BA(1) has been omitted vide Finance Act, 2017, impugned proceedings and order will lapse and will become invalid in law".

4. Since the aforementioned additional ground goes to the root of the matter and requires no verification of any new fact the same is admitted.

5. Having heard the Ld. Counsel on the additional ground and also the DR who strongly oppose to the admission of the additional ground stating that it was never raised before any of the lower authorities, in our considered opinion, since this additional ground goes to the root of the matter and requires no verification of any fact. We will address it first.

6. The assessee company is engaged in the business of designing, manufacturing, marketing, selling and exporting of the rear view mirrors and parts thereof for automobile industry.

7. The International transactions undertaken by the assessee company with its associated enterprises are summarized as under:

S.No.	Nature of Transaction	Method used by assessee	PLI	Amount in Rs.
1.	Purchase of raw material	TNMM	OP/TC	507112107
2.	Sale of finished goods	TNMM	OP/TC	26733427
3.	Services rendered back office services	CUP	NA	35741466
4.	Provision of engineering design services	TNMM	OP/TC	
5.	Provision of back office support services	TNMM	OP/TC	23678628
6.	Group support services rendered	TNMM	OP/TC	
7.	Group support services received European region	TNMM	OP/TC	41854117
8.	Group support received Asia-Pacific region	TNMM	OP/TC	
9.	Design and development services received	OM	NA	6932837
10.	Reimbursement of expenses paid	CUP	NA	60606
11.	Reimbursement of expenses received	CUP	NA	1993475

The Specified Domestic Transactions undertaken by the assessee company with its associated enterprises are summarized in the table below:

S.No.	Nature of Transaction	Method used by assessee	PLI	Amount in Rs.
1.	Purchase of raw material	TNMM	OP/TC	490401349
2.	Business support services received	TNMM	OP/TC	29889261
3.	Web designing services received	TNMM	OP/TC	11236
4.	Payment of service charge	TNMM	OP/TC	44768
5.	Reimbursement of expenses paid	CUP	NA	165034

8. Since the afore-stated transaction exceeded the monetary limit specified in the relevant provision of the Act the matter was referred to the Transfer Pricing Officer for the determination of the Arm's Length Price.

9. Accordingly, the TPO issued a show cause notice. The sum and substance of show cause notice reads as under:

"After going through the submissions of the assessee a show cause notice u/s 92CA(2) was issued to the assessee on 07.10.2016 as under: -

"Please refer to the ongoing TP Proceedings in your case for AY 2013-14. During the course of proceedings information requested was submitted by you at various points of time and on the basis of the above, the following observations are made.

2. DETILS OF SPECIFIED DOMESTIC TRANSACTIONS :

S.No.	Nature of Transaction	Method used by assessee	PLI	Amount in Rs.
6.	Purchase of raw material	TNMM	OP/TC	490401349
7.	Business support services received	TNMM	OP/TC	29889261
8.	Web designing services received	TNMM	OP/TC	11236
9.	Payment of service charge	TNMM	OP/TC	44768
10.	Reimbursement of expenses paid	CUP	NA	165034

10. The assessee filed a detailed reply to support of its claim that the transactions with the AEs are at Arm's Length Price and no adjustment should be made.

11. After considering the detailed submissions of the assessee which did not find much favour with the TPO who finally propose the following adjustments:

Particulars	***Amount in INR***
Adjustment on account of Purchase of raw material	*5,66,22,628*
Adjustment on account of Business Support Services	*62,18,669*
Total adjustment required to be made	***6,28,41,297***

12. Objections were raised before the DRP but were of no avail and the AO finally framed the assessment order which is under challenge before us.

13. Before us referring to the additional ground raised the Counsel for the assessee vehemently stated that sub-section (1) of Section 92BA has been omitted from the statute and by virtue of the amendment this particular sub-clause shall be deemed not to be on the statute since the beginning and, therefore, the assessment order deserves to be quashed. The Counsel referred to various judicial decisions in support of his contention. Per contra, the DR strongly supported the findings of the lower authorities and stated that there is no decision of the jurisdictional High Court.

14. We have given a thoughtful consideration to the orders of the authorities below. The undisputed fact is that as per sub-clause (1) of section 92BA the assessee has undertaken the transaction which has exceeded the prescribed limit. It is also not in dispute that vide Finance Act, 2017 w.e.f. 01.04.2017 the said sub-clause (1) of section 92BA has been omitted. We find that

the AO has made a reference u/s 92CA having observed that the assessee has entered into specific domestic transaction as the case is covered u/s 92BA of the Act.

15. We find that an identical issue came up for adjudication before the coordinate bench, Bangalore in IT(TP)A No. 1722/2017. The relevant findings of the coordinate bench read as under:

"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 ORP. Having adjudicated the objections. the ORP 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 Canesugar Works Ltd., (supra) in which the impact of omission of old rule 10 and 1 OA 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 1 OB. 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 tal<ing 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 1 OB of the Act irrespective of the fact whether during th$ period to which they are entitled to the benefit, the ownership continues with the original* essessee *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 928A, 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 (t) 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 acc~rdance 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."

16. This decision of the coordinate bench was confirmed by the Hon'ble Karnataka High Court in ITA No. 392/2018 along with ITA No. 170/2019. The relevant findings of the Hon'ble High Court read as under:

"5. Having heard learned Advocates appearing for parties and on perusal of records in general and order passed by tribunal in particular it is clearly noticeable that Clause (i) 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 is an issue which is no more res-intigra in the light of authoritative pronouncement of Hon'ble Apex Court in the matter of ***KOHLAPUR CANESUGAR WORKS LTD. v. UNION OF INDIA*** *reported in* ***AIR 2000 SC 811*** *whereunder Apex Court has examined the effect of repeal of a statute visa-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:*

> ***"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."*

6. In fact, Coordinate Bench under similar circumstances had examined the effect of omission of sub-section (9) to Section 10B of the Act w.e.f. 01.04.2004 by Finance Act, 2003 and held that there was no saving clause or provision introduced by way of amendment by omitting sub-section (9) of Section 10B. In the matter of ***GENERAL FINANCE CO. vs. ACIT,*** *which judgment has also been taken note of by the tribunal while repelling the contention raised by revenue with regard to retrospectivity of Section 92BA(i) of the Act.Thus, when clause (i) of Section 92BA having been omitted by the Finance Act, 2017, with effect from 01.07.2017 from the Statute the resultant effect is that ithad 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 92BI and reference made to the order of Transfer Pricing Officer-TOP under Section 92CA could be invalid and bad in law.*

7. It is for this precise reason, tribunal has rightly held that order passed by the TPO and DRP is unsustainable in the eyes of law. The said finding is based on the authoritative principles enunciated by the Hon'ble Supreme Court in ***Kolhapur Canesugar Works Ltd*** *referred to herein supra which has been followed by Co-ordinate Bench of this Court in the matter of* ***M/s.GE Thermometrias India Private Ltd****., stated supra. As such we are of the considered view that first substantial question of law raised in the appeal by the revenue in respective appeal memorandum could not arise for consideration particularly when the said issue being no more res integra."*

17. As no distinguishing decision has been brought to our notice respectfully following the decision of the coordinate bench (supra) which has been upheld by the Hon'ble High Court of Karnataka (supra). We have no hesitation to hold that the cognizance taken by the AO u/s 92B clause (1) and reference made to TPO u/s 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. Additional ground is accordingly allowed.

18. Since we have held that the assessment order is invalid in law, we do not find it necessary to dwell into the merits of the case.

19. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 03/06/2021

Sd/-	**Sd/-**
(SUDHANSHU SRIVASTAVA)	**(N.K. BILLAIYA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 3rd June, 2021
**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi