आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'A' अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, AHMEDABAD

(Through Virtual Court)

BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
& SMT. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./I.T.A. No. 881/Ahd/2019

(**निर्धारण वर्ष /** Assessment Year : 2014-15)

Ashish Subodhchandra Shah (HUF) 21, Palacial Bungalows, Opp. Lane to Star Bazaar, Jodhpur, Satellite, Ahmedabad	**बनाम**/ Vs.	**Pr. Commissioner of Income Tax-5** Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAKHS8184D		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से /**Appellant by :**	Shri Mahesh Chhajed, A.R.
प्रत्यर्थी की ओर से / **Respondent by :**	Shri Virendra Ojha, CIT. D.R.

सुनवाई की तारीख / **Date of Hearing**	24/06/2020
घोषणा की तारीख /**Date of Pronouncement**	29/06/2020

आदेश/O R D E R

PER PRADIP KUMAR KEDIA - AM:

The captioned appeal has been filed at the instance of the Assessee against the order of the Pr. Commissioner of Income Tax, Ahmedabad-5 ('Pr.CIT' in short), dated 26.03.2019 arising in the assessment order dated 20.06.2016 passed by the Assessing Officer (AO) under s. 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2014-15.

2. In the captioned appeal, the assessee has challenged the action of the Pr.CIT assumed under s.263 of the Act whereby assessment order passed by AO under s.143(3) of the Act was sought to be set aside for consequential enquiries on transactions undertaken by the assessee with sister concern having regard to provisions of Section 92BA of the Act.

3. At the time of hearing, the learned AR for the assesse pointed out that an assessment order dated 20.06.2016 concerning AY 2014-16 passed under s.143(3) of the Act assessing the total income at Rs.27,81,630/-. The order so passed under s.143(3) of the Act was sought to be set aside by the Pr.CIT in exercise of jurisdiction under s.263 of the Act on the ground that despite the domestic transactions undertaken by the assessee covered within the ambit of Section 92BA of the Act for which prescribed form 3CEB issued by the Chartered Accountant was filed by assessee, the AO has failed to refer the matter to the Transfer Pricing Officer (TPO) and in carrying out the necessary consequential inquiries.

3.1 A show cause notice under s.263 of the Act dated 04.12.2018 was issued in the regard was referred to by the learned AR for the assessee which read as under:

> *"On verification of your assessment case records for the A.Y. 2014-15, it is seen that the assessment order u/s. 143(3) of the Income Tax Act, 1961 was passed on 20/06/2016 by the ITO, Ward-5(2)(1), Ahmedabad, determining the total income at Rs.27,81,630/- against the returned income of Rs.27,60,030/-. However, on examination of the details as made available by you for the purpose of making assessment order, it is construed that the assessment order dated 20/06/2016 appears to be erroneous in so far as it is prejudicial to the interest of the Revenue for the reasons mentioned in the subsequent paragraphs.*
>
> *2.0 On verification, it was noticed that the case was selected for scrutiny through CASS and one of the reasons for selection was a Transfer Pricing risk parameter namely "Large specified domestic transaction (form 3CEB) and the value of transactions are:-*

(i) Rs.19,36,86,462/-
(ii) Rs.18,000/-

Therefore, as per Board's instruction No.3/2016 & F.No. 500/9/2015-APA-II dated 10.03.2016 issued by the Board the case was mandatory to be referred to TPO but the same was not done. The case accordingly had to be referred to TPO. However, this was not done even though the same was mandatory as per said instruction. The A.O. has not considered the reason for scrutiny selection as per CASS and failed to conduct necessary enquiry.

3.0 From the discussion above, it may be seen that the assessment order passed u/s.143(3) of the Income Tax Act, 1961 on 20/06/2016 for the A.Y. 2014-15 is erroneous in so far as prejudicial to the interest of the Revenue. You are therefore requested to show cause as to why action u/s.263 of the Income Tax Act, 1961 should not be initiated for modifying or even cancelling the said assessment order.

*In case you have any objection to the action proposed, you are requested to appear before me either personally or through your Authorised Representative on **17.12.2018 at 4.00 pm** at my office situated at the above address, alongwith a written reply to this notice."*

3.2 The learned AR for the assessee thereafter referred to para 4 of the revisional order and submitted that the Pr.CIT proceeded on a wrong footing while setting aside the assessment order completed under s.143(3) of the Act by the AO. It was firstly pointed out that Form 3CEB was duly filed along with the return of income and it was incorrect for the Pr.CIT to observe that Form 3CEB showing particulars of 'specified domestic transactions' ('SDT') required to be furnished under s.92E of the Act was filed before the Revisional Commissioner for the first time. It was thus contended that Form 3CEB filed by the assessee was available to the AO for assessment purposes contrary to observation of the Revisional Commissioner. It was thereafter contended that the aforesaid prescribed form was filed only as a matter of abundant caution and was actually not required to be filed in law owing to the fact that the 'SDT' primarily represented sales made to 'Associate Enterprise'(AE) amounting to Rs.19,36,86,462/-. The learned AR submitted that 'sales' made to AE/sister concern do not fall within the sweep of meaning of 'SDT' defined under s.92BA(i) of the Act which is

narrower in its scope and relates to 'expenditure' in respect of which any payment has been made etc., by the assessee to certain category of persons referred to in Section 40A(2)(b) of the Act. It was emphatically asserted that making sales to sister concerns/AE is totally dissimilar to any expenditure transactions entered by the assessee. It was thus contended that a sale transaction is out of ambit of erstwhile clause (i) of Section 92BA of the Act.

3.3 It was further pointed out that the assessee has not entered into any 'SDT' as spelt under clause (ii) to (vi) of Section 92BA of the Act either, as can be easily seen from the return of income filed by the assessee. The assessee has not entered into any transaction susceptible to Section 80IA of the Act.

3.4 The learned AR thus submitted that in the facts and circumstances where the transactions reported in Form 3CEB are not to be regarded as 'SDT' in law at the first place, there was no warrant for the AO to refer the matter to the TPO merely on account of a wrongly filed Form 3CEB in contradiction to the statutory provisions of Section 92BA of the Act. It was thus submitted that in the absence of the transactions falling within the sweep of Section 92BA of the Act, there was no warrant either to refer the matter to the TPO nor any independent enquiry was required by the AO from the perspective of provisions of Section 92BA of the Act as redflagged by the Pr.CIT. It was thus submitted that no 'error' *per se* can be attributed to the AO for non-indulgence in inquiry with reference to Section 92BA of the Act which was *prima facie* inapplicable.

3.5 On a further query raised by the Bench, the learned AR for the assessee further pointed out that remaining transaction of Rs.18,000/- odd towards rental expenditure also do not fall within

the ambit of Section 92BA of the Act in view of threshold of Rs.5 Crore prescribed for Section 92BA of the Act to come into play at the relevant time.

3.6 The learned AR further raised a legal ground that clause 92BA(i) of the Act has been subsequently omitted by the Finance Act, 2017 w.e.f. 01.04.2017 from the statute. It was thus submitted that owing to such omission of clause (i) to Section 92BA of the Act, the resultant effect would impliedly be that it had never been considered as law existing in the statute since its inception. Reliance was placed on the decision of the Hon'ble High Court in the case of *PCIT vs. Taxport Overseas (P.) Ltd. [2020] 114 taxmann.com 568 (Karnataka)* for this proposition. It was argued that clause (i) to Section 92BA of the Act was repealed and obliterated from the statute book completely without any saving clause and therefore it has to be deemed to have never existed insofar as all pending proceedings are concerned. In this background, it was contended that any delinquency committed by AO was reference to a repealed provision does not render the action of AO to be erroneous.

3.7 The learned AR accordingly concluded that the show cause notice issued by the Pr.CIT and subsequent revisional order under s.263 of the Act is bad in law both on legal ground as well as on merits. The learned AR thus urged that order under s.263 of the Act be quashed and the assessment order passed under s.143(3) of the Act be restored.

4. The learned DR, on the other hand, relied upon the order of the Revisional Commissioner and contended that Pr.CIT has rightly invoked its sacrosanct jurisdiction vested under s.263 of the Act in the peculiar facts and circumstances of the case. The learned DR

referred to the assessment order and submitted that the assessment order is totally cryptic on all points and has been passed by AO mechanically without any reflection of application of mind. The learned DR thereafter submitted that despite the submission of Form No.3CEB by the assessee himself, the AO has not looked into the same and did not bother to follow the prescribed procedure for reference to the TPO necessary for suitable inquiry. It was submitted that such non-descript assessment order passed flippantly is clearly erroneous insofar as prejudicial to the interest of Revenue. It was next submitted that the Pr.CIT has merely set aside such a perfunctory assessment order for fresh inquiry by the AO to frame assessment in accordance with law and thus no interference with such revisional action is called for.

5. We have carefully considered the rival submissions. The assessee has challenged the assumption of revisionary jurisdiction under s.263 of the Act in the facts and circumstances narrated on behalf of the assessee as noted in the preceding paras. It is the case of the assessee that the show cause notice issued by the Revisionary Commissioner seeking to displace the assessment order passed by the AO under s.143(3) of the Act in exercise of its statutory functions is not justified at all.

5.1 Supervisory jurisdiction vested under Section 263 of the Act enables the concerned PCIT/CIT to review the records of any proceedings and order passed therein by the AO. It empowers the Revisional Commissioner concerned to call for and examine the records of another proceeding under the Act and if he considers that any order passed therein by the AO is erroneous in so far as it is prejudicial to the interest of the Revenue, then he may (after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary), pass such

order thereon as the circumstances of the case justify, including the order enhancing or modifying the assessment or cancelling the assessment and directing afresh assessment. Thus, the revisionary powers conferred on the PCIT/CIT under s.263 of the Act are of very wide amplitude with a view to address the revenue risks which are objectively justifiable.

5.2 Before we proceed to dwell upon the legality of action of the Revisional Commissioner, it will be expedient to reproduce Section 92BA of the Act as existing in the statute at the relevant time of assessment which seeks to define the meaning of 'SDT':

> ***"92BA**. For the purposes of this section and sections 92, 92C, 92D and 92E, "specified domestic transaction' in case of an assessee means any of the following transactions, not being an international transaction, namely :-*
>
> *(i) any expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of sub-section (2) of section 40A;*
> *(ii) any transaction referred to in section 80A;*
>
> *(iii) any transfer of goods or services referred to in sub-section (8) of section 80-IA;*
>
> *(iv) any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA;*
>
> *(v) any transaction, referred to in any other section under Chapter VI-A or section 10AA. to which provisions of sub-section (8) or sub-section (10) of section 80-IA are applicable; or*
> *(vi) any other transaction as may be prescribed,*
>
> *and where the aggregate of such transactions entered into by the assessee in the previews year exceeds a sum of five crore rupees."*

Needless to say, the consequential proceedings under s.92BA for referent to TPO and other enquiries contemplated in respect of SDT would trigger only when a stipulated transaction falls within the meaning of definition of SDT as provided under s.92BA of the (supra).

5.3 In the facts and circumstances of the case, it is an admitted fact that the so called 'SDT' under lens of the Pr.CIT primarily represents 'sale' made by the assessee to its sister concern. Naturally a 'sale' made by the assessee gets outrightly excluded from the ambit of clause (i) of Section 92BA of the Act which is meant to deal with 'expenditure' incurred by the assessee to the benefit of sister concern/AE. We thereafter notice assertions made on behalf of the assessee that the assessee has not availed any benefit under s.80IA of the Act or any other provisions contemplated under s.92BA(ii) to (vi) of the Act. A reference has been made to the copy of return filed with Revenue to demonstrate the absence of any such claim of benefit availed while determining the return of income. We thus find merit in the case made out by the assessee that various clauses of Section 92BA of the Act were not applicable in the factual matrix. As a corollary, merely because a prescribed Form No. 3CEB was filed in accordance with Rule 10E r.w.s. 92BA of the Act would not make an assessee susceptible to onerous investigation proceedings on such transactions where the assessee *prima facie* demonstrates that Section 92BA of the Act is wholly inapplicable in any manner at the first instance. The Pr.CIT was seized with the relevant facts and could have easily satisfied himself of such *prima facie* assertions. A lack of enquiry in a particular manner or as per certain procedures prescribed would possibly vitiate the assessment order only when it is found that the relevant provisions were applicable to the assessee and not otherwise. The allegations made by the Pr.CIT in the instant case have been successfully rebutted on behalf of the assessee. In view of the domestic transaction with AE not falling in the sweep of Section 92BA of the Act at the threshold, any alleged inaction attributable to the AO in this regard would not vitiate assessment order as erroneous nor did it cause any prejudice to the interest of the Revenue. The ingredients of Section 263 of the Act are thus

clearly not fulfilled. Hence, revisional order passed under s.263 of the Act seeking to set aside the assessment order passed under s.263 of the Act requires to be quashed.

5.4 Having arrived at the conclusion on merits for lack of jurisdiction of the Revisional Commissioner under s.263 of the Act, we are not inclined to dwell upon a legal ground questioning existential position of clause (i) of Section 92BA of the Act in this proceeding.

6. In the result, appeal of the assessee is allowed.

This Order pronounced on 29/06/2020

Sd/-	Sd/-
(MADHUMITA ROY)	(PRADIP KUMAR KEDIA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Ahmedabad: Dated 29/06/2020

True Copy

S. K. SINHA

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. राजस्व / Revenue
2. आवेदक / Assessee
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाइल / Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण, अहमदाबाद ।