

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JM &
SHRI S. RIFAUR RAHMAN, AM**

आयकरअपीलसं./ I.T.A. No. 3581/Mum/2019
(निर्धारणवर्ष / Assessment Year: 2014-15)

Citicorp Services India Pvt. Ltd. First International Financial Centre, 8 th floor, Plot C-54 & 55, G-Block, Bandra Kurla Complex, Bandra East, Mumbai-400 098	बनाम/ Vs.	PCIT - 14, Aayakar Bhava, M. K. Road, Mumbai -400 020
स्थायीलेखासं./जीआइआरसं./PAN No. AADCC6705C		
(अपीलार्थी/Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकीओरसे/ Appellant by	:	Shri L. N. Pant & Ms. Preeti Jain, ARs
प्रत्यर्थीकीओरसे/Respondentby	:	Shri Awangshi Gimpson, DR
सुनवाईकीतारीख/ Date of Hearing	:	18.12.2019
घोषणाकीतारीख / Date of Pronouncement	:	13.03.2020

आदेश / ORDER

Per S. Rifaur Rahman, Accountant Member:

The present Appeal has been filed by the assessee against the order of Ld. Pr. Commissioner of Income Tax – 14, Mumbai

in short referred as 'Ld. PCIT', Mumbai, dated 22.03.2019 for Assessment Year (in short AY) 2014-15.

2. The brief facts of the case are, the assessment was completed on 23.12.16 u/s 143(3) of the Act by accepting the return of income of Rs. 1,34,84,13,060. Ld. PCIT while perusing the records of the assessment order, notice that the case was selected for scrutiny under CASS on non-transfer pricing risk parameter. The assessee filed Form No. 3CEB in which aggregate value of international transactions were reported at Rs. 9,51,52,31,962/-. In the assessment order, it was mentioned that though the assessee is having international transactions but in view of directions contained in the instruction of CBDT, the transfer pricing issue is not examined at all. It was noticed by PCIT that in AY 2012-13 in order passed u/s 143(3) r.w.s. 144C(4) dated 07.04.16, the transfer pricing adjustment of Rs. 49,05,00,660/- was made by AO /TPO and the same is pending in appeal. With reference to para 3.3(b) of CBDT instruction No. 3 of 2016 dated 10.03.16, the cases where transfer pricing adjustments of Rs. 10 crores or more has been made in an earlier year and such adjustment has been upheld by judicial authorities

or is pending in appeal, such cases shall be referred to the TPO. Accordingly, PCIT issued notice u/s 263 of the Act dated 05.03.19 and served on the assessee wherein it was notified to the Assessee why the present appeal cannot be treated as erroneous and prejudicial to the interest of revenue.

3. In response, assessee filed the detail submission. Assessee submitted that all the relevant information was filed before the AO and AO is aware of the factual position. Accordingly, AO has applied his mind and completed the assessment, therefore there are two possible views in the present case and AO has followed one of the possible view, therefore by relying on the following decisions i.e. **i) CIT vrs. Greenworld Corporation (181 taxman.111)**, **ii) Ballarpur Industries Ltd. (85 taxman.com 37)**, **iii) Gokuldas Exports (20 taxman.com 491)** and **iv) Sunbean Auto Ltd. (189 taxman 436)**, assessee submitted that proceeding u/s 263 of the Act cannot be initiated in the present case. It was further submitted that proceeding u/s 263 of the Act cannot be initiated in case of inadequate inquiry. It was submitted that AO has already made inquiry in this aspect and came to the conclusion not to refer the matter to TPO. For

that purpose, assessee relied on the decision of Hon'ble Delhi High court in the case of **Anil Kumar Sharma (335 ITR 83)** and decision of ITAT in the case of **Narain Tatu Rane (70 taxmann.com 227)**. It was further submitted that the case was pending before Ld. CIT(A), not before DRP against the TP adjustment for AY 2012-13 and it was still pending before Ld. CIT(A) and no other appeal is pending before ITAT with TP adjustment exceeding 10 crores. It was also submitted that in the immediate earlier AY 2013-14, the TPO has accepted the transfer pricing study report submitted by the assessee and had not made any adjustment. Further, it was submitted that assessee is currently under negotiation in advance pricing agreement with the CBDT and in case it is finalized, it will be applicable for 5 years and the preceding 4 rollback years i.e. it will cover present assessment year also, therefore it will be undue hardship on the assessee.

4. After considering the submission of assessee, Ld. PCIT rejected the contentions of assessee and by referring to CBDT circular para 3.3(b) and observed that in the case where transfer pricing adjustment of Rs. 10 crores or more has been made in the

earlier assessment year and if such adjustment is either confirmed or is pending in appeal, then such case has to mandatory be referred to TPO. In the instant case, the transfer pricing adjustment of Rs. 49.05 crores was made in AY 2012-13 and it is pending in appeal. Therefore, the observation of AO in the year that it does not require the transfer pricing reference is erroneous, hence is counter to CBDT circular no. 3 of 2016 and the CBDT instructions are binding on the AO. Accordingly, he rejected the other submissions of the assessee.

5. Aggrieved with the above order, assessee is in appeal before us raising the following grounds of appeal:-

1. The Pr. Commissioner of Income-tax ("Pr. CIT") has erred in invoking jurisdiction under section 263 of the Act and passing an order under section 263 of the Act.

2. The Pr. CIT has erred in holding that the assessment order dated 23 December 2016 passed by the Learned Assessing Officer ("AO") under section 143(3) of the Act was erroneous and prejudicial to the interest of revenue as contemplated under section 263 of the Act.

3. The Pr. CIT has erred in not appreciating the fact that the Learned AO had formed the view of not referring the matter to the Learned Transfer Pricing Officer ("TPO") after examining the transfer pricing related information filed and placed upon records by the appellant during assessment proceedings. Hence, notice issued and the order passed under section 263 of the Act are illegal, bad in law and without jurisdiction.

4. The Pr. CIT has erred on facts in initiating the proceedings under section 263 of the Act under the wrong impression that that the transfer pricing matter for the earlier year i.e. AY 2012-13 has been dismissed by the Dispute Resolution Panel and was in appeal before the ITAT. The Pr. CIT has failed to appreciate that the appellant had filed an appeal before the Commissioner of Income-tax Appeals ("CIT (A)") and the appeal was pending before the CIT(A) and not before the ITAT.

5. The Pr. CIT failed to appreciate that proceedings under section 263 of the Act can be initiated only in case of lack of enquiry by the Learned AO and not in case of an inadequate enquiry by the Learned AO.

6. The Pr. CIT has erred in directing the Learned AO to make a reference to the TPO as per the provisions of

section 92C of the Act. The Pr. CIT has failed to appreciate that the words "he may" as used in section 92CA of the Act are preceded by "necessary and expedient". Hence, by not making reference to the TPO, no error has been committed by the Learned AO.

7. The Learned Pr. CIT has erred in relying heavily on Instruction No. 3 /2016 without appreciating the law applicable and facts and circumstances of the appellant's case.

8. The Pr. CIT erred in setting aside the assessment order dated 23 December 2016 passed by the Learned AO under section 143(3) of the Act and directing the Learned AO to make fresh assessment after making a reference to the TPO.

9. The Pr. CIT failed to appreciate that the appellant has applied for an Advance Pricing Agreement ("APA") with the CBDT and the APA is at the advances stages of negotiation and the year under consideration is one of the years covered under the APA. Given that the arm's length pricing of the international transactions of the appellant would be governed by the APA, the Pr. CIT failed to appreciate that invoking the provisions under Section 263 of the Act would cause undue hardship to the appellant.

10. The appellant therefore prays that the impugned order under section 263 of the Act passed by the Pr. CIT be annulled and the order of the Learned AO be restored.

General

11. The appellant craves leave to add, alter, amend, substitute and/or modify in any manner whatsoever modify all or any of the foregoing grounds of appeal at or before the hearing of the appeal.

The Appellant submits that each grounds of appeal is without prejudice to one another.

6. Before us, Ld. AR submitted a detail chart with reference to 10 grounds of appeal raised by the assessee and all the grounds are with reference to similar submissions made before the AO. He brought to our notice CBDT instruction no. 3 of 2016 in para 3.3(b) and submitted that instruction contains the word 'in an earlier assessment year and the word "in an" with the proceedings the immediate preceding assessment year 'and Ld. PCIT has taken the meaning that any pending appeal irrespective of the fact that where immediate or subsequent assessment years

overlooking the fact that it does not carry word 'any earlier assessment year 'but it only contains "in an earlier assessment years". Therefore, in the present case, assessment is pending before Ld. CIT(A) for AY 2012-13 and for the AY 2013-14, TPO/AO has accepted the transfer pricing documents submitted by the assessee, therefore there is no appeal pending before any forum relating to immediate previous assessment year. He brought to our notice page 263 of the paper book and further brought to our notice page 25 of the paper book, in which assessee has filed transfer pricing study report before AO/TPO. He further brought to our notice page 21 of the paper book, in which AO has asked general enquiry in notice issued u/s 142(1) and in the same notice, assessee was asked to submit 3 years assessment details. Further, Ld. AR relied in the case of CIT vrs. Sunbeam Auto Ltd (2010) 194 taxman 504 (Del) and submitted that in para 15 to 17 of Assessment order, AO has made inquiry in the present case with reference to the points and inquiry made by AO by issuing notice u/s 142(1) of the Act. Therefore, it clearly indicates that AO has made inquiry to the status of the assessment for earlier assessment years. Hence, Pr.CIT cannot

invoke the provision of section 263 of the Act when the AO has made inquiry. He further submitted that AO has followed the CBDT circular and instruction and took a possible view not to refer this case to TPO and finally, he submitted that assessee is in negotiation with CBDT and it is on final stage of completion and when the approval is obtained, it will be applicable to next 5 years and also the preceding 4 rollback years which includes the present assessment year. He further submitted that the reasons and activities of the transactions carried on by the assessee are same and there is no change, therefore it will be hardship on the assessee by invoking the provisions of section 263 of the Act.

7. On the other hand, Ld. DR submitted that Ld. PCIT has clearly brought on record significance contained in CBDT instruction no. 3 of 2016 and there is no dispute that this case was selected on non-transfer pricing risk parameters and it is the duty of the AO to refer this case to TPO with reference to the instructions contained in CBDT and it is also a fact that there is an appeal still pending in appellate authority, therefore it clearly falls under the instructions contained in para 3.2(b). Hence, AO has not followed the instructions fully and he submitted that AO

has completed the assessment mechanically by merely recording his observations that this case is not referred. He submitted that the instructions from CBDT is very much binding on the AO and it is a clear fact of non-following of the direct instructions of CBDT. He further submitted that AO never took any view since he has not referred to para 3.2(b) of CBDT instruction and the notice issued u/s 142(1) of the Act is general notice asking for various information from the assessee in order to complete the assessment, therefore it does give a clear picture that AO has merely collected the information and not applied his mind. With regard to case law relied by Ld. AR, he submitted that these are distinguishable on facts. With reference to the case of **CIT vs Bllarpur Industries Ltd. (2017) 85 taxman.com 10(Bom.)**, when there is clear case of non-application of mind, the provision of section 263 of the Act will be applicable and will not fall under the category of the case of Malabar Industrial Co. vrs. CIT(supra). He relied on para 14 of the decision of Coordinate bench of ITAT in ITA 2459/Mum/2017.

8. Considered the rival contentions and the material placed on record, we notice from the record that the assessment for AY

2014-15 were completed by the AO with observation that assessee has international transactions with its AE's and has submitted Form 3CEB and TP report. However, in view of the direction contained in CBDT instruction, transfer pricing issue is not examined at all and accordingly, assessment was completed by accepting the taxable income declared by the assessee. Subsequently, with reference to instruction no. 3 of 2016 which contained the instruction in para no. 3.3(b) that 'where there has been transfer pricing adjustment of Rs. 10 crores or more in earlier assessment year and such adjustments has been upheld by judicial authorities or is pending in appeal'. Now the issue before us is whether the case of the assessee in which AO has not referred international transactions to TPO are prejudicial to the interest of revenue, since the assessee's case in AY 2012-13 in which TP adjustment were made and pending before Ld. CIT(A). Whether the TP adjustment made by the TPO is pending before Ld. CIT(A) will fall under the instructions contained in para 3.3(b) of the CBDT instruction no. 3 of 2016.

9. After careful consideration, we notice that there is no doubt that TP adjustment made more than 10 crores in the AY

2012-13 and there is no TP adjustment made in the immediate proceeding AY 2013-14. As per the instruction in para 3.3(b) where there is adjustment made in an earlier assessment year or it is pending in an appeal before the appellate authority. It is a direction to AO to refer the case to TPO. This instruction is binding on the AO and not so on the assessee. We also notice that the words used are 'in an earlier assessment year' in order to determine the status of the TP category of the assessee. Whether it is normal category or special category. In order to determine the category, we cannot interpret literal meaning of the instruction. Since the instruction contain 3 limbs i.e. TP adjustment determined or pending in appeal or reached finality. In the given case, Ld. AR tries to distinguish the word used in the instruction, whether the word used 'an' instead of 'any' to bring the notion that it is to mean immediate previous assessment year. However, in our considered view, it is only an instruction to determine the category of the assessee whether to refer the case for verification before TPO. Since the TP adjustment recommended in AY 2012-13 is substantial, it automatically fall

under special category and therefore, AO should have referred the matter to TPO.

10. The next issue will be, whether AO has followed one of the possible view in this case, considering the instruction contained in instruction no. 3/2016. In our view, there is no option for AO, but to follow the instruction of CBDT circular. In the given case, AO has not understood the instruction and it clearly indicates that AO has not followed the instruction. Therefore, in our view, PCIT is right in invoking provision of section 263 of the Act.

11. The other plea with reference to APA, it is only a prospective adjustment in case of approval of advance pricing agreement reference to TPO will not have any impact on such reference. Therefore, we are of the considered view, proceeding u/s 263 of the Act initiated by the PCIT are proper and binding to the AO as per the instructions contained in para 3.3(b) of the CBDT. Accordingly, grounds raised by the assessee are dismissed.

12. In the net result the appeal filed by the assessee is **dismissed.**

Order pronounced in the open court on 13th March 2020.

<i>Sd/-</i> (Saktijit Dey) न्यायिकसदस्य / Judicial Member मुंबई Mumbai;दिनांक Dated : <i>Sr.PS. Dhananjay</i>	<i>Sd/-</i> (S. Rifaur Rahman) लेखासदस्य / Accountant Member 13.03.2020
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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File
आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai