

**IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUH RAHMAN, HON'BLE ACCOUNTANT MEMBER AND
SHRI AMARJIT SINGH, HON'BLE JUDICIAL MEMBER**

ITA NO. 953/MUM/2021 (A.Y: 2014-15)

Multi Commodity Exchange of India Limited CTS 255, Exchange Square Suren Road Chakala Andheri (E) Mumbai – 400093 PAN: AADCM8239K	v.	Pr.CIT –(Central)-4 6 th Floor, Room No. 663 Aayakar Bhavan, M.K. Road Mumbai - 400020
(Appellant)		(Respondent)

Assessee by	:	Shri P.J. Pardiwala & Shri Tanzil Padvekar
Department by	:	Shri Sanjeev Kashyap
Date of Hearing	:	07.02.2022
Date of Pronouncement	:	27.04.2022

ORDER

PER S. RIFAUH RAHMAN (AM)

1. This appeal is filed by the assessee against order of the Learned Principal Commissioner of Income Tax, Central-4, Mumbai [hereinafter in short "Ld. Pr.CIT"] dated 30.03.2021 for the A.Y. 2014-15.

2. Brief facts of the case are, M/s. Multi Commodity Exchange of India (MCX), the assessee filed its original return of income on 29.11.2014

declaring total income at ₹.182,75,65,990/-. The case was selected for scrutiny under CASS and notice u/s.143(2) and 142(1) of the Act was issued to the assessee. The assessment was completed by passing order u/s.143(3) r.w.s 144C(3) dated 21.01.2019 determining total income at ₹.244,79,31,198/-. Ld. Pr.CIT observed that Special Audit Report (SAR) was directed by the Forward Market Commission (FMC) in the affairs of the assessee company from inception till 30th September, 2013. The report was called for on various aspects including review of certain transactions undertaken with related and non-related parties. In accordance with the directions, the special auditor M/s. Price water House Coopers Pvt. Ltd. (PWC) conducted Special Audit and submitted its report on 21.04.2014. In the Special Audit Report, several discrepancies were brought to light by the Special Auditor based on review of various documents, procedures, agreements, etc., pertaining to the transactions.

3. Ld. Pr.CIT observed that the Assessing Officer alongwith recorded satisfaction of the Range head proposed that the assessment order dated 21.01.2019 passed by the Assessing Officer u/s 143(3) r.w.s 144C(3) of the Act for the current assessment year i.e. A.Y. 2014-15 be revised u/s.263 of the Act. It was submitted before him that during the assessment proceedings, while assessing the various related party

transactions of the assessee, the assessee has submitted that such related party transaction have been examined by the transfer Pricing Officer (TPO) and therefore, no details pertaining to such transaction(s) were submitted during the assessment proceedings. It is submitted by the assessing officer before Ld. Pr.CIT that while passing order u/s.92CA(3) of the Act , the TPO has not taken cognizance of the findings of the PWC Special Audit report while making the adjustment and to the extent, the final assessment order dated 21.01.2019 passed u/s 143(3) r.w.s 144C(3) of the Act is erroneous in so far as it is prejudicial to the interests of the revenue. In view of the above facts, Ld. Pr.CIT has initiated proceedings u/s 263 of the I.T. Act and notice was issued to the assessee.

4. In response assessee file its objection dated 06.03.2019. Due to change of incumbent the assessee was again asked to make the submissions in this regard and assessee has taken adjournment on various occasion and did not file any records before Ld. Pr.CIT. Based on the information available on record, Ld. Pr.CIT completed the proceedings by observing that based on the evidences of the case, Assessing Officer erred in law, in not providing SAR submitted by PWC on 21.04.2014 wherein the SAR highlighted discrepancies in respect of related party's transactions. The Transfer Pricing Officer passed order u/s.92CA(3) of

the Act without taking into consideration the SAR for determination of Arm's Length Price (ALP) for this assessment year. Accordingly, Ld. Pr.CIT set-aside the Assessment Order dated 21.01.2019.

5. Aggrieved assessee is in appeal before us raising following grounds in its appeal: -

1. *The Learned Principal Commissioner of Income Tax - 4 (Ld. PCIT - 4) erred in initiating revision proceedings under section 263 of the Income Tax Act, 1961 ("the Act"). Your Appellants submit that the initiation of proceedings under section 263 of the Income Tax Act, 1961 is illegal and bad in law and the order of the Ld. PCIT - 4 be quashed.*

2. *The Ld. PCIT - 4 failed to consider the letter/submission dated 06/03/2019 filed before the Ld. PCIT -4 wherein your Appellant had explained in detail why the proceedings under section 263 of the Income Tax Act, 1961 are illegal and bad in law.*

3. *The Ld. PCIT - 4 erred in stating that the Appellant had not filed any submission/ presented the case. Looking into the facts & circumstances of the case your Appellant submits that on change of the incumbent, on 13/02/2020, its authorized representative once again visited the office of the Ld. PCIT4 to present their case. After waiting for almost more than two hours, one of the staff of the Ld. PCIT - 4, Mr Ranjan informed that he was in a meeting. Accordingly, a copy of the submission filed on 06/03/2019 was once again handed over to the staff to be put in the file when his staff stated that after talking to Ld. PCIT - 4, he will give a new date. However, to the Appellants utter surprise, the Ld. PCIT - 4 did not consider the same while passing the order under section 263 of the Income Tax Act, 1961.*

4. *The Ld. PCIT - 4 erred in stating that the order passed by the Ld. AO was erroneous and prejudicial to the interest of the revenue on the ground that the Ld. AO failed to refer the case to the learned Transfer Pricing Officer (Ld. TPO). Looking into the facts & circumstances of your Appellant it is submitted that Ld AO vide his*

letter dated 05/12 216 had refer the case to Ld TPO. Further, the Ld. PCIT - 4 himself in para 10 of the order has stated that the "..... The said Special audit report was available with the AO when the case was referred to the TPO, but the AQ erred in not making available the same to the TPQ..... ". Therefore, assessment order passed is not erroneous & prejudicial to the interest of the revenue and proceedings under section 263 of the Income Tax Act, 1901 are illegal, bad in law and the order of the La. PCIT - 4 be quashed.

5) The Ld. PCIT - 4 failed to appreciate the facts that he had no jurisdiction under Sec.263 on the orders passed by Ld. TPO under Sec.92CA(3) of the Act as Ld. TPO is not included in the definition of the Ld. AO and he discharges his functions and powers independently. Further, as per Sec.92CA(4) of the Act, once the copy of the TPO's Order is received by the Assessing Officer, he shall pass the assessment order in Conformity with the order of the TPO. Looking into the facts & circumstances of your Appellant it is submitted the Ld. AO has passed the order as per sec 92CA(4) of the Act i.e. in conformity with the Ld. TPO's order and accordingly the order passed by the Ld. AO cannot be said to be erroneous or prejudicial to the interest of the revenue. Therefore, proceedings under section 263 of the Income Tax Act, 1961 are illegal and bad in law and the order of the Ld. PCIT - 4 be quashed.

6. The Appellant craves to add to or amend or alter the aforesaid grounds before the disposal of appeal as they may think fit by themselves or by their representatives."

6. At the time of hearing Ld. AR submitted submissions on legal jurisdictional issues which is reproduced below: -

"This appeal is filed challenging the impugned Order passed under Section 263 of the Act by the Ld. CIT (Central) by setting aside the Order of the Ld. Assessing Officer passed under Section 143(3) r.w.s. 144C(3)(1) Dt.30/03/2021 which involved issues of Domestic Transfer Pricing, on the reasoning that the Ld. A.O had failed to bring to notice the Special Audit/Review Report (SAR) prepared by PWC, Auditors, to Transfer Pricing Officer (TPO) who passed Order under Section 92CA(3) of the Act.

Submissions on Legal Jurisdictional Issue No. 1:**The Revision proceedings initiated by CIT u/Sec. 263 of the Act based on A.O's consideration and recommendation is bad in law:**

2. While referring to the Para No. 3 of the Impugned order passed under Section 263 of the Act, it was argued by the Sr. Advocate for the Appellant that the impugned Order passed under section 263 is bad in law as the revision proceeding was initiated on the bases of satisfaction recorded by the A.O. that Ld. CIT needs to revised Assessment Order under Se. 263 of the Act. The Sr. Advocate place his reliance on the decision of the Hon'ble Tribunal, Pune Bench in ITA.No. No.1287/Pun/2017 of Alfa Laval Lund AB Vs CIT(IT/TP), Pune. The Counsel argued that the twin mandatory conditions provided under Sec. 263 of the Act i. e. (i) the CIT calling for and examining the record, And (ii) in HIS consideration an assessment Order is erroneous as well as prejudicial to interest of Revenue etc., which are sine qua non for the exercise of power under Sec. 263 of the Act and both the conditions must be fulfilled together. It is argued that in case of the Appellant both conditions are not fulfilled together as it is kicking point for invoking jurisdiction u/ s 263. Thus, when the CIT invoked his jurisdictions mechanically on basis of the proposal and recommendation of A.O., it lacks the jurisdictional requirement and therefore the exercise of jurisdiction and consequential proceedings by Ld. CIT under Section 263 is bad in law and without lawful assumption of jurisdiction.

Submissions on Issue No. 2:**The PCIT wrongly assumed jurisdiction to revise the order Passed by the TPO as Section 263 does not confer any revisionary jurisdiction over TPO:**

3. Ld. Sr. Counsel argued under the pretext of putting blame on A.O., Ld. CIT has impliedly tried to set aside and revised the Order passed by the TPO. It is argued that the PCIT has no jurisdiction to revise the Order passed by the TPO under Sec. 92AC(3) of the Act as Sec. 263 does not confer any administrative or Supervisory jurisdiction over TPO. For this proposition Sr. Counsel placed his reliance on decision of the Hon'ble Tribunal, Delhi bench, in case of JCB India Ltd vs DCIT Circle -13(2) New Delhi, ITA 518/De1/2021 (Para 14) wherein the Hon'ble Tribunal has answered the question

whether a PCIT has jurisdiction to revise the Order of the TPO passed under Sec. 92AC(3)? Held in Negative and in favour of Assessee.

Submissions on Issue no. 3:

That no Prejudice is caused to the interest of the revenue and therefore mandatory twin conditions for exercising power under Sec. 263 of the Act are not fulfilled. Therefore, the impugned Order under Section 263 is bad in law.

4. *The Forward Market Commission (FMC) directed MCX to appoint Auditor for conducting Special Audit to report whether there was misused of MCX trading Platform as well as Company by interested Persons/Parties for their benefits in violation of the Forward Contract (Regulations) Act, 1952. This Special Audit was directed by FMC due to payment settlement crisis in National Spot Exchange (NSEL), as the Appellant Company and NSEL were controlled by one Financial Technology India Ltd. (FTIL). The FMC directed the Appellant to undertake a Special Audit from inception the Appellant Company i.e 2002 to 30/09/2013 for period of 10 years. As per directions of FMC, the Appellant Company appointed PWC to conduct Special Audit as per the guidelines laid down by FMC. The PWC completed Special Audit as per it's Audit Report dt. 21-04-2014 for specific purpose of FMC, under the scope of work as defined in the PWC Report.*

5. *The scope of work for the Review (AUDIT) is as under:*

(Pls. refer to at Pg. 108 of PWC Report Paper Book Para 1.2.1)

"Scope of work defined for this Review

"1.2.1 The scope of work for this Review can be broadly classified

as follows:

- Identification of related parties (as defined by FMC in the terms of reference and a working definition arrived at for the purpose of this Review)*
- Review of non-trading transaction between MCX and significant related parties*
- Review of transactions of expenses incurred (individually) above INR 25 Lakhs*

- *Review of trading transactions conducted by related parties identified above on the MCX platform*
- *Review of Risk management system of the MCX technology platform.*
- *Ascertain whether the meetings of the Board of MCX were held in compliance with the Companies Act, 1956.*

This Report has been structured in the aforesaid sequence for presentation of findings of this Review."

6. *It was argued by the Appellant that as per clarification given by PwC, Auditors in Special Audit/Review Report that for the purpose of the SAR, the PWC has made it's own Working Definition" of the "Related Parties" which do not constitute 'Related Parties" as defined under provisions of any prevailing Laws or guidance from any Professional bodies of India. (Kindly ref. para 3.5.1. at Page No. 126 of paper book 1.)*

7. *It was further argued by the Appellant that the AO has already made 100% disallowance in respect all transactions of the Parties as mentioned in PWC's Special Audit/Review Report, other than related Parties as defined in Sec. 92BA (i) r/w Sec.40A(2)(b) of the Act and the Parties covered under Domestic Transfer Pricing Provisions were subjected to determination of arm's length price (ALP) and therefore even for sake of argument assuming that the Order passed by Ld. TPO under Sec. 92AC(3) of the Act was erroneous, there has to be prejudice to the revenue. It was further argued that in the respect of 676 parties whose vague reference is made in the Special Audit/Review Report (SAR) of PwC, Page no. 19 of the Report (P-123 of Paper Book) that the provisions of Chapter X are applicable qua specified domestic transactions only when payments are made to a Persons specified in Sec. 40A(2)(b) of the Act.*

8. *The transactions subjected to Domestic Transfer provisions are reported in Form 3CD and 3CEB2 declares which are Specifies Parties and nature of transactions and none of so called 676 additional parties are covered as related Parties as defined in Sec. 40A(2)(b). It was submitted that reference to related Parties made in Special Audit/ Review Report is as per the Self made definition adopted by PwC, Auditors, with SPECIFIC DISCLAIMER Clause that it is a self-made definition of the related parties which is not in accordance with any law but made for the purpose of REVIEW and hence, those related Parties are not covered in strict sense as related*

parties within the meaning of section 92BA r.w.s 40A(2)(b) of the Act. Therefore, it was contended that all related Party as pointed in the Special Audit/Review Report of PWC do not fall with the definition of related parties as per Section 40A(2)(b) of the Act. All those Parties which are covered in the definition of the 'related party' under Sec. 40A (2)(b) are already disclosed to the TPO by filing Auditor Report in Form No. 3CEB, which is prescribed for reporting of domestic transactions subjected to TP Provisions and all such Parties have also been disclosed in Form 3CA which is Audit Report under Section 44AB. Hence, TPO would not have jurisdiction over the transactions between the Parties which did not fall within the preview of the related parties including the 676 as erroneously referred by Ld. CIT (Central) in impugned Order.

6. *It was further argued that the Ld. A.O. has made disallowance in entirety in respect of all payments to the Parties that were alleged in Special Audit Report of PWC relevant for A-Y. 2015-15 (Refer to pg.15 of pb para 29)*

<i>Party Name</i>	<i>Amount in Special Audit Report of PWC</i>	<i>Amount disallowed in Assessment order</i>
<i>Moneywise Financial Services Pvt. Ltd</i>	<i>1,25,00,000/ (at para 8.2.62 onwards of pg 183 of paper book 1)</i>	<i>1,25,00,000/- (At para 37 To 41 of assessment order at page 25-26 of the Paper book 1)</i>
<i>Informatic Value Research Private Ltd.</i>	<i>Providing market intelligence and consulting services (In para 8.2.72 at page 185 of the Paper book 1) Period: 01/04/2013 to 30/09/2013 (6 months 32,00,000 * 6 = 1,92,00,000/- + Further additions: 90,00,000/- Total: 2,82,00,000/-</i>	<i>2,82,00,000/- (in Para 44-46 at Page No. 26-27</i>
<i>Dinesh Rao & Associates</i>	<i>50,00,000/- (in para 8.2.107 at page No. 190-191 of the paper book 1)</i>	<i>50,00,000/- In para 47-49 at Page 27 to 28 of paper book 1)</i>
<i>Sky Star Advertising</i>	<i>3,90,00,000/-(In para 8.2.96 to 8.2.98 at In para 42-43 at Page 26 of the Paper 1)page 188-190 of the paper book 1)</i>	<i>5,00,00,000/-</i>

7. It was also submitted that there are no other payments those have been left out by the A.O. and therefore, no prejudice caused to the interest of the Revenue. Hence one of the twin conditions under Section 263 of the Act, that the Order should be erroneous and also it should cause prejudice to the interest of the revenue have not been fulfilled. Reliance is placed on following two decisions in support of the argument:-

i. Income-Tax vs Gabriel India Ltd [203 ITR 108]

ii. Malabar Industrial Co. Ltd. Vs. Commissioner of Income Tax, 243 ITR 83

Prayer:- In light of the above submissions, it is prayed that the impugned order passed by id. CIT (Central) Mumbai -4 dated 30/03/2021 may be quashed and set aside for lack of want of jurisdiction."

7. On the other hand, Ld. DR relied on the finding of the Ld. Pr.CIT.

8. Considered the rival submissions and material placed on record, we observed that Ld. Pr.CIT initiated the proceedings based on the recommendations filed by the Assessing Officer that TPO has passed the order u/s.92CA(3) of the Act without considering the SAR report in which the report containing various discrepancies relating the related party transactions. We observe that the 263 proceedings were initiated mainly based on the satisfaction recorded by the Assessing Officer that Ld. Pr.CIT needs to revise the Assessment Order u/s. 263 of the Act. It clearly indicates that the 263 proceedings were initiated on the behest of the satisfaction recorded by the Assessing Officer not by the Ld. Pr.CIT. It is

submitted before us the mandatory twin conditions provided u/s. 263 of the Act are (i) the Commissioner calling for and examining the record and (ii) in his consideration and Assessment Order is erroneous as well as prejudicial to the interest of the Revenue *sin qua non* for exercise of the power u/s.263 of the Act, and both the conditions stated above must be fulfilled together. In the given case both the conditions are not fulfilled by the Ld. Pr.CIT. Further it was also submitted before us that the Ld. Pr.CIT has no jurisdiction to revise the order passed by the TPO u/s.92CA(3) as section 263 of the Act does not confer any administrative or revisionary control over TPO. In this regard the case of the JCB India Ltd., v. DCIT in ITA.No. 518/Del 2021. was relied upon to submit that Ld. Pr.CIT has no control over the TPO.

9. We observed that in the similar situation the Pune bench considered the similar facts wherein the proposal of revision u/s. 263 of the Act was received from DCIT(IT)-1, Pune through Jt.CIT(IT), Pune dated 25.03.2016, with a recommendation to initiate proceedings u/s. 263 of the Act. The Pune bench in the similar situation held as under: -

"4. Sub-section (1) of section 263 of the Act is an enabling provision which confers jurisdiction on the CIT to revise an assessment order which he considers erroneous and prejudicial to the interests of revenue. The process of revision u/s 263 of the Act initiates only when the CIT calls for and examines the record of any proceeding

under this Act and considers that any order passed by the AO is erroneous and prejudicial to the interests of the revenue. The twin conditions of – (i) the CIT calling for and examining the record; succeeded by (ii) his considering the assessment order as erroneous etc. – are sine qua non for the exercise of power under this section. The use of the word ‘and’ between the expression ‘call for and examine the record’ and the expression ‘if he considers that any order ... is erroneous ...’ abundantly demonstrates that both these conditions must be cumulatively fulfilled by the CIT and in the same order, that is, the first followed by the second. In other words, the kicking in point for invoking jurisdiction u/s 263 is calling for and examining the record of any proceedings under the Act by the CIT leading him to consider the assessment order erroneous etc. A communication from the AO is not ‘the record of any proceedings under this Act’. To put it simply, the consideration that the assessment order is erroneous and prejudicial to the interests of the revenue should flow from and be the consequence of his examination of the record of proceedings. If such a consideration is not preceded by the examination of record of the proceedings under the Act, the condition for revision does not get magnetized.

5. *It is trite that a power which vests exclusively in one authority, can’t be invoked or cause to be invoked by another, either directly or indirectly. Section 263 of the Act confers power on the CIT to revise an assessment order, subject to certain conditions. Instantly, we are confronted with a situation in which the revision was initiated on the basis of the AO sending a proposal to the CIT and not on the CIT suo motu calling for and examining the record of the assessment proceedings and thereafter considering the assessment order erroneous and prejudicial to the interests of the revenue. The AO recommending a revision to the CIT has no statutory sanction and is a course of action unknown to the law. If AO, after passing an assessment order, finds something amiss in it to the detriment of the Revenue, he has ample power to either reassess the earlier assessment in terms of section 147 or carry out rectification u/s 154 of the Act. He can’t usurp the power of the CIT and recommend a revision. No overlapping of powers of the authorities under the Act can be permitted. As the revision proceedings in this case have triggered with the AO sending a proposal to the Id. CIT and then the latter passing the order u/s 263 of the Act on the basis of such a proposal, we hold that it became a case of jurisdiction deficit resulting into vitiating the impugned order. Without going into the merits of the case, we quash the impugned order on this legal issue itself.”*

10. Respectfully following the above said decision, we are also of the view that Ld. Pr.CIT cannot initiate the proceedings with the borrowed satisfaction and not satisfying the twin conditions laid down u/s. 263 of the Act. Therefore, in our considered view the proceedings initiated u/s.263 of the Act with a borrowed satisfaction is bad in law. Accordingly, proceedings initiated u/s. 263 of the Act are set aside.

11. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open court on 27.04.2022.

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER
Mumbai / Dated 27.04.2022
Giridhar, Sr.PS

Sd/-
(S. RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum