

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 12TH DAY OF DECEMBER, 2019

PRESENT

THE HON'BLE MR. JUSTICE ARAVIND KUMAR

AND

THE HON'BLE MR. JUSTICE SURAJ GOVINDARAJ

ITA NO.392/2018

A/W

ITA NO.170/2019

IN ITA NO.392/2018:

BETWEEN:

- 1 . PR. COMMISSIONER OF INCOME TAX-7
BMTC COMPLEX, KORAMANGALA
BANGALORE.
- 2 . THE DEPUTY COMMISSIONER OF
INCOME TAX
CIRCLE-1(1), BMTC COMPLEX
KORAMANGALA, BANGALORE.

...APPELLANTS

(BY SRI. JEEVAN J. NEERALGI, ADVOCATE)

AND:

M/S TEXPORT OVERSEAS PVT. LTD.,
NO.86D-1, 2ND STAGE, INDUSTRIAL
SUBURB, YESHWANTHPUR
BENGALURU - 560 022
PAN: AAACC7385F.

...RESPONDENT

(BY SRI. S. SHARATH & SRI. CHYTHANYA K.K, ADVOCATES)

THIS APPEAL IS FILED UNDER SECTION 260A OF
INCOME TAX ACT, 1961 PRAYING TO DECIDE THE

FOREGOING QUESTION OF LAW AND/OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT AND SET ASIDE THE APPELLATE ORDER DATED:22.12.2017 PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, 'B' BENCH, BENGALURU, IN APPEAL PROCEEDINGS NO.IT(TP)ANO.1722/BANG/2017 FOR THE ASSESSMENT YEAR 2013-14 SOUGHT FOR IN THIS APPEAL; AND TO GRANT SUCH OTHER RELIEF AS DEEMED FIT, IN THE INTEREST OF JUSTICE.

IN ITA NO.170/2019:

BETWEEN:

- 1 . PRINCIPAL COMMISSIONER
OF INCOME TAX-7
BMTC COMPLEX
KORAMANGALA
BENGALURU.
- 2 . DEPUTY COMMISSIONER
OF INCOME TAX
CIRCLE-7(1)(1)
BMTC COMPLEX
KORAMANGALA
BANGALORE.

...APPELLANTS

(BY SRI. E.I. SANMATHI, ADVOCATE)

AND:

M/S TEXFORT OVERSEAS PVT.LTD
NO.86D-1, 2ND STAGE
INDUSTRIAL SUB-URB
YESHWANTHPUR
BENGALURU - 560 022.

...RESPONDENT

(BY SRI. S. SHARATH, ADVOCATE AND
SRI. CHYTHANYA K.K, ADVOCATE)

THIS APPEAL IS FILED UNDER SECTION 260A OF INCOME TAX ACT, 1961 PRAYING TO DECIDE THE FOREGOING QUESTION OF LAW/OR SUCH OTHER QUESTIONS OF LAW AS MAY BE FORMULATED BY THE HON'BLE COURT AS DEEMED FIT AND SET ASIDE THE APPELLATE ORDER DATED:12.09.2018 PASSED BY THE INCOME TAX APPELLATE TRIBUNAL, 'B' BENCH, BANGALORE, IN APPEAL PROCEEDINGS NO.IT(TP)A NO.2213/BANG/2018 (ANNEXURE-A) FOR THE ASSESSMENT YEAR 2014-2015 AS SOUGHT FOR IN THIS APPEAL, AND TO GRANT SUCH OTHER RELIEF AS DEEMED FIT IN THE INTEREST OF JUSTICE.

THESE APPEALS COMING ON FOR ADMISSION THIS DAY, **ARAVIND KUMAR J**, DELIVERED THE FOLLOWING :

JUDGMENT

Assessee is engaged in export of readymade garments and for the assessment years 2013-14 and 2014-15 filed return of income and order of assessment under Section 143(3) r/w Section 144C(13) of Income Tax Act, 1961 (for short 'Act') came to be passed on 30.06.2017 whereby the assessing officer had made transfer pricing adjustment and other additions. Assessing authority (for short 'AO') has made a reference to transfer pricing order under Section 92CA of the Act to determine arms length price as the assessee had entered into specified domestic transaction and on the

ground it was covered under Section 92BA of the Act. Despite objections being filed by the assessee before Dispute Resolution Panel (for short 'DRP') directions came to be issued by DRP on 28.04.2017 (Annexure-B). Being aggrieved by the order, an appeal came to be filed before Income Tax Appellate Tribunal (ITAT) in I.T.[TP]A No.1722/Bang/2017 (assessment year 2013-14). Likewise, for the assessment year 2014-15 assessee preferred an appeal IT(TP)A No.2213/Bang/2018 being aggrieved by the assessment order dated 21.05.2018. Tribunal by orders dated 22.12.2017 and 12.09.2018 passed in respective appeals held that Clause (i) of Section 98BA of the Act had been omitted by Finance Act, 2017 w.e.f. 01.04.2017 and as such it came to be held that proceedings would lapse. Accordingly appeals filed by the assessee came to allowed.

2. We have heard the arguments of Sri.Jeevan J. Neeralagi and Sri.E.I.Sanmathi, learned Advocates appearing for revenue in respective appeals and

Sri.Sharath, learned counsel appearing on behalf of Sri.Chythanya K.K for respondent/assessee.

3. It is the contention of learned Advocates appearing for revenue that tribunal was not justified in arriving at a conclusion that Clause (i) of Section 92BA of the Act, which had been omitted w.e.f. 01.04.2017 would be applicable retrospectively by presuming the retrospectivity, particularly when the statute itself explicitly stated it to be prospective in nature. As such they have sought for formulating substantial questions of law and have sought for answering the same in favour of revenue and against the assessee.

4. Sri.E.I.Sanmathi, learned counsel appearing for revenue/appellant in ITA No.170/2019 would contend that even the disallowance made by the AO under Section 14A r/w Section 8(2)(iii) of Income Tax Rules for a sum of Rs.14,88,870/- by holding that there was no exempted income and as such disallowance could not have been made even though said provision

was rightly invoked by AO, and as such setting aside the disallowance is erroneous. Hence, he prays for substantial question of law as formulated in the appeal memorandum (ITA 170/2019) be formulated, adjudicated and answered in favour of assessee.

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 **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 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-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*.

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:

ORDER

- i) Both the appeals i.e., ITA No.392/2018 and ITA No.170/2019 are dismissed.
- ii) Order dated 22.12.2017 passed by the Income Tax Appellate Tribunal, Bangalore in IT(TP)A No.1722/Bang/2017 is affirmed.

**SD/-
JUDGE**

**SD/-
JUDGE**

DR