आयकर अपीलीय अधिकरण,चण्डीगढ़ न्यायपीठ "बी" , चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "B", CHANDIGARH

श्री संजय गर्ग, न्यायिक सदस्य एवं डा. बी.आर.आर, कुमार, लेखा सदस्य
BEFORE: Sh. SANJAY GARG, JM & DR. B.R.R. KUMAR, AM

आयकर अपील सं./ ITA NO. 643/Chd/2018
निर्धारण वर्ष / Assessment Year : 2014-15

M/s J.S.K. International Vardman Bhud Road Gullerwala Baddi, Distt. Solan	बनाम	Pr. CIT Shimla
स्थायी लेखा सं./PAN NO: AAEFJ8801B		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri. Satish Agarwal
राजस्व की ओर से/ Revenue by : Dr. Gulshan Raj

सुनवाई की तारीख/Date of Hearing : 04/09/2018
उदघोषणा की तारीख/Date of Pronouncement : 29/11/2018

आदेश/Order

PER DR. B.R.R. KUMAR, A.M

The present appeal has been filed by the Assessee against the order of the Ld. Pr. CIT(A), Shimla.

2. In the present appeal Assessee has raised the following grounds :

(1) That the order passed by the Learned Principal Commissioner of Income Tax, Shimla is arbitrary, biased and bad in law and in facts of the case.

(2) That the order passed by the Learned Principal CIT under section 263 deserves to be quashed as the order passed by the Assessing Officer was neither erroneous nor pre-judicial to the interest of the revenue.

(3) That the Learned Principal CIT has grossly erred in quoting out of context the observations of judgment of Apex Court in the case of Malabar Industrial Company Vs. CIT to invoke jurisdiction under section 263 which is patently illegal and bad in law.

(4) That the Learned Principal CIT has grossly erred in incorrectly invoking the provisions of Explanation 2(c) of section 263(1) to assume jurisdiction under section 263 which order deserves to be quashed.

(5) That the Learned Principal CIT has grossly erred in holding that the order passed under section 143(3) by the DCIT, Circle Parwanoo on 08.03.2016 in which one of the parameters under scrutiny through CASS was to verify large specified domestic transactions (form 3CEB) had to be compulsorily referred to the TPO in accordance with instruction number 3/2016-F.No. 500/9/2015-APA-II dated 10.03.2016 ignoring the fact that the assessment order had already been passed on 08.03.2016 in view of which the aforesaid instruction issued by the CBDT could not have been applied.

(6) That the Learned Principal CIT has grossly erred in invoking provisions of section 263 of the Act ignoring the fact that a specific query had been raised by the Assessing Officer during the course of assessment proceedings vide notice dated 06.01.2016 order sheet entry dated 29.02.2016 and in response to which a copy of the transfer pricing study was submitted and is on record.

(7) That the Learned Principal CIT has grossly erred in invoking para 7 of CBDT instruction dated 16.10.2015 about which the appellant is unaware nor could have ensured the following of the same by the Assessing Officer even if it was held to be applicable.

(8) That the Learned Principal CIT has grossly erred in holding that the assessment order passed by the Assessing Officer is without proper application of mind as well as without making proper enquiries into the facts.

3. Detailed facts taken from the order of the Pr.CIT are that the assessee filed return of income for the A.Y. 2014-15 on 25/11/2014 claiming deduction of Rs. 67,26,292/- under section 80IC of the Income Tax Act,1961. The assessment u/s 143(3) of the Income Tax Act, 1961 passed by DCIT Parwanoo on 08.03.2016. The case was selected for scrutiny under CASS, to verify the following reasons:

i) Large deduction claimed under Chapter VI-A.
ii) Large specified domestic transaction(s) (Form 3CEB)
iii) Mismatch in amount paid to related persons u/s 40A(2)(b) reported in Audit report and ITR.

4. Thereafter, the Assessing Officer vide his office letter No. 4199, dated 23.01.2018 has submitted a proposal to review the assessment order passed u/s 263 of the Act inter-alia submitting that this case was not referred to the Transfer Pricing Officer (TPO) by the then AO even though the case was selected for scrutiny on the basis of TP risk parameters. Elaborating the same he has submitted that one of the parameters for selecting the case under scrutiny through CASS was to verify *"large specified domestic transaction(s)(Form 3CEB)",* but the AO has completed the assessment order without referring the issue of domestic transfer pricing to the TPO as required vide instruction No. 3/2016-F.No.500/9/2015-APA-II dated 10.03.2016; whereby, it was clarified that all cases selected for scrutiny, either under CASS or under the compulsory manual selection system in accordance with the CBDT's annual instructions in this regard- e.g., instruction No. 6/2014 for selection in F.Y. 2014-15 and Instruction No. 8/2015 for selection in F.Y. 2015-16), on the basis of transfer pricing risk parameters (in respect of International Transactions or Specified Domestic Transactions or both), have to be compulsorily referred to the TPO by the Assessing Officer, after obtaining the approval of the jurisdictional PCIT or CIT, for determining Arms Length Price..

5. On account of the above, since the case of the assessee was selected for scrutiny based on Transfer Pricing as a risk parameter and the AO has failed to refer the same to the TPO for determining the arms length price, the PCIT issued a show cause notice u/s 263 of the Act r.w. Explanation -2, vide office letter No. 8706 dated 19.02.2018, as under:-

> *"2.On review of the case records in your case for the assessment year 2014-15 by the undersigned, it is noticed that the case of the assessee- firm was selected for scrutiny through CASS, to verify the following reasons :-*
>
> *iv) Large deduction claimed under Chapter VJ-A.*
>
> *(v) Large specified domestic transaction(s) (Form 3CEB)*
> *(vi) Mismatch in amount paid to related persons u/s 40A(2)(b) reported in Audit report and*
>
> *On perusal of the office note given by the Assessing Officer in the assessment order passed u/s 143(3) dated 08.03.2016, it is found that although the AO has stated in the said office note that" this case was selected for scrutiny under CASS for examining the large deduction claimed under chapter VI-A, large specified domestic transaction(s) (Form 3CEB) and mismatch in amount paid to related persons u/s 40A(2)(b) reported in audit report and ITR. The same has been examined." However, on verification of the case records, nothing was found in the relevant assessment folder to suggest that the large specified domestic transaction(s) (Form 3CEB) have been verified by the Assessing Officer during the course of assessment proceedings. Thus, apparently, the Assessing Officer has not verified the same moreover, the Assessing Officer was also not empowered to verify the "specific domestic transactions" involving Transfer Pricing Risk Parameter, which is more clearly established from the following facts*
>
> *3. As per the Instruction No. 3/2016- F.No.500/9/20l5-APA-II dated 10 March, 2016 all the cases selected for scrutiny, either under the Computer Assisted Scrutiny Selection [(CASS] system or under the compulsory manual selection system (in accordance with the CBDT's annual instructions in this regard -for example, Instruction No. 6/2014 for selection in F.Y 2014-15 and Instruction No 8/201 5for selection in F. T 2015-16 on the basis of transfer pricing risk parameters [in respect of international transactions or specified domestic transactions or both have to be referred to the TPO by the AO, after obtaining the approval of the jurisdictional Principal Commissioner of Income-tax (PCIT) or Commissioner of Income-tax (CIT). The fact that a case has been selected for scrutiny on a TP risk parameter becomes clear from a perusal of the reasons for which a particular case has been selected and the same are invariably available with the jurisdictional AO. Thus, if the reason or one of the reasons for selection of a case for scrutiny is a TP risk parameter, then the case has to be mandatorily referred to the TPO by the AO, after obtaining the approval of the jurisdictional PCIT or CIT.*
>
> *3.1 However, it is noticed that the Assessing Officer, has completed the assessment u/s 143(3) of the Income-tax Act, 1961 in your case without following the directions of the CBDT, as per the Instruction No. 3/2016- F.No.500/9/2015-APA-II dated 10th March, 2016 as mentioned above.*
>
> *4. In the light of above facts and failure on the part of the A.O. to verify and examine the above shows negligence on the part of the A.O. and, thus, constitutes an error within the meaning of Section 263(1) of the Income-tax Act confers the power upon the Commissioner to call for and examine the records of a proceeding under the Act and revise any order if he considers the same to be erroneous and prejudicial to the interests of the Revenue. As per the Explanation 2 For the purpose of this section, it is hereby declared*

that an order passed by the Assessing Officer shall be deemed to be erroneous and prejudicial to the interests of the Revenue, if in the opinion of *the Principal Commissioner or Commissioner :-*

(a) the order is passed without making inquiries or verification which, should have been made; or

(b) the order is passed allowing any relief without inquiring into the claim; or

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

4.1 The assessment, thus, framed by the A.O. for the A.T. 2014-15 vide order passed u/s 143(3) of the I.T. Act, 1961 on 08.03.2016 is erroneous, in so far as it is prejudicial to the interest of revenue.

5. The negligence on the part of the A.O. and his failure to appreciate the facts on record and follow the directions of the CBDT, amounts to an error within the
meaning of section 263(1) - Explanation 2 (c)- of the I.T. Act, 1961, as failure of the Assessing Officer to refer the case in which "specified domestic transactions" were reported by the assessee and mandatorily was required to be referred to the TPO by the AO, makes the error also prejudicial to the interest of revenue. In view of the facts, I propose to set aside/cancel/annul/modify the assessment order passed u/s 143(3) of the Act, 1961 on 08.03.2016 by Dy. Commissioner of Income tax, Circle, Parwanoo in your case for the A.T. 2014-15 and direct him to make a fresh assessment on the above lines, as the case may be.""

6. After giving an opportunity to the Assessee the Ld. PCIT held that the order passed by the Assessing Officer is erroneous in so far as prejudicial to the interest of the Revenue as the AO has not referred the matter to the TPO in accordance with the instructions issued by the CBDT. The relevant portion of the order of the Ld. PCIT passed under section 263 on facts and based on judicial pronouncement reads as under:

"*On perusal thereof, it is noticed that the basic facts brought on record regarding the selection of case for scrutiny under CASS for verification of* "large specified domestic transaction(s)(Form 3CEB)", *is not disputed by them. However, the AR has submitted that the assessment order was passed by the AO in this case on 08.03.2016; whereas, the CBDT Instruction referred to in the show cause notice is dated 10.03.2016, therefore, the AO was not bound to follow an instruction which was not in existence as on the date of passing of the assessment order. Therefore, it was submitted that it cannot be said that the AO has failed to follow the above referred instruction of the CBDT and accordingly, the order passed by the AO cannot be termed as erroneous which is prejudicial to the interest of revenue as provided u/s 263 of the Act. It was also submitted that under the given facts and circumstances of the case as discussed above, the PCIT has no jurisdiction u/s 263 of the Act to cancel or set aside the valid order passed by the AO.*

5. I have carefully considered the aforesaid submission of the AR and also the proposal of the AO and the case records made available. From the same and further detailed discussion held with the AR, it is not in dispute that one of the parameters for selecting the case under scrutiny through CASS is to verify large specified" domestic transactions reported in 3CEB report of the Accountant

furnished by the assessee. In this regard the CBDT vide instruction No.3 of 2016 dated 10.03.20l6 vide para-3.2 has clarified that all cases selected for scrutiny either under CASS or under the compulsory manual selection system on the basis of transfer pricing risk parameters in respect of International Transactions or Specified Domestic Transactions or both have to be mandatorily referred to the TPO by the AO, after obtaining the approval of the jurisdictional PCIT or CIT, as the case may be. It is further clarified that the case has been selected for scrutiny on a TP risk parameter becomes clear from a perusal of the reasons for which a particular case has been selected and the same are invariably available with the jurisdictional AO. Therefore, if the reason or one of the reasons for selection of the case for scrutiny is a TP risk parameter, then the case has to be mandatorily referred to the TPO by the AO, after obtaining the approval of the jurisdictional PCIT or CIT.,

6. However as discussed above, the AR has raised an issue based on facts on record that in this particular case the assessment order was passed by the AO (08.03.2016) before the said instruction dated 10.03.2016 was issued by the CBDT, therefore, the same could not have been followed by the AO in the said assessment order. In this regard, the attention of the AR was drawn towards instruction No. 1 5 o f 2 015 dated 16.10.2015 of the CBDT; whereby the Board has clarified that in terms of section 92 to 92F of the I.T. Act, any income arising from an international transaction or specified domestic transactions between two or more associated enterprises is to be computed having regard to the arms-length price. Instruction No. 3 was issued on 20.05.2003 to provide guidance to the TPO and the AO to operationalise_the insfer pricing provisions and to have procedural uniformity. Due to a number of legislative, procedural and structural changes carried out over the last few years, instruction No. 3 of 2003 was replaced with this (Instruction No. 15 of 2015) dated 16.10.2015 to provide updated and adequate guidance on the transfer pricing provisions pertaining to international transitions.

7. Further, in para -7 of the said instruction dated 16.10.2015, the Board has further clarified that this guidance is applicable only to transfer pricing provisions in respect of international transactions. Similar guidance in respect of transfer pricing provisions pertaining to specified domestic transaction are under the consideration of the CBDT. Till such time the guidance pertaining to specified domestic transactions is not issued, para - 3.5 of this instruction shall apply to the effect that where a case has been selected for scrutiny on non TP parameters and the case also involves specified domestic transactions with AEs. the case shall not be referred to the TPO irrespective of the value that specified domestic transaction or aggregate value of all specified domestic transactions. The only exception to this would be a case selected for scrutiny on non TP parameters where the AO comes to know that the taxpayer has entered into specified domestic transaction or transaction(s) but the tax payer has either not filed the accountants reports under section 94E of the Act or has not disclosed the said specified domestic transaction or transactions in the accountants report filed. In such exceptional situations, the AO may refer the matter to the TPO after providing an opportunity of being heard to the taxpayer.

8. However, in the case of the assessee as discussed above the case was selected for scrutiny under CASS on the TP risk parameter of specified domestic transaction. This fact on record is neither disputed nor denied by the AR. Hence, the AO was statutorily bound to refer the case to TPO to determine ALP in case of such specified domestic transactions entered with AO. As per explanation -2 (c) to section 263 of the Act, it is clarified that for the purpose of this section , an order passed by the AO shall be deemed to be erroneous in so far as it is prejudicial to the interest of revenue, if, in the opinion of the PCIT or CIT the order has not been made in accordance with any order, direction or instruction issued by the CBDT. Apparently, from the aforesaid discussion and facts on record, it is evident that the AO has not followed the instruction No. 15 ofJ2015 dated 16.10.2015 issued by the CBDT specifically on this issue which was applicable as on 08.03.2016, the date on which the assessment order is gassed by t h e AO. Therefore, it is evident that the AO has failed to refer the case to the TPO for the determination of arms-length price in respect of Specified Domestic transactions carried out with the AE, mandatorily required as per the CBDT instruction on the subject matter and further considering to the provisions of Explanation -2(c) to section 263 of the Act.

Therefore, I find that the assessment order passed by the AO is erroneous as well as prejudicial to the interest of revenue as per the provisions of section 263 of the Act.

9. In the case of Ranbaxy Laboratories Ltd. Vs. Addl. CIT, the Hon'ble ITAT 'I' Bench New Delhi in ITA No. 2146 of 2007 dated 22.1.2008 for the A.Y. 2004-05 under similar facts and circumstances, the Hon'ble ITAT in para-71 has held in this regard that in the light of CBDT instruction, the AO was duty bound to refer the matter to the TPO, having regard to the purpose of specialized cell created by the Revenue Department to deal with complicated and complex issues arising under the transfer pricing mechanism. Therefore, on account of these facts and position of law the review order passed by the CIT was held fully justified.

10. The Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd. vs CIT in 243 ITR 83 (SC) has held that a bare reading of section 263 of the Act makes it clear that the pre-requisite to exercise of jurisdiction by the CIT suo motto under it is that the order of the ITO is erroneous insofar as it is prejudicial to the interest of revenue. The CIT has to be satisfied of twin conditions, namely, (i) the order of AO sought to be revised is erroneous, and (ii) it is prejudicial to the interest of revenue. If one of them is absent i.e. if the order of the ITO is erroneous but is not prejudicial to the interest of revenue or if it is not erroneous but is prejudicial to the interest of revenue, recourse cannot be taken u/s 263 of the Act. It also has held that there can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the AO; it is only when an order is erroneous that the section shall 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 fall orders passed without applying the principles of natural justice or without application of mind. It has also held that the phrase "prejudicial to the interest of revenue" is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not confined to loss of tax. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the revenue. If due to an erroneous order of the ITO, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue. The phrase 'prejudicial to the interests of the revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the revenue, for example, when an ITO adopts one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue unless the view taken by the ITO is unsustainable in law. It has been held by the Supreme Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the Assessing Officer accepting the same as such will be erroneous and prejudicial to the interests of the revenue.

11,, In the case of Gee Vee Enterprises vs Addl.CIT 99 ITR 375 (Del), it is held that the ITO being not only an adjudicator but also an investigator, he cannot remain passive in the fact of a return which is apparently in order but calls for further enquiry in the facts and circumstances of the case and the word 'erroneous' in section 263 includes the failure to make such an enquiry. The CIT was justified in exercising his provisional jurisdiction on the ground that the ITO had not made sufficient enquiries before granting registration to the firm and it was not necessary for the CIT to have himself made enquires before cancelling the assessment.

11. Therefore, on account of these facts and position of law, since, the AO has failed to apply the CBDT instruction to refer the case to the TPO for the determination of arms-length price thereby, making the assessment order passed by the AO erroneous in so far as prejudicial to the interest of revenue as provided vide Explanation - 2(c) to section 263 of the Act. These facts on record prove that the assessment order passed by the AO is without proper application of mind as well as without making proper enquires into the facts and further without

considering statutory regulations applicable thereon. Therefore, the assessment order u/s 143(3) of the Act, dated 20.01.2015, is hereby set aside and the AO is directed to re-assess or re-compute the income of the assessee for the relevant assessment year, by conducting further inquiries as necessitated and after affording reasonable opportunity of being heard to the assessee and also referring the case to the TPO for determination of arms-length price in respect of specified domestic transactions carried out with the AEs as per Form 3CEB and further following the instruction No. 15 of 2015 dated 16.10.2015 of the CBDT. "

7. During the arguments before us the Ld. AR mainly argued that the assessment has been completed even before the declaration of instructions by the CBDT and the case could not have been a subject matter of provisions under section 263 of Income Tax Act,1961 based on the Circulars or Instructions issued by the CBDT post assessment as the Circulars cannot be treated to have an effect of application retrospectively.

8. Ld. DR relied on the explanation 2(c) to Section 263 of the Act in support of the order of the Ld. PCIT. For ready reference the relevant explanation of the Section reads as under:

Explanation *2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,—*

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

9. We have heard Ld. Representative of both the parties and gone through the facts of the case.

10. We find that the return was filed on 25/11/2014 and the assessment order was passed on 08/03/2016 after according due opportunity to the assessee. The claim of the deduction under section 80IC has been allowed to the extent of 25% being the eligible amount on the profit as the assessee has claimed the deduction for the seventh year.

11. To deliberate on the issue the Circular No. 3/2003 dt. 20/05/2003, Instruction No. 15/2015 dt. 16/10/2015 and Instruction No. 3/2016 dt. 10/03/2016 needs to be examined in detail.

Instruction No. 3 was issued on 20th May, 2003 to provide guidance to the Transfer Pricing Officers (TPOs) and the Assessing Officers (AOs) to operationalise the

transfer pricing provisions and to have procedural uniformity. Due to a number of legislative, procedural and structural changes carried out over the last few years, Instruction No. 3 of 2003 was replaced with Instruction No. 15/2015, dated 16th October, 2015. After the issuance of Instruction No. 15/2015, the Board has received some suggestions and queries, which have been examined in detail. Accordingly, this Instruction is being issued to replace Instruction No. 15 of 2015. This Instruction is applicable for both international transactions and specified domestic transactions between associated enterprises.

12. Thus after issue of instruction no. 15/2015 dt. 16/10/2015, instruction no.3 /2003 looses its relevance in the absence of any explicit guidance pertaining to any part of the said instruction. Hence the instruction No.15/2015 is considered good for all the purposes.

13. The para 3.1 of the instruction dated 16th Oct ,2015 reads as under.

Reference to Transfer Pricing Officer (TPO)

3.1 The power to determine the Arm's Length Price (ALP) in an international transaction is contained in sub-section (3) of Section 92C of the Act. However, Section 92CA of the Act, inter-alia, provides that where the Assessing Officer (AO) considers it necessary or expedient so to do, he may refer the computation of ALP in relation to an international transaction to the Transfer Pricing Officer (TPO). Sub-section (3) of Section 92CA provides that the TPO, after taking into account the material available with him shall, by an order in writing, determine the ALP in accordance with sub section (3) of Section 92C of the Act. Sub-section (4) of Section 92CA provides that on receipt of the order of the TPO, the AO shall proceed to compute the total income of the taxpayer in conformity with the A LP determined by the TPO. Thus, while the determination of ALP, wherever reference is made to him, is required to be done by the TPO under sub section (3) of Section 92CA read with sub-section (3) of Section 92C, the computation of total income in conformity with the A LP so determined by the TPO is required to be done by the AO under sub-section (4) of Section 92C read with sub-section (4) of Section 92CA of the Act.

3.2 In order to make a reference to the TPO, the AO has to first satisfy himself that the taxpayer has entered into an international transaction with an associated enterprise. One of the sources from which the factual information regarding international transaction can be gathered is Form No. 3CEB filed by the taxpayer, which is in the nature of an accountant's report containing basic details of an international transaction entered into by the taxpayer during the yea r and the associated enterprise with which such transaction is entered into, the nature of documents maintained and the method followed. Thus, the primary details regarding such international transactions would normally be available in the accountant's report. The AO can arrive at a prima facie belief on the basis of these details whether a reference to the TPO is necessary. No detailed enquiries are needed at this stage and the AO should not embark upon scrutinising the correctness or otherwise of the price of the international transaction at this stage . However, in the following situations, the AO must, as a jurisdictional requirement, record his satisfaction that there is an income or a potential of an income arising and/or being affected on determination of the ALP of an international transaction before he proceeds to determine the ALP under sub-section (3) of Section 92C of the Act or to refer the matter to the TPO to determine the A LP under sub-section (1) of Section 92CA of the Act:

(a) where the taxpayer has not filed the Accountant's report under Section 92E of the Act but international transactions undertaken by it come to the notice of the AO;

(b) where the taxpayer has not declared one or more international transaction in the Accountant' s report filed under Section 92E of the Act and the said transaction or transactions come to the notice of the AO; and

(c) where the taxpayer has declared the international transaction or transactions in the Accountant's report filed under Section 92E of the Act but has made certain qualifying remarks to the effect that the said transaction or transactions are not international transactions or do not impact the income of the taxpayer.

In all the above situations, the AO must provide an opportunity of being heard to the taxpayer before recording his satisfaction or otherwise.

Further these instructions clearly states regarding the applicability that the guidance is applicable only to transfer pricing provisions in respect of international transactions. Similar guidance in respect of transfer pricing provisions pertaining to specified domestic transactions are under consideration of the CBDT. Till such time the guidance pertaining to specified domestic transactions is not issued, paragraph 3.5 of this Instruction shall apply to the effect that where a case has been selected for scrutiny on non-TP parameters and the case also involves specified domestic transactions with AEs , the case shall not be referred to the TPO irrespective of the value of the specified domestic transaction or aggregate value of all specified domestic transactions. The only exception to this would be a case selected for scrutiny on non-TP parameters where the AO comes to know that the taxpayer has entered into specified domestic transaction or transact ions but the taxpayer has either not filed the Accountant's report under Section 92E of the Act or has not disclosed the said specified domestic transaction or transactions in the Accountant's report filed. In such exceptional situations, the AO may refer the matter to the TPO after providing an opportunity of being heard to the taxpayer.

8. This Instruction issues under Section 119 of the Act and supersedes Instruction No.3 of 2003 with immediate effect.

14. Thus it is clear that the instruction no. 3/2003 is no more valid and the Assessing Officer shall not refer the matter to TPO irrespective of the value of the specified domestic transactions. In the instant case the transactions shown by the assessee in the Form 3CEB are domestic in nature. Further instructions were issued on 10/03/2016 vide instruction no. 03/2016. The said instruction states that Instruction No. 3 of 2003 was replaced with Instruction No. 15/2015, dated 16th October, 2015. and that after the issuance of Instruction No. 15/2015, the Board has received some suggestions and queries, which have been examined in detail. This Instruction no. 3/2016 is applicable for both international transactions and specified domestic transactions between associated enterprises. It says that if a case has been selected for scrutiny on a TP risk parameters which becomes clear from a perusal of the reasons for which a particular case has been selected and if the reason or one of the reasons for selection of a case for scrutiny is a TP risk parameter, then the case has to be mandatorily referred to the TPO by the AO, after obtaining the approval of the jurisdictional PCIT or CIT. Thus the reference to TPO becomes compulsory from the date of issue of this Circular i.e; 10/03/2016. And we find that the assessment in the instant case has been completed on 08/03/2016.

Hence it cannot be said that the Assessing Officer has not followed the Circulars as per the provisions of Explanation 2(c) of Section 263 which empowers the PCIT to revise the orders of the Assessing Officer. The Assessing Officer could not have followed the instruction which did not exist on the date of passing of the assessment order. Either the Assessing Officer is prompt to complete the assessment or the Revenue is late in issuing the instructions.

15. In either of the situations as the end result the assessment completed cannot be construed as erroneous in so far as it is prejudicial to the interest of the Revenue even as per the Explanation 2(c) of the Income Tax Act,1961.

16. As a result, the appeal of the Assessee is Allowed.

Sd/-

संजय गर्ग
(SANJAY GARG)
न्यायिक सदस्य/ Judicial Member
29/11/2018

Sd/-

डा. बी.आर.आर, कुमार,
(DR. B.R.R. KUMAR, AM)
लेखा सदस्य/ Accountant Member

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

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File