IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, AHMEDABAD
[CONDUCTED THROUGH VIRTUAL AT AHMEDABAD]

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER&
Ms. MADHUMITA ROY, JUDICIAL MEMBER

I.T.A. No. 2262/Ahd/2018
(Assessment Year: 2014-15)

Ammann India Pvt. Ltd. (Earlier known as Ammann Apollo India Pvt. Ltd.) Block No. 157, At Ditasan, Post: Jagudan, Mehsana, Gujarat-382710	Vs.	ACIT Mehsana Circle, Mehsana
[PAN No. AACCA0194N]		
(**Appellant**)	..	(**Respondent**)

Assessee by	**:**	Shri S. N. Soparkar, Sr. Adv. with Shri Parin Shah, AR
Revenue by	**:**	Shri Mohd. Usman, CIT DR

Date of Hearing	02.12.2021
Date of Pronouncement	03.01.2022

O R D E R

PER Ms. MADHUMITA ROY - JM:

The instant appeal filed by the assessee is directed against the order dated 31.10.2017 passed by the Joint Commissioner of Income Tax (Transfer Pricing Officer), Ahmedabad arising out of the order dated 11.10.2018 passed by the ACIT, Mehsana Circle, Mehsana, Gujarat under Section 143(3) r.w.s. 92C(4) & 144C(13) of the Income Tax Act, 1961 (hereinafter referred as to "the Act") for A.Y. 2014-15.

2. The assessee company engaged in the business of manufacturing of construction equipments and components filed its return of income on

29.11.2014 declaring total income at Rs. 6,14,73,820/-. Subsequently, the case was selected through CASS for complete scrutiny and notice under Section 143(2) of the Act dated 28.08.2015 was issued.

3. During the F.Y. 2013-14 pertaining to A.Y. 2014-15 the assessee has acquired the assets and liabilities of the asphalt plant business of GAIL, its domestic AE upon making consideration of Rs. 228,75,37,036/- and acquired the assets and liabilities of sensor paver business from another AE namely Apollo Earthmovers Ltd. (AEML) for a consideration of Rs. 40,95,87,651/-. The TPO/AO treated the said purchase of those two business undertaking under the slump sale arrangement as Specified Domestic Transaction(in short 'SDT') under Section 92BA of the Act and made upward adjustment totaling to Rs. 116,32,00,000/-.

4. Being aggrieved by the said order the assessee went to the Ld. Dispute Resolution Panel-2, Mumbai. Before the said DRP the assessee submitted that purchase of a business undertaking on a going concern basis under the slump sale arrangement is not a specified domestic transaction as per Section 92BA of the Act. Further that Section 92BA(i) was deleted by the Finance Act, 2017 and, therefore, SDT cannot be made applicable in the instant case invoking Section 92BA(i) of the Act. Such contention of the assessee was not found acceptable by the DRP who in turn upheld the order passed by the Ld. AO/TPO. Hence, the instant appeal before us.

5. At the time of hearing of the instant appeal the Ld. Senior Counsel appearing for the assessee submitted before us that the plain reading of the provision of Section 92BA shows that only an expenditure for which

payment is made or is to be made to a person referred in Section 40A(2)(b) is covered under the ambit and purview of Specified Domestic Transaction. In the case in hand, AIPL has not made payment for any expenditure rather it has purchased an undertaking under the slump sale arrangement. Since this is a purchase of undertaking it is not covered under the scope of SDT specified under Section 92BA(i) r.w.s. 40A(2)(b) of the Act the Ld. Counsel appearing for the assessee submitted that the transfer pricing provisions itself do not apply. The Ld. Senior Counsel appearing for the assessee further contended before us that Section 92BA(i) was deleted from the statute by the Finance Act, 2017 w.e.f. 01.04.2017, and once deleted it has lost its existence and further that it has to be considered as a law never been existed. In that view of the matter the decision taken by the Ld. AO/TPO in treating the purchase of those two business undertaking under a slump sale arrangement as specified domestic transaction under Section 92BA(i) r.w.s. 40A(2)(b) of the Act is bad in law and liable to be quashed as contended by him.

6. On this issue he has relied upon the judgment passed by the Hon'ble Karnataka High Court in the matter of PCIT-7 vs. Texport Overseas Pvt. Ltd., reported in (2020) 114 taxmann.com 568 (Karnataka). It was further submitted by him that the principle laid down by the Hon'ble Karnataka High Court in regard to the applicability of Section 92BA(i) of the Act after the omission from the statute by and under the Finance Act, 2017 w.e.d. 01.04.2017 was followed by different benches of the Hon'ble ITAT. Reliance were made in the following judgments:

i) M/s. SKM-UMSL JV vs. ITO – ITA No. 229/CTK/2019 (Cuttack ITAT)
ii) Shree Sai Smelters (I) Ltd. vs. ACIT (118 taxmann.com 350) (Gauhati ITAT)
iii) Raipur Steel Casting India (P.) Ltd. vs. PCIT (117 taxmann.com 944) (Kolkata ITAT)
iv) Swastik Coal Corporation vs. PCIT (ITA 486//Ind/2018) (Indore ITAT)

7. On the other hand, the Ld. DR relied upon the order passed by the TPO and DRP as well.

8. We have heard the respective parties, we have also perused the relevant materials available on record.

9. The short point involved on the maintainability of the order impugned on the issue as to whether under the present facts and circumstances of the case Section 92BA(i) would be applicable particularly when the said section was omitted from the statute by the Finance Act, 2017 w.e.f. 01.04.2017. In fact, it is to be considered as to whether Clause (i) of Section 92BA of the Act which has been omitted w.e.f. 01.04.2017 would be applicable retrospectively. It is a settled principle of law that when a particular provision is repealed from the statue the normal effect would be 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. Further that in a case where a particular provision in a statute is unconditionally 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 proceeding shall not continue but fresh proceedings for the same purpose may be initiated under the new provision. If that be so, then since the Clause (i) of Section 92BA was omitted by Finance Act, 2017 w.e.f. 01.04.2017 from the statute the same cannot be made applicable in the pending proceeding. It is, therefore, to be considered non-est in the concerned statute as if it had never been passed.

In that view of the matter once the said Clause being omitted w.e.f. 01.04.2017 the decision made by AO/TPO and DRP invoking such Section 91BA is without any basis, and/or jurisdiction, invalid and bad in law and, thus, the same is liable to be quashed. On this aspect, we have further carefully considered the judgment passed by the Hon'ble Karnataka High Court. While dealing with the issue the Hon'ble Court was pleased to observe as follows:

> *"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-TCP under Section 92CA could be invalid and bad in law."*

10. We have further considered the following various judgments passed by the Hon'ble Benches as relied upon by the Ld. AR:

(i) ITAT Cuttack Bench in the matter of M/s. SKM- UMSL JV vs. ITO in ITA No. 229/CTK/2019 for A.Y. 2014-15 observed as follows:

> *"…In view of the above, we are of the considered opinion that the transactions related to the assessee falls under the clause(i) at Section 92BA of the Act, which has already been removed by the Finance Act, 2017 w.e.f. 01.04.2017, therefore, the imposition of penalty u/s.271BA of the Act for failure to furnish the report in prescribed Form No.3CEB in terms of provisions of section 92E of the Act, does not survive at all. Accordingly, we allow the appeal of the assessee and cancel levied u/s.271BA of the Act by the AO and upheld by the CIT(A).*
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> *8. In the result, appeal of the assessee is allowed."*

(ii) ITAT Gauhati Bench in the matter of Shree Shai Smelters (I) Ltd. vs. ACIT in ITA No. 228/Gau/2019 for A.Y. 2014-15 dealt with the identical issue. The relevant portion whereof is as follows:

> *"5. We note that in respect of specified domestic transactions which is referred to clause (i) of section 92BA of the Act, which was omitted with effect from 01.04.2017 and the effect of such "omission" of clause (i) of section 92BA means that this provision never existed in the statute book, hence reference to TPO was bad in law.*
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> *As the issue is squarely covered in favour of the assessee by the decision of Co-ordinate Bench in the case of M/s Raipur Steel Casting India (P) Ltd. (supra), and there is no change in facts and law and the Revenue is unable to produce any material to convert the above said findings of the Co-ordinate Bench. Therefore, respectfully following the decision of Co-ordinate Bench on the technical issue referred above, we allow the appeal of the assessee.*
>
> *6. In the result, the appeal of the assessee is allowed."*

(iii) ITAT Kolkata Bench in the matter of M/s. Raipur Steel Casting India (P.) Ltd. vs. PCIT-5 in ITA No. 895/Kol/2019 for A.Y. 2014-15 on the identical issue observed the following:

> *"…We note that ld PCIT issued the above show cause notice u/s 263 in respect of specified domestic transactions referred to in clause (i) of section 92BA of the Act which was omitted with effect from 01.04.2017, and effect of*

such "omission" of clause (i) of section 92BA means that this provision never existed in the statute book, since clause (i) of section 92BA never existed in the statute book therefore, ld PCIT cannot exercise his jurisdiction under section 263 of the Act in respect of specified domestic transactions referred to in clause (i) of section 92BA of the Act. Therefore, the action of the Assessing Officer cannot be held to be erroneous as well as prejudicial to the interest of the revenue, in the facts and circumstances as narrated above. Thus, the usurpation of jurisdiction of exercising revisional jurisdiction by the Principal CIT is "null" in the eyes of law and, therefore, we are inclined to quash the very assumption of jurisdiction to invoke revisional jurisdiction u/s 263 of the Act by the Principal CIT. Therefore, we quash the order of the Principal CIT dated 08.03.2019 being ab initio void."

(iv) ITAT Indore Bench in the matter of Swastik Coal Corporation Pvt. Ltd. vs. PCIT-2 in ITA No. 486/Ind/2018 for A.Y. 2014-15 on the identical issue observed the following:

"8. We find that the above view of the Ld. Pr. CIT is not correct. In view of the aforesaid discussion, moreover, the coordinate bench has also examined the issue in the case of Texport Overseas Pvt. Ltd. in IT(TP&A No.l722/Bang/2017. Admittedly, in this case, the order has been revised purely on the basis that the assessing officer has not referred to determine the arm's length price to the TPO. Since the provision itself stood omitted at the time when the order was passed by the Ld. Pr. CIT, under these undisputed facts in the light of the Judgement of the Hon'ble Supreme Court rendered in the case of General Finance Company (supra) as well as the order of the coordinate bench rendered in the case of Texport Overseas Pvt. Ltd. (supra), the impugned order cannot be sustained, hence is hereby quashed. The order impugned is thus quashed and the grounds raised in the appeal are allowed.

9. In the result, the appeal filed by the assessee in ITA No. 486/Ind/2018 for the A.Y. 2014-15 is allowed."

Thus, relying upon the ratio laid down upon the Hon'ble Karnataka High Court and different benches of the Tribunal we find no justification in passing the impugned order by the TPO/AO in making upward adjustment invoking Section 92BA(i) of the Act in the present facts and circumstances of the case particularly when the said section stood omitted w.e.f. 01.04.2017from the statute itself. Hence, we find the same is without any

basis, void ab initio and without jurisdiction. In our considered opinion the impugned order is, thus, bad in law and hence the same is hereby quashed. Since the matter is allowed on the maintainability point itself further discussion of the ground on merit has become academic.

11. In the result, the appeal preferred by the assessee is allowed.

This Order pronounced in Open Court on	**03/01/2022**

Sd/-	Sd/-
(WASEEM AHMED)	(Ms. MADHUMITA ROY)
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 03/01/2022

TANMAY, Sr. PS ***TRUE COPY***

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1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad