IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' A ' Bench, Hyderabad
(Through Video Conferencing)
Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri D.S. Sunder Singh, Accountant Member

ITA Nos.775/Hyd/2016 & ITA No.1116/Hyd/2018		
Assessment Year: 2010-11		
M/s. Agro Tech Foods Ltd Secunderabad PAN:AAECA0303M	Vs.	Dy. Commissioner of Income Tax, Circle 1(1) Hyderabad
(Appellant)		(Respondent)
Assessee by:	Sri Dhanesh Bafna	
Revenue by:	Sri Y.V.S.T. Sai, CIT-DR	
Date of hearing:	19/11/2020	
Date of pronouncement:	17/12/2020	

ORDER

Per Smt. P. Madhavi Devi, J.M.

Both are assessee's appeals for the A.Y 2010-11. ITA No.775/Hyd/2016 is the assessee's appeal against the order of the CIT (IT&TP) u/s 263 of the I.T. Act dated 31.03.2016 and ITA No.1116/Hyd/2018 is assessee's appeal against the order of the CIT(A) confirming the assessment order passed by the AO u/s 143(3) r.w.s. 263 of the I.T. Act.

2. Brief facts of the case are that the assessee company, engaged in the business of manufacturing, selling and distribution of branded edible oils, food products, bulk commodities etc., has filed its return of income for the A.Y.2010-11 on 8.10.2010 declaring a total income of Rs.30,99,25,790/-

under the normal provisions. During the assessment proceedings u/s 143(3) of the Act, the AO observed that the assessee has entered into international transactions with its AEs. He therefore, referred the matter to the TPO for determination of the ALP of the international transactions u/s 92CA(3) of the I.T. Act. The TPO, vide order dated 28.8.2013, suggested adjustment of Rs.6,06,93,406/- u/s 92CA of the Act. Accordingly, the AO proposed the draft assessment order against which, the assessee preferred its objections before the DRP. The DRP passed an order dated 28.10.2014 wherein it has directed the TPO to re-examine the computation of mark-up by giving due opportunity to the assessee and also to re-workout the adjustment and also by including the three companies i.e., 1.ADF Foods Ltd., 2.DFM Foods Ltd., and 3.Tasty Bite Eatables Ltd., as comparables. Accordingly, the TPO passed the consequential order dated 31.12.2014 and suggested TP adjustment at Rs.3,19,11,176/-.

2.1. The AO while passing the assessment order also considered the expenditure debited by the assessee towards advertisement and sales promotion and held that it falls into the expenditure referred to under Sub-Clause(iii) of Clause (a) of Section.35D of the I.T. Act and he allowed 1/5th of the total of

such expenditure in this year and disallowed the balance being Rs.6,93,37,003/- and accordingly brought it to tax.

2.2. Subsequently, the CIT (IT & TP) assuming powers u/s 263 of the I.T. Act, perused the TPO's order and observed that the order passed by the TPO is erroneous in so far as it is prejudicial to the interest of the revenue. He observed that the assessee has incurred total operating cost of Rs.626.92 crores but the TPO has allocated only Rs.610.44 crores in his segmental analysis and no reason was mentioned for not allocating the balance sum of Rs.16.48 crores. He also observed that the TPO has considered the miscellaneous income and foreign exchange fluctuation gain as operating revenue in the assessee's case, but while computing the operating revenue of the comparables, miscellaneous income and foreign exchange fluctuation gains was not considered as operating revenue in their cases. Therefore, he observed that the arithmetic mean of the assessee and the comparable companies has not been properly worked out by the TPO. Accordingly, he arrived at the PLI of the assessee at 5.03% as against the PLI of the comparable entities at 10.83% and held that assessee's PLI of 5.30% being more than the tolerance range of 5%, it call for TP adjustment.

2.3. Therefore, the CIT issued a notice to the assessee u/s 264 of the I.T. Act. The assessee objected to the revision on the ground that the TPO is not an AO and therefore, the TP order is not amenable to revision u/s 263 of the I.T. Act. The CIT (IT& TP) however, held that the TP order is also amenable to section 263 of the Act and that the TPO as well as the DRP have not considered the incorrect allocation of operating expenditure and also the incorrect consideration of miscellaneous income and foreign exchange gains in the case of the assessee and not in the case of the comparables while computing their PLI. He therefore, held the assessment order to be erroneous in so far as it is prejudicial to the interests of the revenue. The assessee also argued before the CIT that one of the comparable i.e. Tasty Bites Limited should not be considered as comparable because it did not satisfy one of the filters adopted by the TPO. The CIT (IT&TP) did not accept the same by holding that the issue of selection of comparables was decided by the TPO & DRP and that if the assessee was not satisfied with the same, it had recourse of remedy under the Act and that the provisions u/s 263 of the I.T. Act are not meant to provide such remedy to the assessee. He therefore, directed the TPO to recompute the ALP in accordance with the directions of the DRP and keeping in mind the errors pointed out in the revision order, he further observed that the directions of the DRP

cannot be agitated by the assessee nor can they be reconsidered by the TPO. He therefore, held that the purpose of exercise will be limited to correctly computing the arms' length price in the given set of transactions. Against this order of the CIT (IT & TP) u/s.263 of the Act, the assessee is in appeal before us by raising the following grounds of appeal:

> *"Each of the grounds and/ or sub-grounds of the appeal are independent and without prejudice to the others.*
>
> *1. On the facts and in the circumstances of the case and in law, the Hon'ble Commissioner of Income tax (IT&TP) ['CIT'] erred in revising the order passed by the Ld. Transfer pricing Officer ('TPO') under section 263 of the Act*
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> *2. On the facts and in the circumstances of the case and in law, the Hon'ble CIT has grossly erred in invoking the jurisdiction under section 263 of the Act for setting aside the order passed by the Ld. TPO under section 92CA of the Act*
>
> *3. On the facts and in the circumstances of the case and in law, the Hon'ble CIT grossly erred in making revision under section 263 of the Act without appreciating / ignoring that:*
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> *i. Order of the Ld. TPO is not erroneous and prejudicial to the interest of revenue and hence needs to be quashed;*
>
> *ii. The view taken by the Ld. TPO is possible view;*
>
> *iii. There is a change of opinion and hence does not justify the initiation of revision under section 263 of the Act;*
>
> *iv. Without Prejudice, Ld. TPO erred in including Tasty Bites Eatables Limited as a comparable which fails the related party transaction filter.*
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> *It is prayed that the revision initiated by the CIT under section 263 of the Act be quashed.*
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> *The above grounds are without prejudice to each other. The Appellant reserves its right to add, alter, amend, delete or withdraw any ground of appeal either before or at the time of hearing of this appeal".*

3. The learned Counsel for the assessee, Shri Dhanesh Bafna submitted that initially the assessee has taken only two companies as comparable to the assessee i.e. Capital Food Products Ltd and Haldiram Bhujiawala Ltd, but subsequently, the TPO had taken three more companies i.e. ADF Food Ltd, Tasty Bites Eatables Ltd, DFM Foods Ltd also as comparables and consequently, the margins of the assessee as per the TP order was at 7.83% as against the margin of the comparable at 14.36%. He submitted that after giving effect to the DRP's direction, directing the TPO to correct the margin of the comparables adopted by the TPO, the TPO arrived the margin of the assessee at 7.8% and as it was within +_ 5% of the assessee's margin, there was no adjustment proposed by the TPO. He submitted that before the DRP, the assessee had raised the issue of comparability of Tasty Bites and Eatables Ltd to the assessee on account of RPT filters adopted by the TPO but the DRP did not consider the same and since the ALP computed by the AO after giving effect to the order of the DRP was less than +_5% of the assessee's margin and there was no demand arising from the said amount, the assessee has not challenged the same before the ITAT. He submitted that the CIT u/s 263 has not only revised the PLI of the assessee at 5.29% but has also directed the TPO to recompute the PLI of the comparable companies due to which the PLI of the comparable

companies rose to 10.83% and since the difference between the PLI of the assessee and the comparable companies consequent to the order u/s 263 is more than +_5%, the TP adjustment was required. The learned Counsel for the assessee submitted that the TPO, in his order, has adopted 'more than 25% of the RPT transactions' as one of the filters to exclude several companies. He has drawn our attention to the annual report of the comparable, Tasty Bites Eatables Ltd, to demonstrate that the RPT of the said company with its holding company was actually 75%. Therefore, according to him, if the TPO had calculated and applied the RPT filter to Tasty Bites and Eatables Ltd, this company would have been excluded from the final list of comparable by the TPO during the 92CA proceedings itself and the PLI of the assessee would have been within +_5% of the PLI of the comparables and in the result the assessment order would not have been erroneous and prejudicial to the interest of the revenue. He submitted that since there was no demand arising out of the draft assessment order or the final assessment order after giving effect to the directions of the DRP, there was no occasion for the assessee to file any appeal before the ITAT and that it was only due to erroneous order of the CIT u/s.263 of the Act, the demand has arisen. He submitted that the CIT, in his order u/s 263, also could have considered whether the said company i.e., Tasty Bites and Eatables Ltd satisfied the

filters adopted by the TPO and if for the said reason, the said company is excluded from the final list of the comparables, the assessment order could not have been held to be erroneous. He therefore, prayed that the order of the CIT (IT&TP) u/s.263 of the Act should be set aside. He also argued that u/s 263 of the Act only an assessment order can be revised and not the TPO's order passed u/s 92CA of the Act and therefore, the order u/s.263 of the Act is not sustainable.

4. The learned DR, on the other hand, supported the order of the CIT (IT & TP) u/s.263 of the Act and submitted that the CIT has only revised the TPO's order and has not interfered with the directions of the DRP and therefore, the CIT has not exceeded his jurisdiction u/s 263 of the Act. He argued that u/s 263 of the Act, any order passed by the AO can be revised and it may not be only the assessment order. As regards the exclusion of the Tasty Bites and Eatables Ltd from the final list of comparables, he submitted that the TPO had issued a show-cause notice as to why the said company should not be considered as a comparable to the assessee but the assessee had not raised any objection to the same and it was only during the revision proceeding u/s 263 of the Act that the assessee has raised its objection and as it was not part of the TPO order, the CIT could

not have entertained the same. He therefore, prayed that the revision order be sustained.

5. Having regard to the rival contentions and the material on record, we find that the CIT (IT&TP) has found that there was error in the calculation of the PLI of the assessee company i.e. adoption of the operating cost and also allocation of operating cost between the branded food segment and SIT segment and the assessee has not been able to point out that these discrepancies are not arising out of the TPO's order. Therefore, there is clearly an error committed by the TPO, in computing the operating revenue while determining the ALP. Thus, the TPO order was clearly erroneous in so far as it was prejudicial to the interest of the revenue.

5.1. Second question raised by the assessee was whether the CIT (IT&TP) could have revised the TPO order. The provisions of section 263 reads as under:

> *"The Principal Commissioner or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the[2] Assessing] Officer is erroneous in so far as it is prejudicial to the interests of the revenue, 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 an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.*

Thus, it is clear that any order passed by the AO can be revised by the CIT. The order of the TPO u/s 92CA of the Act is based on the reference of the AO and therefore, it is also part of the assessment record and can be revised by the CIT u/s 263 of the I.T. Act. Similar issue had arisen before the Co-ordinate Bench of ITAT at Kolkata in the case of Philips Ltd., Vs. Pr.CIT, Kolkata in ITA No.1142/Kol/2016 for A.Y.2009-10 and vide order dt.27.03.2019, the Tribunal has held as under:

> *"7. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-*
>
> *8. The first issue that is to be adjudicated is whether ld. Pr. CIT has the power u/s 263 of the Act to revise the assessment order passed by an Assessing Officer in compliance with the directions of the DRP u/s 144C(13) r.w.s 144C(5) of the Act. Under Section 144C(10) of the Act, the directions issued by the DRP are binding on the Assessing Officer. Under section 144C(13) of the Act, the Assessing Officer is required to complete the assessment in conformity with the directions of the DRP, without providing any further opportunity of being heard to the assessee. The ld. Counsel for the assessee argues that this process results in merger of the assessment order passed u/s 143(3)/144C(13) of the Act, with the order of the DRP. We now examine this argument.*
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> *8.1. The logic underlying the doctrine of merger, as laid down by the Hon'ble Supreme Court in the case of "Commissioner Of Income-Tax vs M/S. Amritlal Bhogilal & Co. 1958 AIR 868", is that; the juristic justification of the doctrine of merger may be sought in the principle that, there cannot be, at one and the same time, more than one operative order governing the same subject-matter. Therefore the judgment of an inferior court, if subjected to an examination by the superior court, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In*

other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court.

8.1.1. The order passed by the Assessing Officer u/s 143(3) r.w.s. 144C(13) of the Act, in pursuance of directions of the DRP is appealable before the ITAT as per Section 253(1)(d) of the Act. The directions of the DRP u/s 144(5) of the Act, are not appealable before the ITAT. Under those circumstances, in our view, the directions of the DRP, which is a higher authority cannot be said to have merged with the order of the Assessing Officer, passed u/s 143(3) r.w.s. 144C(13) of the Act, which is a lower authority. Thus we are unable to accept this argument of the ld. Counsel for the assessee.

8.1.2. Without prejudice to our above view, it is also settled that the doctrine of merger applies only on those issues that are considered and adjudicated by a higher appellate authority. In the case on hand, the argument of the ld. Counsel for the assessee, at best, holds good, only on those issues, which the DRP had considered and had adjudicated upon. Those issues which were never considered or looked into by the DRP cannot be considered as those which have merged with the order of the Assessing Officer, simply because, the DRP, has as per the provisions of the Act, had the powers to consider any issue that arises in an assessment order. Such enabling power under the Act, does not lead to a conclusion that all issues which were never looked into by the DRP were considered and adjudicated by the DRP.

8.2. In our view at best, without prejudice to our finding that there is no merger of the order of the Assessing Officer with that of the DRP, the doctrine of partial merger may apply to the facts of the case at hand. Thus, on the issues that were not before the DRP and the issues which the DRP had not examined nor has applied its mind to, there can be no merger with the directions of the DRP. In the case on hand, both the issues that were subject matter of revision u/s 263 of the Act, were not issues considered or examined by the DRP.

9. The ld. Counsel for the assessee relied on the decision of the Bombay 'A' Bench of the Tribunal in the case of Trustees of Parsi Panchayat Funds & Properties vs. Director of Income-tax (supra). The contention of the assessee in this case was that, the order framed on the directions given by the DDIT u/s 144A of the Act, could not be revised u/s 263 of the Act, as to the extent, the Assessing Officer could not be said to have applied his mind. The Tribunal held as follows:-

"7. The contention of the assessee was that the order was framed on the direction given by DDIT under section 144A of

the Act and to that extent the Assessing Officer could not be said to have applied his mind and therefore, that portion of the order based on the direction of DDIT under section 144A of the Act, could not be revised under section 263. According to the counsel the amendment to section 263 of the Act which permits revision of orders that are made in pursuance to the directions under section 144A of the Act is intended to cover all those cases and to that part of the order of assessment which is not guided by the directions under section 144A of the Act. The support of the argument was with reference to the earlier decisions which have held that the order could not be erroneous when he follows his superior orders. The Supreme Court decision in CIT v. Elphinstone Spg. & Wvg. Mills Co. Ltd. [1960] 40 ITR 142 was referred to for the proposition that fiction created by the section should not be carried beyond the purpose for which it was intended which was reiterated by the Supreme Court in CIT v. Moon Mills Ltd. [1966] 59 ITR 574, in CIT v. Ajax Products Ltd. [1965] 55 ITR 741 , in CIT v. Amarchand N. Shroff [1963] 48 ITR 59 . It was submitted that the Calcutta High Court in CIT v. Justice R.M. Datta [1989] 180 ITR 86 had held that the words of the statute are precise and unambigugus, they must be accepted as declaring the express intention of the legislation.

The departmental representative contended that the amendment including the revision of an order of assessment framed on the directions under section 144A of the Act has to be construed in its true. perspective and should not be broken up as suggested by the learned counsels for the assessee. In support of the above arguments, reliance was placed on the Bombay High Court decision in CIT v. M.M. Virwani [1994] 207 ITR 225. In support of the argument that the Assessing Officer when applies wrong law it gives raise to an error and could be revised by the Commissioner, reliance was placed on the Rajasthan High Court decision in CIT v. Emery Stone Mfg. Co. [1995] 213 ITR 843. It was pointed out that the order did not deal with the provisions of section 11(4A) of the Act and therefore, error did creep in the order of Assessing Officer.

The contention of the learned counsel for the assessee that the amendment to section 263 of the Act permitting revision of orders has to be limited to that portion of the order not covered by the direction under section 144A of the Act, in our considered opinion deserves to be rejected. Sections 144A and 144B of the Act were introduced with a view to contain litigation by making the immediately superior authority to the Assessing officer to have concurrent jurisdiction in the framing of the assessment and this jurisdiction so exercised by that superior authority is not

merely as a superior but as an Assessing Officer as well. To ensure that the assessments framed after obtaining the directions under section 144A do not go unchecked the Legislature in their wisdom had amended the section 263 to include such an order as within the ambit of revision provided of course it could be said that the order is erroneous so as to make it prejudicial to the interests of the revenue. Considering the volume and the tax involved, the CBDT from time to time had issued such notifications to the effect that Inspecting Assistant Commissioners of Income-tax, Deputy Commissioners of Income-tax would also act as Assessing Officer singly or shall have concurrent jurisdiction. The order of assessment passed by Assessing Officer or Assessing Officer under directions of Inspecting Assistant Commissioner (IAC) or by IAC all are performing the functions of an Assessing Officer. This is clearly brought out in the Notes on Clauses to the Taxation Laws Amendment Bill, 1984 by which the Explanation to section 263 was introduced covering the orders framed as per the directions received under section 144A of the Act. This is reproduced below for the sake of facility:

"Sub-clause (a) seeks to insert an Explanation to sub-section (1) of section 263. Under the existing provisions, the Commissioner is empowered to revise any order passed by the Income-tax Officer under the Income-tax Act if he considers that such an order is erroneous insofar as prejudicial to the interests of the revenue. The Explanation seeks to clarify that, for the purposes of this section, an order of assessment passed by the Income-tax Officer, on the basis of the directions issued by the Inspecting Assistant Commissioner under section 144A or section 144B or an order passed by the Inspecting Assistant Commissioner in exercise of the powers or in performance of the functions of an Income-tax Officer conferred on or assigned to him under clause (a) of sub-section (1) of section 125 or under sub-section (1) of section 125A shall be regarded as an order passed by the Income-tax Officer."

In the case before us the assessment was selected for scrutiny and the DDIT was closely following every stage of the assessment and in the course of such function had issued his directions under section 144A of the Act and was performing the identical functions of the Assessing Officer and the order finally passed according to the directions remain to be an order made by Assessing Officer jointly with DDIT acting as an Assessing Officer. Therefore, there is absolutely no merit in the argument advanced by the learned counsel of the appellant-trust that to the extent of the directions received under section 144A and applied by the Assessing Officer it could not be revised and hence is rejected."

9.1. A perusal of the above case-law shows that, it can be said that the DRP is also discharging a function of an assessing officer and the assessment order still remains that of the Assessing Officer, though it incorporates the directions of the DRP. The DRP proceedings are a stage of assessment proceedings. If the proposition of law laid down in this case-law is applied to the case at hand, then even the directions given by the DRP and incorporated in the assessment order can be a subject matter of revision u/s 263 of the Act, even in the absence of an enabling provisions such as sub-clause (a) to Explanation 1 to Section 263 of the Act, which is clarificatory in nature.

Hence the argument that an enabling provision such as explanation 1(a) to Section 263 of the Act, is required for the ld. Pr. CIT to revise an order passed u/s 143(3)/144C of the Act, is in our view not correct as this explanation only clarifies the powers that are inherently held by the Pr. CIT u/s 263 of the Act. In any event, the argument of the assessee cannot be applied to those issues which were not considered by the DRP.

9.2. Another limb of the argument of the ld. Counsel for the assessee is that the DRP's power extends to such matters that have not been raised in the objections filed by the assessee before it under section 144C sub-section 8 and explanation thereto, and hence the entire order of the Assessing Officer can be said to be have been passed on the directions of the DRP. Simply because there is a power in the Act provided to the DRP, to examine all issues relatable to an assessment, whether raised by the assessee before it or not, it cannot be concluded that all the issues that arise in an assessment are deemed to have been examined or considered by the DRP. Those issues which were not considered or looked into by the DRP cannot be held as decisions taken by the DRP and incorporated in the assessment order passed u/s 143(3) r.w.s. 144C(13) of the Act.

9.3. Another argument raised was that, in the absence of an enabling provision to Section 263 akin to clause (C) to explanation 1 to Section 263, the ld. Pr. CIT does not have the power to revise the order passed in compliance with the directions of the DRP. In our view, the explanation in question only clarifies or explains the position of law. It is not a deviation from the settled position of law. In our view even without such enabling provision, the ld. Pr. CIT has the power to revise u/s 263 of the Act, those issues which were not a matter of consideration by the DRP.

9.4. Reliance was placed on Section 144C(15) of the Act, for bringing to our notice that the DRP comprises of a collegium of three Principal Commissioners of Income Tax

/Commissioners of Income Tax and hence when an order is passed by the Assessing Officer pursuant to the DRP's direction, a Principal Commissioner of Income Tax of equal rank cannot review such order u/s 263 of the Act. Reliance is placed on the decision of the Hon'ble Delhi High Court in the case of CIT vs. K.L. Ahuja reported in [2001] 250 ITR 763 (Delhi). In this judgement the proposition of law laid down was that, if an order is passed by the Assessing Officer in pursuance of directions of his superior officers who happens to be a Commissioner of Income Tax, then such Commissioner of Income Tax cannot revise that order, as it would tantamount to revising one's own order. In the case of K.L. Ahuja (supra), an order under Section 154 of the Act was passed by the Assessing Officer relying upon a general circular issued by CIT which in turn followed an earlier CBDT circular accepting the ITAT Mumbai Bench's decision. Here the facts are entirely different. In this case, it is not a question of revising one's own order. Further, neither the Assessing Officer nor the DRP have applied their mind on the issues which are the subject matter of revision. Hence the question of revising one's own order or orders of authorities of concurrent or equal ranks does not arise. This argument may be accepted only to the extent that the directions given by the DRP and followed by the Assessing Officer may not be subject matter of revision by the ld. CIT u/s 263 of the Act as the persons constituting the DRP are of the same rank as that of the ld Pr. CIT.

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11. Applying the propositions of law laid down in these case-laws to the facts of the case at hand, in our considered opinion, as the Assessing Officer has passed this assessment order, without enquiry and application of mind on these two issues, the order is erroneous and prejudicial to the interest of the revenue.

11.1. The ld. Counsel for the assessee further relied on the decision of the Hon'ble Delhi High Court for the proposition that the ld. CIT cannot direct the Assessing Officer to conduct a fresh enquiry on the issue without specifying as to how the assessment order passed by the Assessing Officer was erroneous insofar it is prejudicial to the interest of the revenue. In our view, the ld. CIT has applied his mind to both these issues by considering, the facts and the law as well as the explanation of the assessee. He has indicated as to how the assessment order in his opinion was erroneous and prejudicial to the interest of the revenue, to the extent of these two issues. Hence this argument of the ld. Counsel for the assessee by relying on the judgement of the Hon'ble Delhi High Court in

the case of D.G. Housing Projects (supra), is not applicable to the facts of this case. Hence we find no infirmity in the order of the ld. Pr. CIT, giving direction to the Assessing Officer to examine both these issues properly and adjudicate the issues afresh, after giving the assessee proper opportunity of being heard.

11.2. The ld. Counsel for the assessee has placed evidences and made detailed submissions on merits on the two issue that where the subject matter of revision. In our view, to express a view on the merits of the claim of the assessee at this stage, is not proper. The facts have to be examined by the Assessing Officer. The ld.Pr. CIT has examined the explanation and facts submitted by the assessee and has come to a conclusion that the Assessing Officer has to examine the same. The Assessing Officer is directed to examine both these issues independently, without getting influenced by any of the observations of the ld. CIT on these issues afresh in his order u/s 263 of the Act and adjudicate both these issues in accordance with law.

11. In the result, appeal of the assessee is dismissed".

Thus, where the direction of the DRP have been held to be part of the assessment order, then, there can be no doubt that TP order is also part of assessment order and is thus amenable to jurisdiction of the CIT u/s.263 of the Act and particularly on the issues which were not considered by the TPO and DRP. Thus, assessee's grounds of appeal No.1 to 3(i), (ii) & (iii) are rejected.

5.2. As regards G.No.3(iv) i.e., the assessee's objection that the Tasty Bites and Eastables Ltd does not satisfy the filter adopted by the TPO, we find that the TPO has himself adopted the RPT filter of more than 25% and in the case of Tasty Bites and Eatables Ltd., it's RPT is clearly beyond the range fixed by the

TPO, its RPT transactions are much more than 50%, but nearly 75%. In such circumstances, the TPO ought not to have considered the said company as a comparable company. Though the assessee may not have challenged the same before the TPO, assessee has challenged it before the DRP, but the DRP has not adjudicated the same and since there was no demand arising due to the consequential order passed by the AO, there was no occasion for the assessee to file an appeal before the ITAT. Therefore, in our opinion, the CIT (IT&TP) ought to have directed the TPO to consider assessee's objections to Tasty Bites and Eatables Ltd before concluding the assessment proceedings. Therefore, we deem it fit and proper to direct the AO to examine and verify whether the RPT transaction of Tasty Bites Eatables Ltd with its AE is more than 25% and if it is found to be correct, then the said company shall be excluded from the final list of comparables. With these directions, the order of the CIT u/s 263 is modified and the AO/TPO is directed to recompute the ALP by excluding the Tasty Bites Eatables Ltd, and if thereafter the PLI of the assessee is less than +_5% of the comparable companies, then no TP adjustment is called for. With these directions, the appeal of the assessee against the order u/s.263 of the Act, is partly allowed.

ITA No.1116/Hyd/2018

6. In ITA No.1116/Hyd/2018, the only grievance of the assessee is that both the TPO and CIT(A) have erred in not considering the assessee's objections to Tasty Bites and Eatables Ltd. Since we have already modified the direction of the CIT u/s 263 of the IT Act, this appeal of the assessee becomes infructuous and it is accordingly dismissed as infructuous.

7. In the result, appeal in ITA No.775/Hyd/2016 is partly allowed and appeal in ITA No.1116/Hyd/2018 is dismissed.

Order pronounced in the Open Court on 17th December, 2020.

Sd/-	Sd/-
(D.S.SUNDER SINGH) **ACCOUNTANT MEMBER**	**(P. MADHAVI DEVI)** **JUDICIAL MEMBER**

Hyderabad, dated 17th December, 2020.
Vinodan/sps
Copy to:

1 Agro Tech Foods Ltd, 31, Sarojini Devi Road, Secunderabad 500003
2 CIT (IT&TP) 5th Floor, Aayakar Bhavan, Basheerbagh, Hyderabad 500004
3 TPO-2 Hyderabad
4 Pr. CIT -
5 The Jt.Commissioner of Income Tax (Transfer Pricing) Hyderabad
6 The DR, ITAT Hyderabad
7 Guard File

By Order