

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH : BANGALORE**

**BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND
SHRI B. R. BASKARAN, ACCOUNTANT MEMBER**

IT(TP)A No.361/Bang/2021

Assessment Year : 2016-17

M/s. Neogenetics Foods Private Limited, Level 14 and 15, Concorde Towers, UB City, 1 Vittal Malya Road, UB City, Bengaluru – 560 001. PAN : AADCN 7689 L	Vs.	DCIT, Circle - 3(1)(1), Bengaluru.
ASSEESSEE		RESPONDENT

Assessee by	:	Shri. Narendra Kumar Jain, Advocate
Revenue by	:	Dr. Manjunath Karkihalli, CIT(DR)(ITAT), Bengaluru

Date of hearing	:	03.02.2022
Date of Pronouncement	:	07.02.2022

ORDER

Per N V Vasudevan, Vice President

This is an appeal by the assessee against the final order of assessment dated 27.05.2021 passed by the (National Faceless Assessment Centre “NFAC”), Delhi, DCIT, Circle-3(1)(1), Bengaluru, passed u/s. 144C r.w.s. 143(3) of the Income-tax Act, 1961 [the Act] relating to assessment year 2016-17.

2. The assessee is engaged in the business of manufacturing and trading of animal feeds. Out of total sales of Rs. 253.02 crores, trading sales is Rs.160.23 crores (63.32% is trading sales). The assessee during the relevant previous year entered into transactions with related parties which were in the

nature of specific domestic transactions (STD) within the meaning of Section 92BA of the Act.

3. The details of Specified Domestic Transactions entered during the year were as follows:

Sl. No.	Specified domestic transaction	Amount (Rs.)	Most appropriate method	Remarks
1	Purchase of Raw Materials	12,29,33,814	CUP Method	The purchase of raw materials by assessee from Nutrikraft India Pvt Ltd (NIPL) is at same price as purchased by NIPL from third parties.
2	Purchase of Finished Goods	155,56,30,968	TNMM	The assessee has considered its related party NIPL as a tested party for trading segment. The margin earned by NIPL is lower when compared to margin earned by 3 rd parties and therefore purchase price of the assessee is at arm's length.
3	Managerial Remuneration	6,72,99,383	Other Method	The remuneration is commensurate with the qualification, experience, expertise of the directors and hence considered as at arm's length
4	Reimbursement of expenses	8,99,95,940	Other Method	Reimbursements are at cost and therefore at arm's length.

With respect to purchase of finished goods, the assessee in its TP study had selected NIPL as tested party. This was for the reason that database do not contain any companies, which are engaged in trading of animal feeds and only comparables engaged in manufacturing of animal feeds were available. If assessee is taken as tested party, no comparables would be available. The Assessee selected 18 comparables in its Transfer Pricing study. The Operating Cost Margin ('OCM') of Manufacturing segment of NIPL was of 0.51% and that of comparables was ranging from 0.92% to 3.34% with a

median of 2.31%. Therefore, it was concluded that SDT related to purchase of finished goods were at arm's length.

4. The margin of the Assessee & NIPL (entity wise) are tabulated as below:

Particulars	NFPL	NIPL
Operating Revenue	253,01,56,578	761,85,99,508
Operating Cost	251,76,43,451	757,95,90,789
Operating Profit	1,25,13,127	3,90,08,719
OP/OC	0.50%	0.51%
OP/OR	0.49%	0.51%

It was the plea of the Assessee that the assessee and related party both have earned similar margin and thus there is no profit shifting.

5. In the TP order passed under section 92CA of the Act, the Transfer Pricing Officer (TPO) to whom a reference was made by the AO u/s.92C of the Act, rejected the TP analysis of the assessee and conducted a fresh TP analysis by considering the assessee as the tested party. The TPO has adopted TNMM as most appropriate method for all the transactions. The TPO selected 5 companies as comparable to the assessee. The average mean margin of the comparables was computed at 15.35% by adopting 'OP/OC' as PLI. Margin of the assessee was computed at -6.27%. Consequently, a sum of Rs. 58,08,40,419/- was determined as TP Adjustment. A Draft Order of assessment was passed incorporating the TP adjustment. The assessee filed objections before Dispute Resolution Panel (DRP) under section 144C of the Act.

6. In its directions dated 30.3.2021, the DRP directed as follows:

Directions by DRP	Compliance by TPO
To exclude Pradeepkrishna Industries Pvt. Ltd as a comparable	Excluded by TPO
To adopt OP/OR as PLI	Complied by TPO
Exclude Director Remuneration from Cost	Complied by TPO
Restrict TP adjustment to AE transactions	Not complied by TPO
Apply Turnover filter, 25% Employee Cost filter and 75% Core income filter	Not complied by TPO

7. Comparables and margins as adopted by the TPO after DRP directions are tabulated below :

Sl. No.	Company Name	Weighted Average Margin [OP/OR] (%)
1	Godrej Agrovvet Ltd	6.72
2	Taiyo Feed Mill Pvt. Ltd.	6.82
3	B V Bio-Corp Pvt. Ltd.	7.26
4	Baramati Cattle feeds Pvt. Ltd.	9.70
	Average	7.63

8. The TPO adopted entity level figures to make TP adjustment. The revised adjustment computed by TPO was as below :

Particulars	Formula	Amount (in Rs.)
Taxpayers operating revenue	OR	2,53,29,55,927
Taxpayers operating cost	OC	2,60,76,39,391
Taxpayers operating profit	OP	-7,74,82,813
Taxpayers PLI	PLI=OP/OC	-3.06%

Average Margin of comparable set	M	7.63%
Arm's Length Price	$ALP=(1-M)*OR$	233,96,91,380
Total operating cost	OR	2,60,76,39,391
Shortfall being adjustment	ALP-OC	26,79,48,011

9. The addition as above was made to the total income of the assessee in the final Assessment Order by the AO against which the assessee has preferred the present appeal before the Tribunal.

10. We shall take up for consideration ground No.4 raised by the assessee as a preliminary ground as it goes to the root of the additions made under section 92BA of the Act. Ground No.4 reads as follows:

“4. The lower authorities have erred in not appreciating that section 92BA(i) of the Act is omitted, without any saving clause by Finance Act 2017, which has retrospective effect as if the clause was never in existence and therefore TP addition made with respect to SDT transactions are bad in law.

11. The learned Counsel for the assessee submitted that post the amendment vide Finance Act 2017, transfer pricing provisions are not applicable to transactions entered by the assessee with the related parties covered under section 40A(2)(b). The Courts have held that omission of 92BA(i) is retrospective in the following decisions:

- *Texport Overseas Pvt Ltd v DCIT IT(TP)A.1722/Bang/2017 which was upheld by Karnataka High Court in ITA No 392/2018 and ITA No 170/2019; TS-1222-HC-2019(KAR)-TP [Refer Pg 887 to 896 of PB-II]*

- *M/s. Cauvery Aqua Private Limited vs DCIT, Circle-2(1)(1), Bengaluru (IT(TP)A No.2021/Bang/2019)* [Refer Pg 910 to 911 of PB-II]
- *Sobha City vs ACIT, Circle 1(2)(2), Bangalore [2021] 127 taxmann.com 39 (Bangalore - Trib.)* [Refer Pg 918 of PB-II]

It was contended that consequently, there could be no addition made by way of determination of ALP u/s.92BA of the Act.

12. The learned DR relied on the order of the DRP wherein the decision of the ITAT Bangalore Bench in the case of Texport Overseas Pvt.Ltd. (supra) was distinguished.

13. We have carefully considered the rival submissions. The Finance Act, 2012 extended its scope to cover certain domestic transactions with related parties within India, defined as 'Specified Domestic Transactions' (SDT) with effect from AY 2013-14. The Finance Act, 2012 introduced Section 92BA giving the meaning of SDT and it provided as follows:

"SECTION 92BA: MEANING OF SPECIFIED DOMESTIC TRANSACTION.

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 twenty crore rupees.

Section 92(2), as amended provided that where in an international transaction or specified domestic transaction, two or more associated enterprises enter into a mutual agreement or arrangement for the allocation or apportionment of, or any contribution to, any cost or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to any one or more of such enterprises, the cost or expense allocated or apportioned to, or, as the case may be, contributed by, any such enterprise shall be determined having regard to the arm's length price of such benefit, service or facility, as the case may be. Section 92(2A) provided that any allowance for an expenditure or interest or allocation of any cost or expense or any income in relation to the specified domestic transaction shall be computed having regard to the arm's length price.

14. In terms of the above statutory provisions of Sec.92BA(i) the transactions in question are to be regarded as falling within the ambit of Sec.40A(2)(b) of the Act and therefore covered by the provisions of Sec.92BA(i). Before DRP, the assessee submitted (i) that the transaction between the Assessee cannot be regarded as SDT, because by Finance Act, 2017 w.e.f. 01.04.2017, clause (i) of section 92BA was omitted from the statute and by virtue 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, the Assessee placed reliance on decision

of ITAT Bangalore Bench in the case of Textport Overseas Pvt.Ltd. Vs. DCIT IT(TP)A.No.1772/Bang/2017 order dated 22.4.2021 wherein it was held that in the light of provisions of section 6 of the General Clauses Act, 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.

15. With regard to the contention that there could be no addition u/s.92BA in view of the subsequent deletion of the aforesaid provisions by the Finance Act, 2017, the DRP refused to follow the decision of ITAT in the case of Textport Overseas Pvt.Ltd. (supra). The learned AR reiterated submissions made before the DRP and brought to our notice that the decision of the ITAT in the case of Textport Overseas Pvt.Ltd. (supra) has been confirmed by the Hon'ble Karnataka High Court and hence the order of the DRP is unsustainable. The question is whether the transactions in question can be said to be an SDT. On this issue, as rightly pointed out by the learned counsel for the assessee, the decision of the ITAT in the case of Textport Overseas Pvt.Ltd. (supra) has been confirmed by the Hon'ble Karnataka High Court in the very same case of Textport Overseas Pvt. Ltd.

in ITA No.392/2018 order dated 12.12.2019, with the following observations:-

"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 KOB LAPUR 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 ITA No.2936/Bang/20180 M/s. Sobha City, Bangalore 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 ITA No.2936/Bang/20180 M/s. Sobha City, Bangalore arise for consideration particularly when the said issue being no more res Integra."

16. Since the decision rendered by the Hon'ble High Court of Karnataka is binding on this bench of Tribunal sitting in Bengaluru, we follow the same. Accordingly, we hold that the reference to the TPO in respect of specified domestic transactions mentioned in clause (i) of sec.92BA is not valid, as the said provision has been omitted. Accordingly, we direct the AO to delete the addition relating to specified domestic transactions made u/s 92CA of the Act.

17. We however notice that the co-ordinate bench in the case of Textport Overseas (supra) has restored the matter to the file of the A.O. with the direction to examine the claim of expenditure in accordance with the provisions of section 40A(2) of the Act. Following the same, we restore this

issue to the file of the AO with the direction to examine the claim of expenditure mentioned above in terms of the provisions of section 40A(2) of the Act. Accordingly, following the binding decision rendered by Hon'ble High Court of Karnataka in the case of Texport Overseas P Ltd (supra), we hold that the reference to the TPO in respect of specified domestic transactions mentioned in clause (i) of sec.92BA is not valid, as the said provision has been omitted. Accordingly, we direct the AO to delete the addition relating to specified domestic transactions made u/s 92CA of the Act. However, as pointed out by Ld D.R, the co-ordinate bench, in the case of Texport overseas P Ltd, has restored the matter to the file of the A.O. with the direction to examine the claim of expenditure in accordance with the provisions of section 40A(2) of the Act. Following the same, we restore this issue to the file of the AO with the direction to examine the claim of expenditure mentioned above in terms of the provisions of section 40A(2) of the Act. In view of the above conclusion, we refrain from adjudicating other issues raised by the assessee in the grounds of appeal with regard to correctness of determination of ALP of the SDT.

18. The other ground that needs to be adjudicated in this appeal is Grd.No.13 & 14 raised by the Assessee in the grounds of appeal, which reads as follows:

13. The lower authorities have erred in invoking provisions of Section 68 without appreciating that Sec 68 is not applicable in the instant case. The amount payable to trade creditors being genuine, addition is liable to be deleted.

14. The lower authorities have erred in making additions u/s 68 amounting to Rs. 52,87,093/- without appreciating that Sec 68 cannot be invoked for making additions w.r.t outstanding balance of trade

creditors as both purchase and sale of goods have been accepted by the same authorities.

19. In the draft assessment order the AO has made an addition of Rs. 3,97,93,505/- u/s 68 of the Act on the ground that the assessee has failed to prove the genuineness, identity and creditworthiness of the creditors. The details were filed before DRP as additional evidence. During the remand proceedings, the AO accepted that transactions with creditors are genuine, except for three namely, KS Enterprises, Ritesh Kumar Vasant Kumar & Manoj Traders for Rs.30,94,014/- Rs.5,17,710 and Rs.16,75,369/- respectively. The Appellant vide letter dated 24.02.2021 submitted that it has inadvertently mentioned PAN of Manoj Traders as AXFPS8517S instead of AXFPS8517C & also provided PAN of KS Enterprises. The DRP directed the AO to delete the necessary additions after verifying the genuineness of KS Enterprises & Manoj Traders.

20. Pursuant to the aforesaid direction of the DRP, the AO before passing the impugned order issued notice u/s 142(1) of the Act dated 19.04.2021 to the assessee requesting details of KS Enterprises & Manoj Traders. Against this, the assessee vide response dated 21.04.2021 (Pg 854-855 of Paper Book I) filed the following details:

Name of the Party	Supportings	Reference
KS Enterprises	Copy of Ledger extract	Pg 856-857 of Paper Book-I
	Copy of Confirmation Letter	Pg 359 of Paper Book-I
	Bank Statements	Pg 860-875 of Paper Book-I
	Purchase register along with sample invoices	Pg 876-878 of Paper Book-I
Manoj Traders	Copy of Ledger extract	Pg 858-859 of Paper Book-I
	Copy of Confirmation Letter	Pg 361 of Paper Book-I
	Bank Statements	Pg 860-875 of Paper Book-I

	Purchase register along with sample invoices	Pg 876-878 of Paper Book-I
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21. However, the AO without making any reference to the above evidence filed by the Assessee, passed the final assessment order making additions of Rs.52,87,093/- for the above 3 creditors.

22. In this regard, the learned Counsel for assessee submits that the genuineness of transaction is proved as all the supporting evidences are filed. The goods were purchased and payments have been made through banking channel. None of this is doubted by the AO. Further, it was submitted that when the AO has accepted the purchases, sales & trading results disclosed, therefore additions cannot be made for balances of sundry creditors as these represents figures of purchases. Therefore, provisions of section 68 of the Act are not attracted in the instant case. In support of the same, the following decisions were relied upon:

- *Annamaria Travels & Tours (P) Ltd vs Dy CIT [(2005) 95 TTJ 71 (Delhi) (Pg 1038-1040 of Paper Book II)*
- *IKEA Trading (India) (P.) Ltd vs DCIT, Circle 11(1), New Delhi [2021] 123 taxmann.com 129 (Delhi - Trib.) (Pg 1044 – 1045 of Paper Book II)*
- *CIT, Agra vs Pancham Dass Jain [2006] 156 TAXMAN 507 (ALL.) (Pg 1048 – 1050 of Paper Book II)*

The learned DR relied on the order of the AO.

23. We have carefully considered the rival submissions. From the perusal of the final Assessment Order (paragraph 4.5) it is clear that the only reason given by the AO for not accepting the genuineness of the transaction with M/s. Manoj Traders and M/s. K. S. Enterprises is failure of

the assessee to furnish copy of stock register. In our view, this cannot be a proper reason for rejecting the claim of the assessee when the confirmation letter, purchase register along with sample invoices were furnished by the assessee. The learned Counsel for the assessee also submitted that payments have been made to all the 3 parties and that evidence would demonstrate that the trade creditors were genuine. Taking into account these circumstances, we are of the view that it would be just and appropriate to set aside the issue with regard to the addition of Rs.52,87,093/- to the AO for consideration afresh in the light of the evidence already filed by the assessee and also in the light of the further evidence that the assessee may file with regard to repayment of the trade credits. The AO is directed to consider the claim of the assessee in accordance with law, after affording assessee opportunity of being heard.

24. In the result, appeal by the assessee is treated as partly allowed for statistical purposes.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-
(B. R. BASKARAN)
Accountant Member

Sd/-
(N.V. VASUDEVAN)
Vice President

Bangalore,
Dated: 07.02.2022.
/NS/*

Copy to:

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| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.