IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD ñCòBENCH

**Before: Shri Rajpal Yadav, Judicial Member**
**And Shri Amarjit Singh, Accountant Member**

**ITA No. 2892/Ahd/2016**
**Assessment Year 2008-09**

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| The DCIT,<br>Circle-1(1)(1),<br>1st Floor, Aaykar Bhavan,<br>Race Course Circle,<br>Vadodara-390007<br>(Appellant) | Vs | Bundy India Ltd.<br>2, GIDC, Industrial Estate, Makarpura,<br>Baroda-390014<br>PAN: AAACB3039M<br>(Respondent) |

**Revenue by: Shri Prasoon Kabra, Sr. D.R.**
**Assessee by: None**

Date of hearing : 24-04-2018
Date of pronouncement : 22-05-2018

**आदेश/ORDER**

**PER : AMARJIT SINGH, ACCOUNTANT MEMBER:-**

This Revenueôs appeal for A.Y. 2008-09, arises from order of the CIT(A)-1, Vadodara dated 30-08-2016, in proceedings under section 143(3) of the Income Tax Act, 1961; in short ñthe Actò

2. The revenue has raised following grounds of appeal:-

*"1. The order of the Hon'ble ITAT bearing order No. 1650/Ahd/2014 dtd 31.03.2016, i.e. for A.Y 2008-09 has been appealed before the Hon'ble Gujarat High Court and further in order to keep the matter alive, a second appeal is filed against the order of Ld. CIT(A), wherein the order u/s 143(3) rws 263 of the Act dtd. 20.03.2015, has been annulled."*

3. The brief fact of the case is that assessee has filed return of income declared loss of Rs. 2, 04,77,664/- on 30th Sep, 2008. Thereafter, the case was assessed u/s. 143(3) r.w.s. 144C(3) of the act by determining total income at Rs.

8,57,52,857/- The major addition in the assessment order was made on account of transfer pricing Rs. 10,58,37,07/1/-, disallowance u/s. 14A r.w. 8D of the act of Rs. 24,295/- and disallowance u/s. 40(a)(ia) of Rs. 3,69,155/- . The income was determined at Rs. 85,77,52,857/- after setting off business loss of Rs. 2,04,77,664/-. Subsequently, the ld. CIT-I has passed order u/s. 263 of the act on 27th March, 2014 and set aside the order of the assessing officer to frame assessment in view of following issues:-

Set off of arms length price against brought forward losses

4. The Ld. CIT stated that assessing officer has allowed the addition made on account of arms length price computed u/s. 92CA(3) to be set off against brought forward losses. He was of the view that determining of arms length price does not fall under any of the heads of income specified u/s. 14, therefore, the allowing of the same against the brought forward losses should have been examined in detail.

Short of Deduction on TDS

5. It was submitted by the assessee that it had paid total Rs3,64,61,642/- to M/s. M/s. TI Group Automotive System Ltd. of U.K. as management charges and out of this amount it had disallowed sum of Rs.1,61,53,514 while computing business income u/s 40(a)(i) of the act. The assessee has also submitted that as per provision of DTAA the surcharge and education cess should not be added to the tax.The ld. CIT-I has directed the assessing officer to ascertain the amount paid to M/s. M/s. TI Group Automotive System Ltd. of U.K.(TI UK) and the disallowance made by the assessee u/s. 40(a)(ia). He has also directed the assessing officer to verify the tax deducted on the said amount paid as per provisions under double taxation avoidance (DTA) between India and U.K.

Thereafter, the assessing officer passed order u/s. 143(3) r.w.s. 263 of the act on 30th March, 2015 by disallowing an amount of Rs. 1,96, 69,109/- u/s. 40(a)(ia) for short deduction of TDS. The assessing officer has also held that the transfer pricing was the only enhancement of the income which does not fall under any

heads specified u/s. 14 of the act. Therefore, it cannot be considered as business income and no set off of business loss can be allowed. Consequently he has made addition to the tune of Rs. 2,00,84,214/- to the total income of the assessee.

6. Aggrieved assessee filed appeal before the ld. CIT(A). The ld. CIT(A) has allowed the appeal of the assessee on the ground that ITAT Ahmedabad vide its decision in the case of the assessee in ITA No. 1650/Ahd/2014 passed on 13th Feb, 2015 held that the order u/s. 263 passed by the ld. CIT is not sustainable in the eyes of law. Therefore, the ld. CIT(A) has held that the assessment passed u/s. 143(3) r.w.s. 263 in pursuance of the order of ITAT, Ahmedabad is annulled. During the course of appellate proceedings before us, the ld. departmental representative has supported the order of assessing officer. On the other hand nobody has attended from the side of assessee. However, a written submission dated 23rd April, 2018 was filed. In the written submission, it was stated that dispute resolution panel DRP in assessee's own case for assessment year 2010-11 on similar facts and circumstances has issued direction in favour of the assessee by stating that section 92CA(2) of the act is a procedural section which lays downs how income from international transactions should be computed. It does not change nature of income nor can create any new head of chargeable income under the act. Accordingly, the DRP has accepted the contention of the assessee and directed the assessing officer to allow the benefit of set off/carry forward losses as per the regular provisions of act. Regarding short deduction of TDS, in the written submission it is submitted that the double taxation avoidance agreement (DTAA) was considered by the assessee as per which surcharge and education cess not to be added for the purposes of withholding tax.

7. We have heard ld. departmental representative and perused the material on record carefully. We have noticed that the Co-ordinate bench of the ITAT in the case of the assessee vide ITA 1650/Ahd/2014 dated 13th Feb, 2015 has held

that the order u/s. 263 in the case of the assessee for the assessment year under consideration passed by the ld. CIT on 27th March, 2014 is not sustainable in the eyes of law. The relevant part of the decision of Co-ordinate Bench of the ITAT is reproduced as under:-

> *"5. We have heard both sides and perused the orders of the authorities below. As far as the first objection of the Ld. Commissioner about the correct method of the computation of assessed income is concerned, since other authority of the Revenue Department i.e. DRP has already held that the benefit of set off/carry forward of losses are to be computed as per the regular provisions of the Act, therefore, we hereby hold that there was no legal sanctity on the part of Ld. Commissioner to direct the AO to verity and decide afresh this issue.*
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> *6. Further, we hereby hold that the decision of Hon'ble Delhi Court pronounced in the case of ITAT vs. DG Housing Project Ltd 343 ITR 329 (Delhi) is applicable wherein it was held that the Ld. Commissioner again remitting the matter for a fresh decision to the AO to conduct further inquiries without a finding that the order of the AO is erroneous is not sustainable. Therefore, we are of the view that the manner in which the Ld. Commissioner has given direction to the AO are not in line with several decisions of Hon'ble courts namely, CIT vs. Gabreil India Ltd 71 taxman 585, CIT vs. Arvind Jewellers 150 taxman 170 (Gujarat).*
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> *7. About the second issue raised by Ld. Commissioner, we hold that firstly the AO has examined that issue on those relevant facts hence cannot be said to have committed an error and secondly the issue can be said to be controversial because in the case of DIC Asia Pacific Lt. vs. ACIT International taxation 22 taxmann.com 310 (Kolkatta), it was held as under:-*
>
> > *"Held*
> >
> > *plain reading of provisions of articles 2, 11 and 12 of India Singapore DTAA shows that while interest and royalties can indeed be taxed in the source State, the tax so charged on the same, under articles 1 and 12, cannot exceed 15 per cent and 10 per cent respectively. The expression 'tax' is defined in article', 2(I) to include 'income-lax' and is stated to include 'surcharge' thereon, so far as India is concerned Article 2(2) further extends the scope of the 'tax' by laying down that it shall also cover 'any identical or substantially similar taxes which are imposed by either contracting State after the date of signature of the present agreement in addition to, or in place of, the taxes referred to in paragraph 1' [Para 6]*
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> > *The education cess, as introduced in India initially in year , was nothing but in the nature of a additional surcharge. It was described as such in the Finance Act introducing the said cess. [Para 8]*
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> > *Article 2(1) of the applicable tax treaty provides that the taxes covered shall include tax and surcharge thereon. Once one comes to conclusion that education is nothing but an additional surcharge, it is only corollary thereto that the education cess will also be covered by the scope of article 2. Accordingly, provisions of articles 11 and 12 must find precedence over the provisions of the Income-tax Act and restrict the taxability, whether in respect of income-tax or surcharge or additional surcharge – whatever name called, at the rates specified in the respective Article. In any case, education cess was introduced the Finance Act, 2004, with effect from assessment year 2005-06 which was much after the signing of India- Singapore tax treaty on 24-1-1994. In view of the*

> *specific provisions to the effect that the scope of article 2 shall also cover 'any identical or substantially similar taxes which are imposed by either contracting State after the date of signature of the present agreement in addition to, or in place of the taxes referred to in paragraph 1, and in view of the fact that education cess is essentially of the same nature as surcharge, being an additional surcharge, the scope of article 2 also extends to the education cess. [Para 9]*
>
> *Therefore, the education cess cannot be levied in respect of tax liability of the assessee-company. [Para 10]"*

*8. We have reproduced the above paragraph with view to know whether this issue was prejudicial or not and whether the AO has taken one view which was also a plausible view. Moreover, we have noted that Ld. Commissioner has not demonstrated any breach of law or procedure by the AO to allege that the impugned order of the AO was prejudicial to the interest of the revenue. Rather the direction of Ld. Commissioner appears to be general in nature asking the AO to verify the facts again afresh. In the absence of any independent finding and leaving the AO to start a fresh investigation is not within the powers assigned u/s. 263 of the IT Act. We therefore hold that the order u/s. 263 is not sustainable in the eyes of law."*

After considering the above facts and judicial findings of the Co-ordinate Bench, we considered that there is no infirmity in the decision of ld. CIT(A) wherein it is held that the assessment order passed under section 143(3) r.w.s 263 in pursuance of the decision of ITAT is annulled. Accordingly, we do not find any merit in the appeal of the revenue and the same is dismissed.

8. In the result, the appeal of the revenue is dismissed.

Order pronounced in the open court on 22-05-2018

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| **Sd/-** | **Sd/-** |
| **(RAJPAL YADAV)** | **(AMARJIT SINGH)** |
| **JUDICIAL MEMBER** | **ACCOUNTANT MEMBER** |

**Ahmedabad : Dated 22/05/2018**

**आदेश** क□□ा□ल□प अ□ेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद