

**IN THE INCOME TAX APPELLATE TRIBUNAL "K" BENCH, MUMBAI
BEFORE SHRI G.S.PANNU, AM AND SHRI RAVISH SOOD, JM**

ITA No(s). 2459/Mum/2017
(निर्धारण वर्ष / Assessment Year:2012-13)

M/s General Computer Services International, St. John High School, Dilaram Estate, S.V. Road, Goregoan (West), Mumbai - 400062.	बनाम/ Vs.	Principal Commissioner of Income-tax-31, Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN No.		AAGPG5158B
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Anant N. Pai, A.R.
प्रत्यर्थी की ओर से / Respondent by	:	Sh. Jayant Kumar, CIT, D.R.

सुनवाई की तारीख / Date of Hearing	:	23.02.2018
घोषणा की तारीख / Date of Pronouncement	:	21.05.2018

आदेश / O R D E R

PER RAVISH SOOD, JUDICIAL MEMBER:

The present appeal filed by the assessee is directed against the order passed by the Principal Commissioner of Income Tax-31, Mumbai (for short Pr. CIT) under Sec. 263 of the Income Tax Act, 1961 (for short 'Act'), dated 06.03.2017, which in itself arises from the order passed by the A.O under Sec. 143(3) of the Act, dated 31.03.2015 for A.Y. 2012-13. The assessee assailing the order of the Pr.CIT had raised before us the following grounds of appeal:-

1. On facts and circumstances of the case and in law, the learned Principal Commissioner erred in revising the Appellant's assessment order without any credible finding, either at the time of issue of

notice of initiation of revision proceedings or at time of passing his order u/s. 263, to show that the assessment order passed was erroneous and prejudicial to the interests of the Revenue.

The Appellant prays that the order passed u/s. 263 of the Income Tax Act, 1961 may therefore please be quashed in appeal.

2. *On facts and circumstances of the case and in law, the learned Principal Commissioner also failed to note that the assessment order was already a subject matter of appellate order passed by Commissioner (Appeals) at the time of revision and that in this circumstance; he was not competent to revise the assessment order.*

The Appellant prays that the order passed u/s. 263 of the Income Tax Act, 1961 may therefore please be quashed in appeal.

3. *The Appellant reserves the right to add to, alter or delete any of the above grounds with permission of Hon'ble Tribunal."*

2. Briefly stated, the facts of the case are that the assessee firm which is engaged in the business of providing infrastructure facilities to educational institutions had e-filed its return of income for A.Y. 2012-13 on 30.09.2012, declaring total income of Rs. 7,51,720/-. The return of income filed by the assessee was processed as such under Sec. 143(1) of the Act. Subsequently, the case was selected for scrutiny assessment under Sec. 143(2). The assessment under Sec. 143(3) of the Act was completed by the A.O on 31.03.2015 at a total income at Rs. 46,62,880/-.

3. The Pr. CIT called for the records of the assessee for the year under consideration, and after perusing the same observed that the assessee had advanced loans of Rs. 5,63,32,265/- to its wholly owned subsidiary company (for short 'WOS'), viz. M/s Universal Middle East FZCO, UAE, without charging any interest. The perusal of the records revealed that the interest free advances to the aforementioned WOS were made out of the funds which were borrowed by the assessee from three banks. The Pr. CIT observed that the A.O while framing the assessment had made a disallowance of Rs. 30,48,926/- under Sec. 36(1)(iii) of the interest on borrowed capital, to the extent the same were advanced by the assessee free of interest to its WOS. However, the Pr. CIT being of the view that as the aforesaid international transaction should have been referred to the Transfer Pricing Officer (for short 'TPO') for computation of arm's length price ('ALP') as per Sec. 92CA(1) of the Act before making any disallowance, thus held a conviction that the failure on the part of the A.O to do so had rendered the

assessment order dated 31.03.2015 as erroneous in so far as it was prejudicial to the interest of the revenue in view of Explanation 2(a) of Sec. 263(1) of the Act. The Pr. CIT in the backdrop of his aforesaid conviction issued a notice under Sec. 263(1) of the Act to the assessee, calling upon him to show cause as to why the assessment order passed under Sec. 143(3), dated 31.03.2015 may not be revised.

4. The assessee in his reply objected to the proposed revision of the order and submitted that as per the mandate of law an order could be revised, subject to the condition that the same is found to be erroneous in so far as it is prejudicial to the interest of the revenue. It was the contention of the assessee that in a case where the order passed was erroneous, but not prejudicial to the interest of revenue or where the order was found to be prejudicial to the interest of the revenue, but not erroneous, in either of such a situation the power of revision under Sec. 263 could not be exercised. The assessee further submitted that where in a case there were two possible views and the A.O had taken one of the possible view, no occasion to exercise the power of revision did arise. The assessee to buttress its contention that the assessment order passed under Sec. 143(3) could not be revised, submitted that the revisional powers though could be exercised in a case where no inquiry as required under the law was done, however, the same could not be exercised for directing a fuller inquiry to find out whether the view taken is erroneous, specifically when the view had already been taken after carrying out an inquiry. The assessee further submitted that as per Explanation 2(a) of Sec. 263 introduced by the Finance Act, 2015 w.e.f. 01.06.2015, the order passed by the A.O would be deemed to be erroneous in so far it was prejudicial to the interest of the revenue, if the order was passed without making inquiries or verifications which should have been made. It was further submitted by the assessee that Explanation 2(a) to Sec. 263 would take within it sweep the orders passed by the assessing officer without carrying out inquiries or verifications, which a prudent officer would have carried out.

5. The assessee in order to drive home its contention that the order passed by the A.O under Sec. 143(3), dated 31.03.2015 was not amenable for revision under Sec. 263 of the Act, submitted that the A.O during the course of the assessment proceedings had raised the issue of applicability of the transfer pricing provisions and specifically sought the Form 3CEB and TP Study Report. It was submitted by the assessee that after placing on record the aforesaid documents, it was explained to the A.O that as the transaction undertaken by the assessee with its WOS of advancing interest free loans was that of a shareholder function and not of providing any intra group services, thus, as per OECD guidelines, the question of arm's length principle did not arise. The assessee in the backdrop of the aforesaid facts submitted that as the transaction entered into by the assessee with its WOS was not in the nature of a transaction referred to under Sec. 92B of the Act, therefore, the transfer pricing provisions were not applicable. It was thus the claim of the assessee that as the A.O had passed the order after seeking and verifying the TP Study report, thus the order passed by him could not be revised under Sec. 263 of the Act. The assessee in its reply filed with the Pr. CIT stressed on its contention that revisional proceedings under Sec. 263 could not be taken recourse to on account of an inadequate inquiry by the A.O. Alternatively, it was submitted by the assessee that even if the transaction of advancing interest free loan to the WOS (being shareholder function) was considered as an international transaction, the maximum amount of addition that could have been made was Rs. 1,66,538/- being interest @ LIBOR rate. The assessee by raising the aforesaid contention tried to impress upon the Pr.CIT that now when the A.O while framing the assessment had made a disallowance of Rs. 31,91,837/- under Sec. 36(1)(iii) of the Act, in respect of the interest pertaining to the amounts advanced free of interest to the WOS, and also made a disallowance of Rs. 4,829/- under Sec. 14A of the Act, the order passed by him under Sec. 143(3) could not be held to be prejudicial to the interest of revenue. The assessee further submitted that if the order of the A.O was to be revised under Sec. 263 then the additions of Rs. 31,91,837/- and Rs. 4,829/- made under Sec. 36(1)(iii) and 14A of the Act, respectively, would have to be deleted, as in the event of

referring the matter to the TPO, the latter's order would supersede the order of the A.O with respect to the matter of interest on borrowed capital.

6. The assessee submitted that as a precautionary measure it had filed the TP Study Report and Form 3CEB during the course of the assessment proceedings. Based on these, the A.O chose not to make a reference to the TPO, because it was not an international transaction, and/or for the reason that the contemplated additions of Rs. 31,91,837/- under Sec. 36(1)(iii) and Rs. 4,829/- under Sec. 14A would be more than whatever the TPO might suggest after reviewing the transaction as an international transaction. It was thus the claim of the assessee that now when the A.O had passed the order after considering the option available to him and had made the maximum addition on the basis of the facts and information available before him, therefore, having arrived at a possible view, the order passed by him under Sec. 143(3), dated 31.03.2015 could not be revised. The assessee further in order to fortify its claim that the order passed by the A.O under Sec. 143(3), dated 31.03.2015 was not open for revision, submitted that as the assessee had carried the matter in appeal before the CIT(A)-42, Mumbai, who vide his order dated 12.08.2016 had confirmed the additions/disallowances made by the A.O under Sec. 36(1)(iii) and Sec.14A of the Act, therefore, as the order passed by the A.O stood merged in the order of the CIT(A), the same ceased to exist and thus could no more be revised in exercise of powers under Sec. 263 of the Act.

7. The Pr. CIT after deliberating at length on the contentions advanced by the assessee before him, was however not persuaded to subscribe to the same, on the following grounds :-

- (i) The Pr. CIT advertent to the contention of the assessee as regards satisfaction of the twin conditions i.e. the order being erroneous as well as prejudicial to the interest of the revenue for invoking the revisional powers contemplated under Sec. 263 of the Act, observed that both the conditions stood duly satisfied in the case of the assessee. It was observed by him that as the assessee had entered

into an international transaction, therefore, as per clauses (c) and (d) of the *Explanation* below Sec. 92B and Sec. 92CA(1) r.w. CBDT Instruction No. 3, dated 20.05.2003 providing guidance to the TPO's and the AO's to operationalize the transfer pricing provisions and to have procedural uniformity, the A.O was required to make a reference to the TPO to determine the ALP of the international transaction under consideration. The Pr. CIT was of the view that as the A.O had failed to make the required reference, thus in view of clause (c) to *Explanation 2* of Sec. 263(1), the order passed by the A.O not being in conformity with the instruction issued by the CBDT, was to be deemed to be erroneous in so far as it was prejudicial to the interest of the revenue.

- (ii) The Pr. CIT was also not impressed with the contention of the assessee that now when the A.O had made a disallowance of interest on borrowed capital of Rs. 31,91,837/- under Sec. 36(1)(iii) and Rs. 4,829/- under Sec. 14A of the Act, which had been upheld by the CIT(A), therefore, no prejudice was caused to the revenue. The Pr. CIT was of the view that though the aforesaid disallowance made by the A.O had been upheld by the CIT(A), but as the assessee had not forgone its right of carrying the matter in further appeal before the Tribunal, therefore, the aforesaid contention of the assessee did not carry any force. Still further, the Pr.CIT observed that a perusal of the order passed by the CIT(A) revealed that the disallowance under Sec. 36(1)(iii) was sustained by him for the reason that the contentions of the assessee that the amount advanced to its WOS, viz. Universal Middle East FZCO was by way of commercial exigency and as a strategic investment, had not found favour with the appellate authority. However, it was noticed by the Pr. CIT that the CIT(A) while disagreeing with the assessee and upholding the disallowance of interest of Rs. 31,91,837/- made by the A.O under Sec. 36(1)(iii), had neither raised nor even discussed the issue of reference of the said international transaction to the TPO. In the backdrop of the aforesaid

facts, it was observed by the Pr. CIT that the issue of determining the ALP of interest to be charged by the assessee from its WOS was not the same as disallowance under Sec. 36(1)(iii) of the Act, as the former was in context of the income to be charged including allowance for any expense or interest arising from any international transaction, while for the latter pertained to the claim of deduction from the income. The Pr. CIT thus held a conviction that as the issue of reference of the international transaction of the assessee to the TPO had neither been referred to or adjudicated by the CIT(A), thus the same cannot be said to have been the subject matter of the appeal decided by him. On the basis of the aforesaid observations, the Pr. CIT was of the view that as the issue of determining the ALP of the interest which was to be charged by the assessee or that which was liable to be paid by the subsidiary of the assessee, had not been considered and decided by the CIT(A), therefore, as per clause (c) of Explanation 1 of Sec. 263(1), the power of the revisional authority under the aforesaid statutory provision did extend and would always be deemed to have extended to such matters as had not been considered and decided in appeal. The Pr. CIT was thus of the view, that in the absence of any decision by the CIT(A) on the issue of determining the ALP of the interest on the amount advanced by the assessee to its WOS, the right to revise the order in context of the said issue remained vested with him.

- (iii) The Pr. CIT was of the view that as the determining of the ALP of the interest which was to be charged by the assessee on the amount advanced to its WOS, viz. Universal Middle East FZCO, UAE, was an international transaction, therefore, as per CBDT Instruction No. 3, dated 28.05.2003, though a statutory obligation was cast upon the A.O to have made a reference to the TPO, but no such reference in the course of framing of the assessment was made by him. It was further observed by the Pr. CIT that as per Para 3.2 of the Instruction No. 3, issued by the CBDT on 10.03.2016, it was clearly provided that all

cases selected for scrutiny on the basis of transfer pricing risk parameters had to be referred to the TPO by the AO. Still further, as per Para 3.3 of the said Instruction, a case selected for scrutiny on non Transfer Pricing parameters but having an international transaction had to be referred to the TPO, where the A.O notices that the international transactions were undertaken, but the tax payer had not filed the auditors report under Sec. 92E of the Act. As per Para 3.4 of the Instruction the cases where the tax payer had declared the international transaction or specified domestic transaction in the Auditors report filed under Sec. 92E of the Act, but had made certain qualifying remarks to the effect that the said transaction or transactions were not international transactions or did not impact the income of the tax payer, the A.O remained under an obligation to record a satisfaction before seeking the approval of the Pr. CIT to refer the matter to TPO. It was further observed by the Pr. CIT that where the applicability of Chapter X of the Act was objected by the tax payer, the A.O was required to specifically deal with it, so as to make sufficient compliance with the principles of nature justice.

8. On the basis of the aforesaid observations, the Pr.CIT held a conviction that as the A.O had failed to comply with the Instruction No.3 of CBDT with regard to the international transaction of the assessee, hence for the limited purpose of making a reference to the TPO, the order of the A.O, dated 31.03.2015 passed under Sec. 143(3) of the Act was held to be erroneous in so far as it was prejudicial to the interest of the revenue. Thus, on the aforesaid limited issue for making necessary compliance with the Instruction No.3/2016, dated 10.03.2016 of CBDT and also the provisions of Chapter X, specifically Sec. 92CA of the Act, the order of the A.O was set aside with a direction to make a reference to the TPO for determining the ALP relating to the international transaction involved in the case of the assessee, and taking further necessary action in accordance with law. Before parting, it was specifically clarified by the Pr. CIT that the revisionary action under Sec. 263 was not being invoked by him for making

disallowance under Sec. 36(1)(iii) which had been made by the A.O and upheld by the CIT(A), but for the applicability of the specific provisions relating to avoidance of tax specified in Chapter X of the Act relating to international transaction which had not been the subject matter of the appeal before the CIT(A).

9. Aggrieved, the assessee had assailed the order passed by the Pr. CIT under Sec. 263 of the Act, before us. The Ld. Authorized Representative (for short 'A.R') for the assessee at the very outset submitted that he was not pressing ground of appeal no. 2. The **Ground of appeal No. 2** is thus dismissed as not pressed. The ld. A.R adverting to the facts of the case submitted that the Pr. CIT had wrongly assumed jurisdiction under Sec. 263 and set aside the order of the A.O, with a direction to make a reference to the TPO for determining the ALP of the interest pertaining to the amount advanced to the WOS. It was submitted by the Ld. A.R that as the A.O during the course of the assessment proceedings had specifically raised the issue of applicability of the Transfer Pricing provisions and had after perusing the Form 3CEB and TP Study Report which was placed on record, as per his directions, was persuaded to be in agreement with the claim of the assessee that the transaction undertaken with the WOS of advancing interest free loan was that of a shareholder function and not of providing any intra group services, hence as per the OECD guidelines the question of arm's length principle did not arise. It was further averred by the ld. A.R that even otherwise as per Sec. 92CA of the Act, it was discretionary on the part of the A.O to make a reference to the TPO. The Ld. A.R. submitted that as the aforesaid view taken by the A.O was in conformity with certain judicial pronouncements as were then so available in context of the issue under consideration, therefore, it could safely be concluded that he had after making necessary inquiries arrived at a possible view. The Ld. A.R averred that now when the A.O while framing the assessment had arrived at a possible view, therefore, the Pr. CIT could not have exercised his revisional jurisdiction for the purpose of substituting his view as against that arrived at by the A.O. The Ld. A.R. in support of his aforesaid contention relied on

the judgments of the Hon'ble High Court of Bombay in the case of CIT Vs. Gabriel India Ltd. (1993) 203 ITR 108 (Bom) & CIT Vs. Fine Jewellery (I) Ltd. (2015) 372 ITR 303 (Bom) and the judgments of the Hon'ble Supreme Court in the case of CIT Vs. Max India Ltd. (2007) 295 ITR 282 (SC) & CIT Vs. Greenworld Corporation (2009) 314 ITR 81 (SC). It was further vehemently submitted by the Ld. A.R. that as the A.O after making necessary inquiries and perusing the TP Study Report had formed a view that the transactions entered into by the assessee with its WOS were not in the nature of a transaction referred to in Sec. 92B of the Act, and the Transfer Pricing provisions were not applicable, therefore, the Pr. CIT could not have invoked his revisional jurisdiction on the ground of inadequate enquiry by the A.O. The Ld. A.R further submitted that as the assessee had answered the issues on the basis of which the revisional proceedings were initiated by the Pr. CIT, and the latter had while passing his order not shown as to how the same were erroneous, thus, the order of revision could not be sustained and was liable to struck down. The Ld. A.R. in support of his aforesaid contention relied on the judgment of High Court of Andhra Pradesh in the case of CIT Vs. G.K. Kabra Co-Op. Ind. Estate (1995) 211 ITR 336 (AP). It was further averred by the Ld. A.R that though the Pr. CIT had initiated the revisional proceedings on certain specific issues, but while passing the order had traversed beyond them, thus, the order passed by him under Sec. 263 could not be sustained and was liable to be struck down. Reliance in support of the aforesaid contention was placed on the judgment of the Hon'ble High Court of Delhi in the case of CIT V.s Ashish Rajpal (2010) 320 ITR 674 (Del). The Ld. A.R. taking support of certain judicial pronouncements submitted that where the sole basis of revision is found to be non-existent, then the only course available with the Tribunal is to quash the order of revision. It was further the contention of the Ld. A.R. that as the A.O while framing the assessment had made disallowance pertaining to interest on borrowed capital of Rs. 31,91,837/- under Sec. 36(1)(iii) and Rs. 4,829/- under Sec. 14A of the Act, thus in the backdrop of the fact that even if the transaction of advancing interest free loans by the assessee to its WOS was considered as an international transaction, the maximum amount of

addition that could have been made would be Rs. 1,66,538/- being interest @ LIBOR rate. The ld. A.R taking support of his aforesaid contention submitted that it could safely be concluded that the order passed by the A.O under Sec. 143(3) was in no way prejudicial to the interest of the revenue. The ld. A.R further assailed the order passed by the CIT under Sec. 263, on the ground that though a perusal of the 'Show Cause' notice (for short 'SCN') issued by the Pr. CIT revealed that the order passed by the A.O was sought to be revised in view of clause (a) to *Explanation 2* of sub-section (1) of Sec. 263, however, the revision was carried out by him on the basis of clause (c) to *Explanation 2* of sub-section (1) of Sec. 263. The ld. A.R taking support of his aforesaid contention submitted that the Pr. CIT had as a matter of fact traversed beyond the 'SCN' while revising the order in exercise of powers vested with him under Sec. 263 of the Act. The ld. A.R further adverting to the merits of the case, submitted that as on the date of framing of the assessment, viz. 31.03.2015, two of the CBDT Instructions relied upon by the Pr. CIT i.e (i). Instruction No. 15-2015, dated 16.10.2015; and (ii). Instruction No. 3/2016, dated 10.03.2016, were not available before the A.O, thus the assessment order passed by him could not be held as erroneous in so far it was prejudicial to the interest of the revenue, on the ground that the A.O had failed to comply with the said respective instructions.

10. Per contra, the Ld. Departmental Representative (for short 'D.R.') relied on the order passed by the Pr. CIT under Sec. 263 of the Act. It was submitted by the Ld. D.R that as the A.O while framing the assessment had failed to make a reference to the TPO as required by the CBDT Instruction No. 3, dated 28.05.2003, therefore, the Pr. CIT rightly appreciating that the order passed by the A.O under Sec. 143(3) of the Act, dated 31.03.2015 was erroneous in so far as it was prejudicial to the interest of the revenue, as the same was passed not in accordance with the Instructions issued by the CBDT, had thus rightly exercised the powers vested with him under Sec. 263 and had set aside the order of the A.O on the limited issue that the latter in compliance of the CBDT Instruction No. 3/2016, dated 10.03.2016

and also the provisions of Chapter X, specifically Sec. 92CA of the Income Tax Act, 1961 shall make a reference to the TPO for determining the ALP relating to the international transaction and taking further necessary action in accordance with law. The Ld. D.R submitted that as the Pr. CIT being well within his right had exercised his revisional jurisdiction under Sec. 263 of the Act, thus no infirmity did emerge from his order. The ld. D.R submitted that as the A.O had failed to make necessary inquiries as regards the international transaction of the assessee, which consequently had led to failure on his part to make a reference to the TPO in terms with the CBDT Instruction No. 3, dated 20.05.2003, thus the assessment order passed by him was rendered as erroneous in so far as it was prejudicial to the interest of the revenue. It was averred by the ld. D.R that as clause (a) only supplements clause (c) to *Explanation 2* of sub-section (1) of Sec. 263, thus a conjoint perusal of the same was required to be carried out. The ld. A.R submitted that as the assessee had not filed the audit report in Form No. 3CEB as per the mandate of Sec. 92E of the Act, therefore, its case was not taken up for scrutiny assessment on transfer pricing ground. The ld. A.R further submitted that the A.O despite learning that the international transaction of the assessee were more than Rs. 5 crores, however failed to make a reference to the TPO under Sec. 92CA(4) of the Act. The ld. D.R in support of his contention that it was mandatory on the part of the A.O to have made a reference to the TPO, relied on the judgment of the High Court of Delhi in the case of *Ranbaxy Laboratories Ltd. Vs. CIT (2012) 345 ITR 193 (Del)*, wherein the High Court has held that by virtue of CBDT Instruction No. 3, dt. 25th May, 2003, it is mandatory on the part of AO to make reference to TPO under s. 92CA(4) wherever the aggregate value of international transaction exceeds Rs. 5 crores. The ld. D.R further submitted that if the A.O in discharge of the statutory obligation so cast upon him, would had made a reference to the TPO, then an addition higher than the domestic rate would have been made. The ld. D.R in order to drive home his aforesaid contention relied on the order of the ITAT, Mumbai in the case of *GeodesicLtd. Vs. DCIT-8(1), Mumbai (2017) 79 taxmann.com 215 (Mumbai-Trib)*.

11. The ld. A.R in his rejoinder, submitted that as clause (c) and clause (a) to *Explanation 2* of sub-section (1) of Sec. 263, are not interchangeable, as both of the respective clauses operate in their independent fields, therefore, clause (c) could not been substituted by the Pr. CIT while revising the order by clause (a). The ld. A.R submitted that the revenue cannot be permitted to add any new ground to support the order passed under Sec. 263 of the Act. The ld. A.R in support of his aforesaid contention relied on the judgment of the High Court of Punjab & Haryana in the case of CIT Vs. Jagadhri Electric Supply & Industrial Co. (1983) 140 ITR (P&H). It was further submitted by the ld. A.R that as the transaction of advancing interest free amount to its WOS was a shareholding transaction, thus for the said reason the assessee had not filed the transfer pricing audit report in Form 3CEB.

12. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. We may herein observe that the Ld. A.R assailing the validity of the order passed by the Pr. CIT under Sec. 263 of the Act, had averred that the assessment order in the case of the present assessee was passed by the A.O in accordance with the CBDT Instruction No. 3/2003, dated 20.05.2003. It was the claim of the Ld. A.R that as the Instruction No. 3/2003, dated 20.05.2003 was applicable to cases which were picked up for scrutiny assessment on transfer pricing issues and was not applicable to those cases which had been selected for scrutiny assessment on a non-transfer pricing issues, therefore, as the case of the assessee was taken up for scrutiny assessment on a non-transfer pricing issue, thus the aforesaid Instruction No. 3/2003, dated 20.05.2003 was not applicable to its case. It was further averred by the Ld. A.R that the requirement of making a reference to the TPO in the cases which were selected on non-transfer pricing issues was required only on the basis of a subsequent Instruction No. 3/2016, dated 10.03.2016, which however was not applicable to the case of the assessee for A.Y. 2012-13. We find that the Ld. A.R had tried to impress upon us that as per the CBDT Instruction No. 3/2003, dated 20.05.2003 there was no

requirement of making a reference to the TPO in cases which had been picked up for scrutiny assessment on non-transfer pricing issues, therefore, the assessment framed by the A.O in the case of the assessee could not be held to be in contravention or in disregard of the aforesaid Instruction. Rather, the Ld. A.R had further tried to fortify his claim that the requirement of making a reference to the TPO in a case which was selected for scrutiny assessment on non-transfer pricing issue was required only as per the CBDT Instruction No. 3/2016, dated 10.03.2016, which however was not applicable to the case of the assessee for A.Y. 2012-13.

13. We may herein observe, that at the first blush the aforesaid contention of the Ld. A.R appeared to be convincing as the assessment order passed by the A.O under Sec. 143(3), dated 31.03.2015, without making any reference to the TPO was not apparently found to militate against the CBDT Instruction No. 3/2003, dated 20.05.2003, which was applicable only in cases which were selected for scrutiny assessment on transfer pricing issues. But, after deliberating at length on the issue under consideration, we are unable to persuade ourselves to subscribe to the contention advanced by the Ld. A.R before us. We find that as the assessee had advanced an interest free loan to its WOS, viz. M/s Universal Middle East FZCO, UAE, which as observed by the Pr. CIT being a transaction of lending of money by the assessee to its associate enterprise, viz. M/s Universal Middle East FZCO, UAE, was clearly as per Sec. 92B(1) an international transaction carried out by the assessee during the year under consideration. We are unable to persuade ourselves to be in agreement with the claim of the assessee that the advancing of the amount to its WOS was not be characterized as an international transaction. Rather, the assessee pursuant to the query raised by the A.O in the course of the assessment proceedings, as regards the applicability of the transfer pricing provisions, had furnished with him Form 3CEB and TP Study Report. We are not impressed with the claim of the assessee that it had filed the TP Study Report and Form 3CEB with the A.O as a precautionary measure to avoid any future litigation and penal consequences. As a person who had entered into an international

transaction during the previous year is required as per the mandate of Sec. 92E of the Act to obtain a report from an accountant in Form 3CEB, therefore, we are unable to persuade ourselves to accept the claim of the assessee which had furnished the Form 3CEB along with the TP Study Report during the course of the assessment proceedings, that it had not carried out any international transaction during the year under consideration. Rather, as per Sec. 92E it is obligatory on the part of a person who had entered into an international transaction to furnish a report in Form 3CEB, on or before the specified date i.e. the 'due date' applicable for filing of the return of income for the year under consideration, in the prescribed form duly signed and verified by a Chartered Accountant. We are of the considered view that in the backdrop of the aforesaid facts, the assessee who though remained under a statutory obligation to have filed the report in Form 3CEB for the year under consideration i.e. A.Y. 2012-13, latest by 30.09.2012, had however failed to do so.

14. We are persuaded to be in agreement with the claim of the assessee, that as per the CBDT Instruction No. 3/2003, dated 20.05.2003, the A.O remained under a statutory obligation to make a reference to the TPO in those cases which were picked up for scrutiny assessment on transfer pricing issues, and not those which had been selected for scrutiny assessment on non-transfer pricing issues. However, in the case before us, though an international transaction was carried out by the assessee during the year, but as the assessee had not filed statutory audit report in Form 3CEB which was obligatory on its part to have been filed latest by 30.09.2012, therefore, the case of the assessee could not have been selected for scrutiny assessment on transfer pricing issue. Rather, the fact that the assessee had carried out an international transaction came to light only in the course of the assessment proceedings, which further stood proved to the hilt on placing on record of Form 3CEB by the assessee. We are of the considered view that the assessee cannot be allowed to take benefit of circumventing the applicability of the CBDT Instruction No. 3/2003, dated 20.05.2003, by withholding the fact of having carried out an international

transaction while filing its return of income for A.Y. 2012-13. We thus, are of the view that in the backdrop of the aforesaid facts, it stands proved to the hilt that the assessee by advancing loans to its WOS, viz. Universal Middle East FZCO, UAE, had carried out an international transaction during the year under consideration, but had in blatant violation of the statutory obligation of filing the requisite details of the said international transaction in the prescribed Form 3CEB along with its return of income for the year under consideration, had however filed the same only during the course of the assessment proceedings. Be that as it may, in the backdrop of the aforesaid facts, we are of a strong conviction that the assessee cannot seek non-applicability of the CBDT Instruction No. 3/2003, dated 20.05.2003. We are of the considered view that the failure on the part of the A.O to have made a reference to the TPO during the course of the assessment proceedings, having rendered the order passed by him under Sec. 143(3), dated 31.03.2015 as erroneous in so far as it was prejudicial to the interest of the revenue, thus, had rightly been revised by the Pr. CIT. We are of the considered view that no infirmity emerges from the setting aside by the Pr. CIT of the order passed by the A.O, on the limited issue that a reference shall be made to the TPO for determining the ALP of the international transaction carried out by the assessee.

15. We shall now advert to the alternative contention raised by the Ld. A.R that as the A.O had made a disallowance of interest on borrowed capital under Sec. 36(1)(iii) of Rs. 31,91,837/- and under Sec. 14A of Rs. 4,829/- in respect of the interest free advance given by the assessee to its WOS, therefore, even if the transaction of advancing interest free loan to the WOS was considered as an international transaction, the order passed by the A.O by no means would be prejudicial to the interest of the revenue. It was submitted by the ld. A.R. that by characterising the advancing of interest free loan by the assessee to its WOS as an international transaction, as the maximum addition that could be made was Rs. 1,66,538/- being interest @ LIBOR rate, hence in the backdrop of disallowance under Sec.36(i)(iii) of Rs.31,91,837/- made by the A.O while framing the assessment under Sec.

143(3), the order passed by the A.O would in no way be prejudicial to the interest of the revenue. We have given a thoughtful consideration to the contentions advanced by the Ld. A.R and are unable to persuade ourselves to accept the same. We find ourselves to be in agreement with the observations of the Pr. CIT that the determining of ALP in respect of interest pertaining to amount advanced to an associate concern is not the same as disallowance of interest on borrowed capital under Sec. 36(1)(iii) of the Act. We are persuaded to subscribe to the view of the Pr. CIT that determining of ALP relates to the income to be charged including allowance for any expense or interest arising from any international transaction, while for the disallowance under Sec. 36(1)(iii) relates to the claim of deduction from income. The **Grounds of appeal No. 1 and 3** raised by the revenue are dismissed.

16. We thus in terms of our aforesaid observations finding no reason to dislodge the well reasoned order passed by the Pr. CIT under Sec. 263 of the Act, thus uphold the same.

17. The appeal filed by the assessee is dismissed in terms of our aforesaid observations.

Order pronounced in the open court on 21/05/2018

Sd/-

(G.S. Pannu)

ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक 21.05.2018

Ps. Rohit

Sd/-

(Ravish Sood)

JUDICIAL MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

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

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai