

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "B", MUMBAI  
BEFORE SHRI B.R.BASKARAN, ACCOUNTANT MEMBER AND  
SHRI PAWAN SINGH, JUDICIAL MEMBER

ITA No. 3560/M/2017 (Assessment Year- 2010-11)

The Boston Consulting Group (India) Private Ltd, 14 <sup>th</sup> Floor, 227, Nariman Point, Mumbai-400021  <b>PAN: AABCB3524G</b>	Vs.	Principal Commissioner of Income –tax -3 Mumbai, Room No. 614, 6 <sup>th</sup> Floor, Aayakar Bhavan, M.K. Road, Mumbai-400020.
(Appellant)		(Respondent)

Assessee by : Sh. Arvind Sonde  
Advocate

Revenue by : Sh. Bhupendra Kumar  
Singh CIT –DR

Date of hearing : 06.02.2018

Date of Pronouncement : 17.04.2018

**Order Under Section 254(1) of Income Tax Act**

**PER PAWAN SINGH, JUDICIAL MEMBER:**

1. The instant appeal by assessee under section 253 of Income-tax Act, is directed against the order of Principle Commissioner of Income-tax (PCIT) passed under section 263 of Income tax Act, dated 10 March 2017 for assessment year 2010-11. Aggrieved, by the order of learned PCIT the assessee has filed present appeal before us, raising following grounds of appeal;

(1) *On the facts and in the circumstances of the case and in law, the learned PCIT erred in exercising jurisdiction under section 263 of Income tax Act.*

*The appellant, therefore, prays that the order under section 263 of the act passed by learned PCIT be quashed.*

(2) *On the facts and in the circumstances of the case and in law, learned CIT erred in treating the assessment made under section 143(3) of the act read with section 144C(13) dated January 22, 2015 erroneous and prejudicial to the interest of revenue and setting aside the same under section 263 of the Act.*

*The appellant, therefore, prays that the order under section 263 of the Act passed by learned CIT be quashed.*

2. The assessee vide its application dated 16 October 2017 raised following additional ground of appeal;

Without prejudice to the ground No.1& 2 of the assessee's appeal,

(3) *On the facts and in the circumstances of the case and in law, learned Principal Commissioner of Income tax erred in not allowing sum amounting of Rs. 1,06,70,725/- and Rs. 79,74,010/- as bad debts under section 36(1)(vii) of the Income tax Act.*

*The appellant, therefore, prays that some of Rs. 1,06,70,725/- and Rs.79,74,010/- be treated as bad debts.*

3. The brief facts of the case are that assessee company filed its return of income for assessment year 2010-11 on 12<sup>th</sup> October 2010 declaring total income under the normal provision at Rs.23,00,03,890/-. The return of income was selected for scrutiny. During the assessment proceeding under section 143(3), the assessing officer noted that assessee has entered into international transaction with its Associated Enterprises (AE). Therefore, a reference under section 92C(A) was made to the Transfer Pricing Officer (TPO) for determination of Arm's Length Price (ALP) of international transaction between assessee and its Associated Enterprises. The TPO determined the Arm Length Price vide its order dated 28<sup>th</sup> of January 2014 in its order under section 92C(A)(3) and suggested adjustment for Rs. 6,92,35,403/- to the international transaction determined by the assessee. Accordingly, the assessee was given an opportunity by assessing officer and draft assessment was prepared by, wherein adjustment suggested by TPO was made /added to the total

income of the assessee. Further, in accordance with the provision of section 144C the draft assessment order dated 26 February 2014 was served upon the assessee. Against the proposed addition in the draft assessment order, the assessee filed Objection before Dispute Resolution Penal (DRP). The Objections of assessee was disposed of by Id. DRP by giving direction under section 144C(5) on 20<sup>th</sup> November 2014. The DRP upheld the adjustment suggested by TPO in its direction under section 144C (5) of the Act. Therefore, on the basis of direction of DRP an addition of Rs.6,92,35,403/- was made to the total income of assessee while passing assessment order under section 143(3) read with section 144C(13) dated 22 January 2015.

4. The learned PCIT perused the assessment record under section 263 of the Act and took the view that assessment order dated 22 January 2015 is erroneous and prejudicial to the interest of revenue. Therefore, the learned PCIT issued show cause notice under section 263 dated 02 February 2017 to the assessee. The learned PCIT issued show cause notice to the assessee for proposed revision on two issues, number (i) that assessee company had debited advance written off of Rs. 1,96,17,068/- and number (ii) deposit written off of Rs. 2,10,000/-. The Id. PCIT opined that these amounts are not trade advances, the same should have been disallowed by the assessing officer while completing assessment. The learned PCIT also took the view that while passing assessment order under section 143(3) read with section 144C(13) the assessing officer has committed lapse of not applying his mind to the issues. Therefore, the assessment order passed by assessing officer is erroneous and prejudicial to the interest of revenue.
5. The assessee filed its reply dated 28<sup>th</sup> February 2017 before Id. PCIT. In the reply the assessee contended that the underlying nature of amount of advances written off of Rs. 1.96 crore and deposit written off of Rs. 2.10

lakhs represent business expenses incurred by the assessee. The assessee also provided the breakup of amount of Rs. 1.96 crore which consisted of the following amount;

Sr No.	Particulars	Amount (Rs)	Amount(Rs)
1	Payments related to employees cost		
	a) taxes paid in accordance with the provisions of section 192 of the Act	10670725	
	b) tax equalisation	7974010	
	c) other amount receivable from employees	140970	
	Total of (a+b+c)		18785705
2	Payment made to vendors for various business expenses		652037
3	Payment in respect of rented office premises		142244
4	Payment for other miscellaneous business expenses		37082
	Total		19617068

For the amount of deposit written off of Rs.2,10,000/-, the assessee contended that this amount represents a refundable deposit for a residential accommodation taken on lease by the assessee company which could not been recovered by the company on determination of lease term. For both the amounts the assessee contended that the amounts were in the nature of business/trade advances. The assessee further contended that the amounts were allowable as bad debts under section 36(1)(vii) and the same satisfied the conditions prescribed under section 36(2) of the Act. The assessee also referred and relied on the decision of Hon'ble Supreme Court in case of TRF Ltd Versus CIT (2010) 233 ITR 397(SC) for the ratio of law that for the purpose of claiming of deduction it is sufficient if the bed that is written off as irrecoverable in the account of assessee. The assessee further contended that notice under section 263 dated 02 February 2017 is barred by limitation. The assessee submitted that assessing officer passed draft assessment order under section 143(3) read

with section 144C on February 26, 2014. The final assessment order dated 22 January 2015 was passed by assessing officer merely to give effect to the direction of honourable DRP. The assessee submitted that the alleged error, if at all was committed by the assessing officer while passing the draft assessment order, once the draft assessment order is issued by assessing officer, the assessing officer ceased to have jurisdiction on the assessment order since from that stage, the direction of DRP prevails. Accordingly the Id. Counsel for assessee contended that the time limit prescribed under section 263(2) should be reckoned from the end of financial year in which draft assessment order was issued by the assessing officer.

6. The reply of the assessee was not accepted by Ld. PCIT. For the issue related with limitation for issuance of notice, learned PCIT concluded that draft order is not final order and that the demand raised consequent to the draft order is not unforeseeable. Final order was passed by assessing officer under section 143(2) read with section 144C(13) on 22 January 2015, the show cause notice on 02.02.2017, which is well within stipulated period prescribed under section 263(2) of the Act. With regard to the contention of assessee related with twin condition prescribed under section 263 that order is neither erroneous nor prejudicial to the interest of revenue, the learned CIT concluded that assessee had written off advances and deposit written off, should have unearthed by the assessing officer. The assessing officer has failed to examine the claim of assessee. The assessing officer has not applied his mind, no enquiry was conducted by assessing officer and it falls within the category of 'no inquiry', which makes the order erroneous and prejudicial to the interest of revenue. The learned PCIT also examined the contention of assessee related with the allowance of advance written off and deposit written off of Rs. 1.96 crore and Rs. 2.10 lakhs respectively. The learned PCIT concluded that the

claim of written off of advance and deposit written off are not allowable as bad debts. On the basis of his conclusion the ld PCIT set-aside the assessment order dated 22.01.2015 and directed the assessing officer to verify the claims of the assessee related with advance written off of Rs. 1,96,17,068/- and deposit written off of Rs.2,10,000/-. Therefore, aggrieved by the order of PCIT the assessee has filed present appeal before this Tribunal.

7. We have heard learned Senior Counsel, Sh. Arvind Sonde Advocate and learned departmental representative Shri Bhupendra Kumar Singh CIT DR at length and gone through the order of learned PCIT and the material placed before us. The learned Sr. Counsel for assessee submits that the order passed by assessing officer is neither erroneous nor prejudicial to the interest of revenue. The assessment order passed by assessing officer was subjected to the scrutiny of DRP. The DRP consist of three senior Principal Commissioners of Income-tax or three Commissioners of Income tax. The DRP has examined the entire record related with the assessment order on the basis of which the assessment order was passed by assessing officer. Once the assessment order is examined by the DRP, the learned PCIT has no jurisdiction. In other way it was submitted that was the draft assessment order is approved by the DRP, the assessment order is not revisable by learned PCIT. The DRP is vested with the power to confirm, reduce or enhance the variation proposed in the draft order under section 144C (8). On merit it was submitted that advance written off represent business expenses incurred by the assessee wholly and exclusively for the purpose of business. The advances written off consist of Rs. 1,06,70,725/- tax paid by assessee in respect of certain employees in accordance with the provision of section 192 of the Act and amount of Rs. 79,74,010/- was incurred on account of tax equalisation. The assessee company paid taxes in respect of certain employee in accordance

with the provision of the Act the said amount was irrecoverable from the employees and the assessee company has already claimed it under the head 'advance written off' in the financial statement under Schedule-9. Therefore, the said amount represents the business expenditure. For the amount of tax equalisation of Rs. 79,74,010 /- it was submitted that that the assessee group company charged this amount on account of tax equalisation which was subsequently recoverable by the assessee. The same could not be recovered and it was written off during the relevant financial year. The claim of written off was allowable under the law.

8. In support of his submission the learned senior Counsel relied upon the decision of Hon'ble Apex Court in case of CIT Vs Rai Bahadur Hardutroy Motilal Chamaria [1967] 66 ITR 443 and decision of Delhi High Court in CIT Vs Triveni Engineering and Industries Ltd [2012] 343 ITR 245 (Delhi). In support of raising additional ground of appeal, the ld. counsel submits that the additional grounds are related with merit of the case and arising out of order passed by ld. PCIT. No further investigation of facts is required to bring on record as the ground of appeal emanates from the order impugned in the present appeal. In support of his submission, the ld. counsel relied upon the decisions of Hon'ble Supreme Court in NTPC Vs CIT (229 ITR 383) (SC) and Jute Corporation of India Vs CIT (187 ITR 688).
9. On the other hand, the ld. DR for the Revenue supported the order of ld. PCIT. The ld. DR further submits that the ld. PCIT gave detailed reasons in para-5 of his order about the admissibility of claim and in not making necessary investigation by the assessing officer during the assessment proceedings. The assessee has not filed any material to show the business expediency related with the claim of advance written off and deposit written off. The ld. DR further submits that there is no bar in the Act which prevents the ld. PCIT to pass the order after the order of DRP, qua

the issues which were not the subject matter before DRP. The DRP is a part of assessment proceeding and not appellate authority. As per Explanation 2 attached with section 263, the order is erroneous and prejudicial to the interest of Revenue, if the order is passed without making any enquiry or verification of claim which should have been made. The Assessing Officer allowed the relief without enquiring into the claim. On merit, it was submitted that the Assessing Officer has not examined the issue related with the advance written off and deposit written off. The Assessing Officer has not raised any query during the assessment proceeding. While setting aside the assessment order the assessing officer was directed to verify the facts related with claim of write off in accordance with Income-tax Act. On the application for raising the additional ground of appeal, the ld. DR fairly conceded that for additional ground of appeal no new facts are necessary to be brought on record. The ld. DR left the decision on the application on the discretion of Bench.

10. We have considered the rival contention of ld. representative of the parties and have gone through the order of ld. PCIT. First we are taking the application of assessee for raising additional grounds of appeal. We have perused the contents of the application for raising additional ground of appeal and the additional ground of appeal. In the additional ground of appeal the assessee has raised the ground related with the merit of the addition/ claim, which were written off. Considering the law laid down by Hon'ble Apex Court in case of NTPC and Jute Corporation of India (supra), where, the grounds of appeal emanates from the record and no new facts is not required to be brought, the party is entitled to raise such additional ground. Therefore, in our view the application of assessee for raising additional ground of appeal is liable to be allowed. Hence, we are

accepting the application for raising the additional grounds of appeal. The additional ground of appeal is taken on record.

11. Ground No. 1 & 2 relates to validity of revision order passed under section 263 of the Act. Before discussing the facts of the present case we may refer the role of assessing officer and the revisionary authority. The assessing officer is a quasi judicial authority and his order is amenable to statutory appeal or revision, in case any finding of the assessing officer goes against the assessee. However, if the order is prejudicial to the interest of revenue, the remedy of appeal is not available to the revenue. Therefore section 263 is enacted to empower the Commissioner to exercise the power to invoke jurisdiction conferred under section 263 of the Act. Therefore, in our view the order passed by assessing officer must be speaking and substantial. If the order passed by assessing officer is subversive of the administration of revenue, it must be regarded as erroneous and prejudicial to the interest of revenue and the revenue is bound to suffer. In our considered view the order is prejudicial to the interest of revenue as per the provision of section 263; (a) if the order sought to be revised was passed without considering and referring the facts or contains error of facts or law, on the face of it, (b) if the order is based on incorrect assumption of law or facts or allowed the relief silently, or (c) if the order passed by assessing officer in a mechanical way thereby accept what the assessee has stated while furnishing the return of income and failed to make requisite enquiries or does not examine the genuineness or legitimacy of the claim which may be called for as per the facts of the case.
12. We are conscious of the fact that the assessing officer may not be able to draft the assessment order as drafted by judicial officer. Similarly, it is not expected that from the assessing officer that he may not accept or reject the various claim without narrating those claim in his order, at least

there must be some reference of claim in his order. The perusal of the assessment order shows that the assessing officer mechanically accepted the claim with regards to the advance written off and deposit written off. The Id. Counsel for the assessee submitted that the assessing officer had considered the relevant facts and the material while passing the assessment order and the draft assessment order was scrutinised by Id. DRP while considering the objections filed by the assessee. In our view the submission of Id. AR for the assessee is not correct and must fail for the reasons that the DRP was only seized of the objections of the assessee with regard to the TP adjustment. The DRP has no occasion to consider the computation of various head on income. Therefore, it cannot be said that there is approval of the DRP with regard to the computation of deduction. Hence the contention of Id. Counsel for the assessee that the DRP having approved the computation part of the draft assessment order cannot again be revised by the CIT under section 263 is not sustainable.

13. We have also perused the provision of section 144C. In our view every assessment order involving transfer pricing issue does not necessarily required the prior approval of the DRP, it is the option of the assessee either to file appeal before Commissioner (Appeals) or to file objections as provided under section 144C. Under section 144C, the AO shall pass and forward a draft assessment order to the assessee who, thereafter shall, within 30 days of receipt of the draft order (a) file his acceptance of the variations to the AO; or (b) may file his objections with the DRP and the AO. Further, sub-section (5) of Sec.144C provides that the DRP, in a case where any objection is received shall issue the directions, as it thinks fit, for the guidance of the AO to enable him to complete the assessment. Sub-sec.(8) provides power of the DRP, wherein the DRP may confirm, reduce or enhance the variations proposed in the draft order so, however, shall not set aside any proposed variation or issue any direction under

sub-section (5) for further enquiry and passing of the assessment order. Thus, it can be seen that only where variations are made to the returned 'income of the assessee', that the AO has to forward the draft assessment order to the assessee and the assessee shall accept the variations or file objections with the DRP and the DRP may confirm, reduce or enhance the variations. Thus, the approval of the DRP is not to the entire draft assessment order but is only to the variations proposed by the AO related to international transaction of assessee with its associated enterprises. Therefore, we are not inclined to accept the contentions of the assessee on this issue.

14. In *Malabar Industrial Co. Ltd Vs CIT* (243 ITR 83) the Hon'ble Apex Court held that there can be no doubt that the provision cannot be invoked to correct each and every type of mistake committed by the assessing officer, it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category falls the order passed without applying the principles of natural justice without application of mind.”

15. In the present case the order sought to be revived reflects that it was passed in mechanical way and without application of mind by assessing officer, the assessing officer allowed the relief to the assessee without making any investigation of the facts related with the claims of write off(s). In our view the *Explanation 2* of section 263 is squarely applicable on the facts of the present case. Thus, in view of the forgoing reasons the assessment order was passed without making requisite inquiries will satisfy the condition of the order being erroneous and prejudicial to the interest of revenue. The case law relied by ld. Counsel in case of *CIT Vs Rai Bahadur Hardutroy Motilal Chamaria* (supra) assessee is not applicable on the factual matrix of the present case as we have already

referred that the DRP order was confined to those issues which was objected before it and the issue under consideration is with regards to existing power of PCIT under section 263.

16. We are also not convinced with the contention of the Id Counsel for assessee that the revision order is barred by limitation period prescribed under section 263(2). In our considered view no tax liability is created while passing draft assessment order. The tax liability is created under the final assessment order passed under section 143(3) read with section 144C, thus, the period of limitation would start from the date only. Thus, the assessee also failed on this issue. In the result the ground No.1& 2 of appeal raised by the assessee is dismissed.
17. Ground No 3 relates to the allowance of write off of Rs. 1,06,70,725/- and Rs. 79,74,010/- We have noted that the Id. PCIT issued show-cause notice for proposed revision related with advance written off of Rs. 1.96 Crore and deposit written off of Rs. 2,10,000/-. Similarly, while passing the order under section 263, the Id. PCIT set-aside the assessment order under section 143(3) read with section 144C(13) dated 22.01.2015 directed the Assessing Officer to verify the claim of write off of advance deposit of Rs. 1.96 Crore and Rs. 2.10 Lakhs. We have noted that the assessee has not challenged the verification/claim of Rs. 2.10 lakhs in additional ground of appeal. The assessee has only raised ground of appeal related with Rs. 106,70,725/- and Rs. 79,74,010/- (both are part of Rs. 1.96 Crore) as a claim of advance written off. Rest of the figures of claim as bifurcated in para 3 of impugned order are also not challenged by assessee. Thus, we are concerned with the claim of Rs. 106,70,725/- and Rs. 79,74,010/- only.
18. The assessee has filed the details of amount of taxes paid in accordance with the provisions of section 192 of the Act and employee-wise details of tax equalisation. The assessee has also placed on record the copy of

Form-16 issued to the employee (page 3 to 104 of PB). We may refer that the Id. Counsel for the assessee submitted that the claim of the assessee are allowable under the law. Considering the facts that all the details furnished by the assessee require verification at the end of assessing officer. Since, we have upheld the validity of the order of revision order of Id PCIT and have expressed our view that the details furnished by the assessee requires examination at the end of assessing officer, we direct the assessing officer to adjudicate the issue on merit. The assessee may put forth all its contentions before assessing officer. Needless to say that before adjudicating the claims of write off, the assessing officer shall grant opportunity to the assessee before passing the order. In the result the ground No.3 of the appeal is allowed for statistical purpose.

19. In the result the validity of the revision order passed by Id. PCIT is upheld and the additional ground of appeal is restored to the file of assessing officer.

Order pronounced in the open court on 17<sup>th</sup> day of April 2018.

Sd/-

**(B.R. BASKARAN)**

**ACCOUNTANT MEMBER**

Mumbai; Dated 17/04/2018

S.K.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

Sd/-

**(PAWAN SINGH)**

**JUDICIAL MEMBER**

BY ORDER  
(Asstt.Registrar)  
**ITAT, Mumbai**