

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "A", BANGALORE**

Before Shri George George K, JM & Ms.Padmavathy S, AM

ITA No.622/Bang/2020 : Asst.Year 2015-2016

M/s.PGS Premiere Conferencing Private Limited, Plot No.117, Neil Rao Tower 3 EPIP Phase-I, New Whitefield, Suit No.3W, Bangalore – 560 066 PAN : AAFCP4234M.	v.	The Principal Commissioner of Income-tax-5 Bangalore.
(Appellant)		(Respondent)

Appellant by : --- None ---
Respondent by : Sri.K.Sankar Ganesh, JCIT-DR

Date of Hearing : 20.10.2022	Date of Pronouncement : 21.10.2022
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ORDER

Per George George K, JM :

This appeal at the instance of the assessee is directed against Principal Commissioner of Income Tax's (PCIT) order dated 27.02.2020 passed u/s 263 of the I.T.Act. The relevant assessment year is 2015-2016.

2. The grounds raised read as follows:-

"The grounds mentioned herein by the Appellant are without prejudice to one another.

1. *That, the order of the learned Principal Commissioner of Income-tax - 5, Bangalore [Pr.CIT], dated 27 February 2020 passed under section 263 of the Income-tax Act, 1961 ("the Act") to the extent prejudicial to the Appellant, is bad in law and liable to be quashed.*

2. *That, on the facts and the circumstances of the case, the learned Pri.CIT has erred in regarding the order dated 25 October 2017 passed under section 143(3) of the Act as erroneous and prejudicial to the interests of the Revenue.*

3. *That, on the facts and the circumstances of the case, the learned Pri.CIT erred in disregarding the fact that the AO had, after due verification of documents available on record and assessment of the same, taken a decision to not refer the matter for the year to the learned Transfer Pricing Officer ('TPO').*

4. *That on the facts and circumstances of the case and in law, the learned Pr.CIT failed to appreciate that the Arm's Length Price 'was accepted by the learned TPO during the previous years on similar transactions and thereby erred in concluding that non-reference to TPO is prejudicial to the interests of the Revenue.*

5. *That, on the facts and the circumstances of the case, the PCIT has failed to appreciate that learned AO had carried an assessment of the international transactions during the course of the regular assessment proceedings and reference to the TPO in the present case would result in reassessment of the transactions which is not in accordance with law.*

6. *That, on the facts and the circumstances of the case, the learned Pr.CIT erred in concluding that the reference to the TPO is a mandatory requirement in case of selection of scrutiny assessment is based on TP risk parameter.*

7. *That on the facts and circumstances of the case and in law, the learned Pr.CIT erred in not ruling on the assessee's contentions that instruction no.3/2016 mandating the requirement to make a reference to the TPO is contrary to the provisions of the Act.*

The Appellant craves leave to add to and / or to alter, amend, rescind, modify the grounds herein above or produce further documents before or at the time of hearing of this Appeal."

3. The brief facts of the case are as follows:

The assessee is a company engaged in Teleconferencing and web related communications. For the assessment year 2015-2016, the return of income was filed on 30.11.2015 declaring total income of Rs.10,73,11,330. The assessment u/s 143(3) of the I.T.Act was completed vide order dated 25.10.2017 accepting the returned income. Subsequently, it was noticed by the PCIT that one of the reasons for

assessment being taken up for scrutiny was on account of transfer pricing risk parameter. The PCIT further noticed that the A.O. did not refer the matter to the Transfer Pricing Officer (TPO) to determine Arm's Length Price (ALP) of the international transactions undertaken by the assessee with its Associated Enterprises (AEs), in accordance with the CBDT Instruction No.3/2016 dated 10.03.2016. Accordingly, notice u/s 263 of the I.T.Act was issued directing the assessee to explain why the assessment completed on 25.10.2017 is to be treated as erroneous and prejudicial to the interest of the revenue. The assessee filed its objection on 09.01.2020. The objection filed by the assessee are reproduced in para 5 of the impugned order of the PCIT. The PCIT, however, rejected the contention of the assessee and passed the impugned order u/s 263 of the I.T.Act, wherein he set aside the assessment order as erroneous and prejudicial to the interest of the revenue. The PCIT directed the A.O. to make reference to the TPO in respect of the international transaction and specified domestic transactions listed in the Form 3CED and Form 3CD. The relevant finding of the PCIT in this regard reads as follows:-

“15. In view of the discussion above, it is amply clear that the assessment order has not been passed in accordance with the Instruction issued by the Board, and therefore, is deemed to be erroneous in so far as it is prejudicial to the interests of the revenue. Accordingly, I am of the opinion that the assessment order is prejudicial to the interest of the revenue. I, therefore set aside the assessment order, and direct the Assessing Officer to make a reference to the TPO in respect of the international transactions and specified domestic transactions listed in the Form 3CEB and Form 3CD. If during the course of the process, he comes across other such transactions which have not been reported therein, then he

shall make a reference in respect of these transactions too. The findings of the TPO, needless to say, shall be adopted by the Assessing Officer in the revised assessment order.”

4. Aggrieved by the order passed u/s 263 of the I.T.Act, the assessee has filed the present appeal before the Tribunal. None was present on behalf of the assessee, though in the earlier round, the representative of the assessee had appeared before the Tribunal and has sought for adjournment. During the course of this week, the cases were posted several times, however, there was no appearance. Moreover, we find that the issue raised is prima facie decided by the Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Ltd. v. CIT reported in ITA 504 of 2008 (judgment dated 18.11.2011).

5. The learned Departmental Representative submitted that since the reason for selection of the case for scrutiny is on account of transfer pricing risk parameter necessarily the A.O. ought to have referred the matter to the TPO, after obtaining the approval of the jurisdictional PCIT or CIT. In this context, the learned DR relied on the Board Instruction No.3/2016 (supra). The learned DR submitted that the issue in question is squarely covered by the judgment of the Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Ltd. v. CIT (supra) and the order of the Mumbai Bench of the Tribunal in the case of Bank of Baroda v. JCIT in ITA No.3699/Mum/2018 (order dated 05.10.2020).

6. We have heard the learned DR and perused the material on record. The admitted fact is that one of the reasons for selection of the assessment for scrutiny is transfer pricing

risk parameter. In the assessment completed u/s 143(3) of the I.T.Act, there is no discussion about the ALP of international transaction or specified domestic transaction listed in Form 3CEB / 3CD. In such a scenario, as per the Board Instruction No.3/2016 dated 10.03.2016, the case ought to have been mandatorily referred to the TPO by the Assessing Officer after obtaining necessary approvals. In fact, the instruction further states that if the information on international transactions or specific domestic transactions has not been disclosed in the return or the audit report, and the Assessing Officer comes to know about the same during the course of scrutiny proceedings which have otherwise been selected on non TP risk parameter, then also the A.O. has to mandatorily refer the transactions for examination by the TPO. It was further stated in the said Board Instruction (at para 3.7) that the power to determine the ALP of the international transaction should not be carried out at all by the A.O. Therefore, inspite of the assessment being picked up for scrutiny on account of transfer pricing risk parameter, the A.O. having not referred the matter to the TPO to determine the ALP of the international transaction undertaken by the assessee with its AE, was in direct contravention / non-adherence to the Board Instruction, cited supra. Clause (c) of Explanation 2 to section 263(1) of the I.T.Act states that the assessment order made not in accordance with any order, direction or instruction issued by the Board u/s 119 of the I.T.Act is erroneous order and prejudicial to the interest of the revenue. The Board Instruction No.3/2016 has been issued u/s 119 of the I.T.Act. Therefore, non-compliance of the above

said Instruction by the A.O. will render the said assessment order as erroneous and prejudicial to the interest of the revenue.

7. The Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Ltd. v. CIT (supra) had held that when Board Instruction No.3/2016 has been validly upheld, it is binding on the Assessing Officer and not taking recourse thereto would render the assessment order as erroneous and prejudicial to the interest of the revenue. The relevant finding of the Hon'ble Delhi High Court (supra), reads as follows:-

“15. It is clear from the above that this Court held that referring of the matter to the TPO for determination of arm's length price acts as a guide to the AO and is, in fact helpful in ensuring that the discretion of the Assessing Officer will not be abused.

16. We thus agree with the view taken by the Tribunal that the judgment of Special Bench in Aztec Software (supra) is not in conflict with Sony India (supra) once the validity of said instruction is upheld by this Court. The follow up thereof is that the Assessing Officer was supposed to refer the matter to the TPO having regard to the fact that Specialized Cell was created by the Revenue Department to deal with the complicated and complex issues arising out of the transfer mechanism. The Tribunal was right in holding that even the instant case itself provides a good example for need to refer the matter to TPO in such cases. When circular is issued under Section 119 of the Act and its validity is upheld it is binding on the Assessing Officer. Not taking recourse thereto and passing the order amounted to making assessment without conducting proper inquiry and investigation as enjoyed by law which was also warranted in the facts of this case and, therefore, the Commissioner was right in holding that such assessment was erroneous and prejudicial to the interest of the Revenue in the light of law laid down by the Apex Court in Malabar Industrial Co. Ltd. (supra).”

8. The above view of the Hon'ble Delhi High Court was also followed by the Mumbai Bench of the Tribunal in the case of

Bank of Baroda v. JCIT (supra). The relevant finding of the Tribunal reads as follows:-

*“26. In our considered view, even though ld. PCIT came across the issue of reference to the TPO during the review proceedings under Section 263 of the Act after serving the show cause notice for initiating the revision proceedings and however, the ld. PCIT has issued another show cause notice drawing the attention of assessee on the failure of the Assessing Officer to refer the case to the TPO and the Assessing Officer has completed the assessment without reference to the TPO under Section 92CA of the Act. In our view, issue of separate show cause notice, even though during revision proceedings, amounts to issue of fresh show cause notice under Section 263 of the Act and we may say it is issued and part of Section 263 proceedings. **It is a fact that the case of assessee falls under the provisions of Section 92CA of the Act and the matter must have been referred to the TPO.** In the records it does not show or quantified how much interest of the Revenue is lost since the issue was not referred to the TPO as the Assessing Officer does not have the qualification or facility to verify the international transactions. This is clearly against the provisions of Section 92CA of the Act and CBDT Circular in force and it is binding on the Assessing Officer to refer this issue to the TPO even though he may be of the opinion that the international transactions carried by the assessee are within arm’s length. **The statute and instructions of CBDT are to the Assessing Officer to refer the matter to TPO clearly indicates that the order passed by the Assessing Officer under Section 143(3) of the Act is without proper inquiry and investigation particularly on the issue of computation of ‘ALP’ in relation to international transactions and ld. PCIT is right in treating the order passed under Section 143(3) of the Act as erroneous insofar as it is prejudicial to the interests of the Revenue.***

*27. **Similarly, the Hon'ble Delhi High Court had held in Ranbaxy Laboratories Ltd. vs CIT, 345 ITR 193 (Delhi)that non-reference to TPO renders the order ‘erroneous’ and prejudicial to Revenue.**”*

(emphasis supplied)

9. In view of the aforesaid reasoning and the judicial pronouncements, cited supra, we uphold the order of the PCIT passed u/s 263 of the I.T.Act as correct and in accordance with law. It is ordered accordingly.

10. In the result, the appeal filed by the assessee is dismissed.

Order pronounced on this 21st day of October, 2022.

Sd/-
(Padmavathy S)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 21st October, 2022.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The PCIT-5, Bangalore
4. The Pr.CIT, Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore