

आयकर अपीलिय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद /

**IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH 'B'**

**BEFORE SHRI RAJPAL YADAV, VICE-PRESIDENT
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./ ITA No.530/Ahd/2019

निर्धारण वर्ष/Asstt. Year: 2014-15

Shri Ashish Subodchandra Shah 21, Palacial Bungalows Opp: Lane to Star Bazar Jodhpur, Satellite Ahmedabad 380 015. PAN : ADRPS 5385 E	Vs.	Pr.CIT-3, Ahmedabad.
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<i>अपीलार्थी</i> (Appellant)		<i>प्रत्यर्थी</i> (Respondent)
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Assessee by :	Shri M.S. Chhajad, AR
Revenue by :	Shri O.P. Sharma, CIT-DR

सुनवाई की तारीख/Date of Hearing : 14/07/2021

घोषणा की तारीख/Date of Pronouncement: 16/07/2021

आदेश O R D E R

PER RAJPAL YADAV, VICE-PRESIDENT

Present appeal is directed at the instance of the assessee against order of the Id.Pr.Commissioner, Ahmedabad dated 11.03.2019 passed under section 263 of the Income Tax Act, 1961 for the Asstt.Year 2014-125.

2. Sole grievance of the assessee is that the Id.Commissioner has erred in taking cognizance under section 263 of the Income Tax Act and setting aside the assessment order dated 17.11.2016 and directing the AO to pass fresh assessment order.

3 Brief facts of the case are that the assessee is an individual and running proprietorship concern in the name and style of "G.P. Textiles". He has filed his return of income for the Asstt.Year 2014-15 on 11.11.2014 declaring total income at Rs.33,98,080/-. This return was selected for scrutiny assessment and ultimately, the Id.AO has passed assessment order under section 143(3) of the Act on 17.11.2016. The Id.AO has determined taxable income of the assessee at Rs.57,75,980/-. He made the following additions to the total income of the assessee:

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|------|--|-----------------------|
| i) | <i>Disallowance of commission expenses</i> | <i>Rs.13,81,400/-</i> |
| ii) | <i>Disallowance of interest expenses</i> | <i>Rs.5,80,490/-</i> |
| iii) | <i>Disallowance u/s.14A</i> | <i>Rs.32,386/-</i> |
| iv) | <i>Disallowance of labour expenses</i> | <i>Rs.3,83,630/-</i> |

4. The Id.Commissioner while going through the assessment order formed an opinion that in Form No.3CEB the assessee has shown a domestic transaction of Rs.19,44,64,576/-. According to him, it is a specified domestic transaction and its value is more than Rs.5 crores. Therefore, this transaction should have been referred to the TPO by the AO for determining arm's length price, and only thereafter the assessment order should have been framed. This action of the AO is erroneous which has caused *prejudice* to the interest of the Revenue. Accordingly, he issued a notice under section 263 of the Act.

5. In response to the notice, the assessee has filed detailed submission vide letter dated 22.11.2018. Copy of this letter has been placed on page no.1 to 11 of the paper book. Broadly the assessee raised four fold of submissions. He contended that during course of the assessment proceedings, he has explained

that the alleged specified domestic transaction to the AO vide letter dated 3.8.2016 and 10.8.2016. Copies of these letters have also been placed on paper book on page no.20 to 26; (b) the AO gone through these transactions and arrived at a conclusion that no reference to the TPO is required under section 92BA. This section provides definition of "specified domestic transaction". At the most in the case of the assessee only definition provided under sub-clause (1) could be attracted, and this clause has been deleted w.e.f 1-4-2017, therefore, the Id.Commissioner cannot take cognizance under section 263 of the Act on the strength of omitted provision of law. The assessee has relied upon the judgment of Hon'ble Supreme Court in the case of General Finance Company Vs.ITO, 257 ITR 338 (SC); in the case of Kolhapur cane Sugar Works Ltd. UOI as well as orders of ITAT, Bangalore and the judgments of Hon'ble Karnataka High Courts. The Id.Commissioner was not satisfied with the contentions of the assessee and set aside the assessment order. The Id.counsel for the assessee while impugning the order of the CIT has placed before us the bifurcation of the transaction, which could be required to be referred to the TPO at the most. Such bifurcation red as under:

Sr. No.	Date	Particulars	Amount	Remarks	
1	AY 2014-15	Transactions entered with related parties is as under:		Transaction with related parties are duly disclosed in Form 3CEB	
		Particulars	Nature		
		1. Global Enterprise (Prop. Ashish S Shah HUF)	Purchase		19,36,86,462/-
		2. Amiben P Shah	Interest		2,063/-
		3. Diptiben D Shah	Interest		3,095/-
		4.SwatibenSShah	Interest		3,095/-

	5. Neenben KShah	Interest	3,095/-
	6. Subhodchandra K Shah	Interest	4,03,135/-
	7. Subhochandra K Shah HUF	Interest	3,63,631/-

6. He thereafter reiterated submissions as were raised before the Id.CIT. On the other hand, the Id.CIT-DR relied upon the order of the Id.Commissioner.

7. We have duly considered rival submissions and gone through the record carefully. Section 263 of the Income Tax Act has direct bearing on the controversy, therefore, it is pertinent to take note of this section. It reads as under:

“263(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

[Explanation.- For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,-

- (a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer shall include-
- (i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the basis of the directions issued by the Joint Commissioner under section 144A;
 - (ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer conferred on, or assigned to, him under the orders or directions issued by the Board or by the Chief Commissioner or Director General or Commissioner authorized by the Board in this behalf under section 120;

(b) "record shall include and shall be deemed always to have included all records relating to any proceeding under this Act available at the time of examination by the Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, National Tax Tribunal, the High Court or the Supreme Court.

Explanation.- In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded."

8. On a bare perusal of the sub section-1 would reveal that powers of revision granted by section 263 to the learned Commissioner have four compartments. In the first place, the learned Commissioner may call for and examine the records of any proceedings under this Act. For calling of the record and examination, the learned Commissioner was not required to show any reason. It is a part of his administrative control to call for the

records and examine them. The second feature would come when he will judge an order passed by an Assessing Officer on culmination of any proceedings or during the pendency of those proceedings. On an analysis of the record and of the order passed by the Assessing Officer, he formed an opinion that such an order is erroneous in so far as it is prejudicial to the interests of the Revenue. By this stage the learned Commissioner was not required the assistance of the assessee. Thereafter the third stage would come. The learned Commissioner would issue a show cause notice pointing out the reasons for the formation of his belief that action u/s 263 is required on a particular order of the Assessing Officer. At this stage the opportunity to the assessee would be given. The learned Commissioner has to conduct an inquiry as he may deem fit. After hearing the assessee, he will pass the order. This is the 4th compartment of this section. The learned Commissioner may annul the order of the Assessing Officer. He may enhance the assessed income by modifying the order. At this stage, before considering the multi-fold contentions of the Id. Representatives, we deem it pertinent to take note of the fundamental tests propounded in various judgments relevant for judging the action of the CIT taken u/s 263. The ITAT in the case of Mrs. Khatiza S. Oomerbhoy Vs. ITO, Mumbai, 101 TTJ 1095, analyzed in detail various authoritative pronouncements including the decision of Hon'ble Supreme Court in the case of Malabar Industries 243 ITR 83 and has propounded the following broader principle to judge the action of CIT taken under section 263.

- (i) The CIT must record satisfaction that the order of the AO is erroneous and prejudicial to the interest of the Revenue. Both the conditions must be fulfilled.

- (ii) Sec. 263 cannot be invoked to correct each and every type of mistake or error committed by the AO and it was only when an order is erroneous that the section will be attracted.
- (iii) An incorrect assumption of facts or an incorrect application of law will suffice the requirement of order being erroneous.
- (iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.
- (v) Every loss of revenue cannot be treated as prejudicial to the interests of the Revenue and if the AO has adopted one of the courses permissible under law or where two views are possible and the AO has taken one view with which the CIT does not agree. It cannot be treated as an erroneous order, unless the view taken by the AO is unsustainable under law
- (vi) If while making the assessment, the AO examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determine the income, the CIT, while exercising his power under s 263 is not permitted to substitute his estimate of income in place of the income estimated by the AO.
- (vii) The AO exercises quasi-judicial power vested in him and if he exercises such power in accordance with law and arrive at a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not see stratified with the conclusion.
- (viii) The CIT, before exercising his jurisdiction under s. 263 must have material on record to arrive at a satisfaction.
- (ix) If the AO has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation by a letter in writing and the AO allows the claim on being satisfied with the explanation of the

assessee, the decision of the AO cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

9. In the light of the above, let us examine the facts of the present case. A perusal of the transactions entered with the related parties whose value at the most could be determined at arm's length, are the transactions with related parties. We have noticed the break-up of such transactions (supra) and at the cost of repetition, we take this transaction again below:

Sr. No.	Date	Particulars	Amount	Remarks	
1	AY 2014-15	Transactions entered with related parties is as under:		Transaction with related parties are duly disclosed in Form 3CEB	
		Particulars	Nature		
		1. Global Enterprise (Prop. Ashish S Shah HUF)	Purchase		19,36,86,462/-
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		6. Subhodchandra K Shah	Interest		4,03,135/-
		7. Subhochandra K Shah HUF	Interest		3,63,631/-

10. At this stage, we would like to take note of the definition of expression "specified domestic transaction" provided under section 92BA, which reads as under:

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.]

11. Sub-clause (i) of the above provision has been omitted from the Act w.e.f. 1.4.2017. If this clause is taken out, then the remaining clauses are clause (ii) to (vi). Let us evaluate the transaction which at the most should be referred to TPO for determination of arm's length price in the present case. We have taken note of bifurcation of the transaction, and out of all seven transactions only transaction no.1 i.e. purchase from Global Enterprises at the most could be referred for determination of ALP under sub-clause (i) of section 92BA. This aspect has been gone into by the Id.AO and the assessee has explained qua this transaction. The relevant part of the same reads as under:

"Re.: Your notice u/s 142(1) dtd. 30th June, 2016

With reference to above and on behalf of and upon request from aforesaid assessee, we would like to state that your notice dtd. above has been received by assessee on 8th July 2016 only and hence, we could get very little time to prepare documents required by you.

We have however, attempted to prepare and submit as much details and now we are submitting those as below:

1. Point no.1 of notice

It seems that scrutiny is attracted due to following 3 broad points on which you sought to file

a. Large commission expense and low net profit

Kindly note that assessee deals in knitted fabrics and much of the sales is done through commission agents and brokers and hence, commission expenses is found to be high.

For the sake of comfort, we attempt to give comparative list of past 2 years also which will clarify that during the year under assessment, commission as % of sales has reduced but sales is much dependent upon commission agents.

<i>Financial Year</i>	<i>Commission Expenses (Amount Rs.)</i>	<i>Sales as per Audit Report (Amount Rs.)</i>	<i>Net Profit as per Audit Report (Amount Rs.)</i>	<i>Commission as a % of sales</i>
<i>2013-14</i>	<i>23,46,917/-</i>	<i>22,34,96,914/-</i>	<i>32,43,340/-</i>	<i>1.05%</i>
<i>2012-13</i>	<i>26,21,040/-</i>	<i>16,64,70,249/-</i>	<i>26,24,854/-</i>	<i>1.57%</i>
<i>2011-12</i>	<i>18,35,747/-</i>	<i>11,70,91,114/-</i>	<i>22,15,512/-</i>	<i>1.57%</i>

b. Justification of large specified domestic transaction (form 3CEB)

In this connection, we would like to brief you about background of business which is relevant to explain this point.

Earlier in 1996 when the assessee started the business in the name of G.N. Textiles of trading in knitted fabrics, it used to source ready fabrics from Ludhiana and Tirupur. Thereafter, slowly he realized that it is beneficial to get the fabric manufactured and sell it. Hence, new unit viz. Global Enterprise in proprietorship of HUF of assessee was started in 2006 with its branch located at Ludhiana. It started to purchase yarn there, get it processed like dyeing, knitting, finishing etc. at premises of jobworkers and sell ready fabric to G.N. Textiles. Global enterprise has its own office cum godown at Ludhiana and has also staff strength there to look after activities there. M/s. G.N. Textiles traditionally sources most of the material from Global enterprise only since long. This is to reduce overall cost of the product procured.

We hereby make an attempt to submit purchases made by assessee from Global enterprise for last 3 assessment years to prove that this practice is followed by assessee since long not to save taxes but to cut costs and get good margins.

<i>Asst.Year</i>	<i>Purchases from Global Enterprise in Rs.</i>	<i>Total purchases of assessee</i>	<i>% of purchase from Global Enterprise to total purchase</i>
<i>2014-15</i>	<i>19,85,73,366</i>	<i>21,42,00,058</i>	<i>92.70</i>
<i>2013-14</i>	<i>13,55,31,646</i>	<i>15,19,70,944</i>	<i>89.18</i>
<i>2012-13</i>	<i>9,72,84,771</i>	<i>10,91,47,309</i>	<i>89.13</i>
<i>2011-12</i>	<i>7,47,94,066</i>	<i>8,50,09,432</i>	<i>87.98</i>

Further there is no attempt to reduce taxes but just to earn good margins by self engaging in the same line rather than procuring material directly from outside parties. This is further done in the name of associate concern to distinguish identity of both the units in Ludhiana local market so that adequate benefits of lowest purchase prices and lowest processing charges can be enjoyed.

It is also imperative to note that the assessee has got transfer pricing audit for the year and is getting it done since introduced. The copy of form no.3CEB duly uploaded within time has been submitted to you during our earlier submission dtd.23rd October 2015.

With reference to the above we would like to submit the following details regarding ongoing scrutiny as required by you.

1. Working of Domestic Arm Length transaction along with copy of purchase invoices:

With regard to our major purchase from related party viz. Global Enterprise, you have asked to justify purchase prices with those of other unrelated suppliers. In this regard, please find herewith enclosed detailed working of purchase price comparison in respect of material purchased from Global Enterprise with other unrelated party either on same day or nearby date along with few sample purchase bills of Global enterprise i.e. related party as well as of other unrelated parties.

List of unrelated suppliers of which copies of bill are produced:

- a) Dewan Knitwear*
- b) Sweety fabrics Pvt. Ltd*
- c) Amit enterprise*

Kindly note that there is difference in prices on account of different material also."

12. On the basis of the explanation given by the assessee during the course of scrutiny assessment, the Id.AO did not refer this transaction to the TPO for determination of ALP. Now reverting back to section 92BA, it reveals that transaction mentioned at Sr.No.2 to 6 are not attracted in the case of the assessee; because he has not undertaken any of the transaction mentioned in serial nos.2 to 6. Only transaction, which could be fallen in the definition of specified domestic transaction is transaction mentioned at Serial no.1, and in the case of the assessee, that transaction could be purchase from the related parties. Now at the time of assessment proceedings, the Id.AO did not make reference to the TPO, but by the time, the Id.Commissioner took cognizance of the record for re-initiation of assessment order by exercising power under section 263. This clause has been omitted from the statute book. Therefore, the question before us is, whether in the absence of sub-clause (i) of section 92BA in the provision can still be transaction of the assessee regarding purchase made from the related party deserves to be referred to the TPO. Reply to this question has been given by the Hon'ble Karnataka High Court in the judgment of Pr.CIT Vs. Texport Overseas P.Ltd. 114 taxmann.com 568. The facts before the Hon'ble Karnataka High Court was that there was a domestic transaction which fall within the definition of "specified domestic transaction" with help of section 92BA(i). A reference was made to the TPO and objections were filed before the DRP also. But ultimately when the assessment order was passed under section 144(3) of the Act, read with section 143(3) of the Act, this clause

has been omitted from the Act. In other words, the assessment order was passed on 30.6.2017, and this clause, on the strength of which this reference was made to the TPO, stand omitted w.e.f. 1.4.2017. The case of the assessee was that after April, 2017 this proceeding would lapse, which was not accepted by the AO as well as TPO, but the Tribunal accepted the stand of the assessee. Department took the matter in appeal before the Hon'ble Karnataka High Court, and the Hon'ble High Court answered the question in favour of the assessee, and against the Revenue. The discussion made by the Hon'ble High Court reads 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 integra 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:

"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, Co-ordinate 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. v. 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 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 92BI 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 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.

8. Insofar as question No. 2 is concerned, we find from the order of the Tribunal that issue relating to the deletion of

disallowance made by the Assessing Officer has been remitted back to the Assessing Officer which finding is based on factual aspects which would not call for interference by us, that too, by formulating substantial question of law. The Assessing Officer has to undertake the exercise of factual determination. As such, without expressing any opinion on merits with regard to question No. 2 formulated by the revenue in the respective appeals, we proceed to pass the following..."

13. The above discussion is clearly applicable on the facts of the present case, when the Id.Commissioner issued a show cause notice under section 263 and ultimately passed impugned order; by that time the alleged domestic transaction of purchase from related party was not required to be considered as a specified domestic transaction under section 92BA of the Act. It has been omitted, and therefore, no proceedings under section 263 should have been undertaken by the Id.Commissioner.

14. In view of the above discussion, we allow this appeal, and quash the impugned order.

15. In the result, appeal of the assessee is allowed.

Order pronounced in the Court on 16th July, 2021.

Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-
(RAJPAL YADAV)
VICE-PRESIDENT

Ahmedabad; Dated 16/07/2021