

आयकर अपीलीय अधिकरण
मुंबई पीठ " डी", मुंबई
श्री जी. एस. पन्नू, अध्यक्ष एवं
श्री विकस अवस्थी, न्यायिक सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI
BEFORE SHRI G. S. PANNU, PRESIDENT &
SHRI VIKAS AWASTHY, JUDICIAL MEMBER
आअसं. 835/मुं/2021 (नि.व. 2015-16)
ITA NO.835/MUM/2021 (A.Y.2015-16)

Metallurgical Services Private Limited,
Mehta House, Ashok Silk Mills Lane,
Opp. Damodar Park, Off LBS Marg,
Ghatkopar (W), Mumbai 400 086
PAN: **AAFCM-5665-D**

..... अपीलार्थी /Appellant

बनाम Vs.

Principal Commissioner of Income Tax, Mumba-6,
Room No.501, 5th Floor,
Aaykar Bhavan, M.K.Road,
Mumbai-400020

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : S/Shri Siddesh Chougule & Ajit Jain
प्रतिवादी द्वारा/Respondent by : S/Shri Amol Kirtane & Mehul Jain
सुनवाई की तिथि/ Date of hearing : 17/06/2022
घोषणा की तिथि/ Date of pronouncement : 13/09/2022

आदेश/ ORDER

This appeal by the assessee is directed against the order of learned Principal Commissioner of Income Tax Appeals-6, Mumbai (in short 'the PCIT') dated 24.03.2021, passed under Section 263 of the Income Tax Act, 1961 (in short 'the Act') for Assessment Year 2015-16.

2. Shri Siddesh Chougule appearing on behalf of the assessee submitted that the PCIT has invoked revisionary powers under Section 263 of the Act on the premise that the assessee has failed to declare in 3CEB report the transactions with related parties. As per notice dated 27.02.2020 issued under Section 263 of the Act, the assessee has failed to disclose transactions of purchase of business between the assessee and M/s. Metallurgical Services (a partnership firm), wherein, the partners of the firm are the shareholders of the assessee company. Further, the Assessing Officer has failed to examine the transaction of sale of 107894 equity shares of assessee having Face Value of Rs.10/- at a premium of Rs.4,990/- to Exova (U.K) Ltd.

2.1. The Id. Authorised Representative of the assessee (in short 'Id. AR') raised multiple contentions assailing validity of invoking jurisdiction u/s. 263 of the Act, as well as, on the merits of issues raised in revision order. The Id. AR pointed that a perusal of the impugned order would show that the proceedings have been initiated on 'reference'. To substantiate his contentions, the Id. AR referred to para 2 and 3 of the impugned order wherein the PCIT has used the expression 'on reference' and 'considering the reference'. The Id. AR submitted that the provisions of Section 263 of the Act cannot be invoked on a reference made by any other authority. In support of his contentions, the Id. AR placed reliance on the order of Pune Bench in the case of Alfa Laval Lund AB vs CIT in ITA No. 1287/Pun/2017 dated 02.11.2021.

2.2. On merits of the issues, the Id. AR assailing the observation of the PCIT that the assessee has failed to mention transactions with related parties submitted that, the PCIT has erred in holding that the assessee has entered into 'specified domestic transaction' with M/s. Metallurgical Services, for purchase of

business. The PCIT invoked the provisions of Sec. 92BA(i) of the Act to bring in the concept of 'specified domestic transaction'.

The Id. AR submitted that the provisions of clause (i) of Section 92BA of the Act were omitted by the Finance Act, 2017, therefore, they are deemed to have never existed. Hence, no addition can be made under clause (i) of Section 92BA of the Act. To support this submission reliance is placed on the decision by Hon'ble Karnataka High Court in the case of PCIT vs Texport Overseas Pvt. Ltd., in ITA No. 392 of 2018 decided on 12/12/2019 [271 Taxman 170(Kar)].

2.3. The Id. AR submitted that prior to the transaction of allotment of shares by subscription of shares there was no relation between the assessee and Exova (U.K) Ltd. Issue of equity shares to Exova (UK) Ltd. in FY 2014-15 relevant to AY 2015-16 was the initial allotment. It was transaction between two unrelated independent parties. Therefore, Exova (U.K) Ltd. does not fall within the meaning of 'Associated Enterprises' as defined in Chapter X of the Act at the time of transaction of allotment of equity shares. Hence, there was no occasion to report the transaction in Form 3CEB. To support his submission the Id. AR placed reliance on the decision in the case of Vodafone India Services (P) Ltd. vs UoI reported as 50 taxmann.com 300 (Bombay).

2.4. The Id. AR stated that without prejudice to the primary contention, the assessment order is not erroneous as no profit is generated from transaction of purchase of equity shares by Exova (U.K) Ltd. Exova (U.K) Ltd. has subscribed to the equity shares of the assessee. It is not an expenditure but an investment. Hence, the provisions of Section 92B(1) of the Act are not attracted.

2.5. The Id. AR further made an alternate plea that as per CBDT Instruction No. 3/2016 dated 10.03.2016, a reference can be made to the Transfer Pricing Officer

(TPO) if a case has been selected for scrutiny due to transfer pricing risk parameters in following circumstances :-

“3.3

(a) *Where the AO comes to know that the taxpayer has entered into international transactions or specified domestic transactions or both but the taxpayer has either not filed the Accountant's report under Section 92E at all or has not disclosed the said transactions in the Accountant's report filed;”*

The Id. AR contended that in the light of facts mentioned above the case of the assessee does not fall within the parameters of the condition set out by the Board in the instructions (supra).

2.6. The Id. AR submitted that the PCIT vide notice dated 21.05.2020 had sought further information from the assessee and the same was provided to the PCIT. Hence, in the light of information furnished, no further reference was required to be made to the AO/TPO.

2.7. The Id. AR pointed that the PCIT in the impugned order has objected to assessee's claim of depreciation. As per PCIT, the Assessing Officer in assessment proceedings has not examined the issue, hence it falls under Explanation-2(a) and (b) to Section 263 of the Act. The Id. AR referred to notice under Section 142(1) of the Act dated 22.08.2016 (page 267 of the Paper Book). The Id. AR pointed that the Assessing Officer made a specific query with regard to the depreciation at Sr. No. 15 of the annexure to the notice under Section 142(1) of the Act and the assessee filed detailed reply to the said notice.

3. *Per contra*, Shri Mehul Jain representing the Department strongly supported the impugned order. The Id. DR submitted that provisions of Section 263 of the Act were invoked as the Assessing Officer failed to examine the

transactions between related parties. Assessee had entered into transactions with Associated Enterprises, therefore, assessee was duty bound to disclose the transactions in Form 3CEB. The assessee did not disclose transactions with related parties, nor were the transactions examined by the assessing officer during assessment proceedings. The Id. DR prayed for dismissing the appeal of assessee and uphold the impugned order.

4. We have heard the submissions made by rival sides and have examined the orders of Lower Authorities. We have also considered various decisions on which Id. Authorized Representative for the assessee has placed reliance to support his contentions. The assessee in appeal has assailed the validity of order passed u/s. 263 of the Act as well as the grounds on which PCIT has exercised revisional jurisdiction u/s. 263 of the Act. A perusal of the show cause notice issued u/s. 263 and the impugned order would show that PCIT in exercise of jurisdiction u/s. 263 of the Act has primarily raised following issues:

- (i) Non-disclosure of alleged related party transactions in Form 3CEB;
- (ii) Sale of shares by the assessee company to Exova UK Ltd.(foreign entity) at a price less than business worth; and.
- (iii) Assessee's claim of depreciation on goodwill generated on purchase of business in slump sale by the assessee from M/s. Metallurgical Services.

5. The CIT(A) has observed that the Assessing Officer has failed to examine aforesaid transactions during assessment proceedings, hence, the assessment order is erroneous and in so far as prejudicial to the interest of Revenue within the meaning of section 263 of the Act.

6. Before adjudicating the issues raised in the appeal it would be imperative to reiterate undisputed facts for the sake of clarity:

- M/s. Metallurgical Services (a partnership firm) sold its entire business vide agreement dated 09/05/2014 (effective from 01/04/2014) in a slump sale to the assessee company for a consideration of Rs.78.25 crores.
- The partners of M/s. Metallurgical Services i.e. Shri Shishir Mehtra and Ms. Shifali Mehta are the Promoter Directors.
- Exova (UK) Ltd. subscribed to 107894 shares of the assessee company for a total consideration of Rs.53.94 crores. The equity share having face value of Rs.10/- was sold at a premium of Rs.4990/-.
- The promoter directors Shri Shishir Mehtra and Ms. Shifali Mehta jointly sold 20,000 equity shares held in assessee company to Exova (UK) Ltd.
- Out of total consideration of Rs.78.25 crores paid to M/s. Metallurgical Services, Rs.70 crores was on account of goodwill on which depreciation has been claimed by the assessee.

7. The first argument raised by the assessee assailing the action of PCIT for invoking revisional jurisdiction u/s. 263 of the Act is that the provisions of section 263 of the Act have been invoked on a 'reference'. The PCIT has not examined the issue on its own, hence, exercise of powers u/s. 263 of the Act, on reference from another authority is not valid.

A bare perusal of the provisions of section 263 of the Act would show that for assuming revisional jurisdiction the PCIT/CIT may **call for and examine records** of any proceedings under the Act and **if he considers** that order passed therein by the Assessing Officer is **erroneous in so far as it is prejudicial to the interest of Revenue** after giving an opportunity of hearing to the assessee and

after making such enquiry as he deems necessary, pass order as the circumstances of the case justify. Thus, conditions sine qua non for exercising powers u/s. 263 of the Act is, the PCIT/CIT has to:

- (i) call for and examine the records; and
- (ii) consider the same.

In the instant case we find that the PCIT upon receiving reference, called for the records and examined the same. After considering the records the PCIT formed an opinion that the assessment order is erroneous and prejudicial to the interest of Revenue. It is not a case of simpliciter invoking of revisional jurisdiction u/s 263 of the Act upon receiving of the reference. Thus, the preliminary exercise of examining the records by the PCIT and forming his own view after considering the records was carried out by the PCIT, before invoking jurisdiction u/s. 263 of the Act. Therefore, the arguments of Id. Authorized Representative for the assessee that provisions of section 263 of the Act have been invoked merely on reference without consideration of records by the PCIT as envisaged under the provisions of sub-section (1) to section 263 of the Act is unfounded. Therefore, the said argument is rejected.

8. The next argument by the assessee is against the findings of PCIT that the transaction between M/s. Metallurgical Services and the assessee is a 'specified domestic transaction' and falls within the ambit of section 92BA(i) of the Act. The clause (i) to Section 92 BA has been omitted by the Finance Act, 2017 w.e.f. 01/04/2017 without any 'Saving' clause. Thus, the effect of said omission without 'saving' would be that it shall be deemed that the said clause never existed in the statute. The Id. Authorized Representative for the assessee in support of his arguments has referred to the decision of Hon'ble Karnataka High Court in the case of PCIT vs. Texport Overseas Pvt. Ltd.(supra). The Hon'ble

Karnataka High Court has upheld the decision of Bangalore Bench of the Tribunal in the case of Texports Overseas Pvt. Ltd. vs. DCIT in IT (TP)A No.1722/Bglr/2017 for Assessment Year 2013-14 decided on 22/12/2017, wherein the Tribunal has held that once a particular provision of section is omitted from the statute it shall be deemed to be omitted from its inception unless it is protected by Saving clause or a provision to make it clear that action taken or proceedings initiated under that provision or section would continue and would not be left on account of omission. The Hon'ble High Court approving the findings of Tribunal held:

"6. In fact, Coordinate Bench under similar circumstances had examined the effect of omission of sub-section (9) to Section 10E of the Act w.e.f. 01.04.2004 by Finance Act, 2003 and held that there was no saving clause or provision introduced by way of amendment by omitting sub-section (9) of Section 10B. In the matter of GENERAL FINANCE CO. vs. ACIT, which judgment has also been taken note of by the tribunal while repelling the contention raised by revenue with regard to retrospectively of Section 92BA(i) of the Act. Thus, when clause (d) of Section 92BA having been omitted by the Finance Act, 2017, with effect from 01.07.2017 from the Statute the resultant effect is that it had never been passed and to be considered as a law never been existed. Hence, decision taken by the Assessing Officer under the effect of Section 92BI and reference made to the order of Transfer Pricing Officer-TOP under Section 92CA could be invalid and bad in law.

7. It is for this precise reason, tribunal has rightly held that order passed by the TPO and DRP is unsustainable in the eyes of law. The said finding is based on the authoritative principles enunciated by the Hon'ble Supreme Court in Kolhapur Canesugar Works Ltd. referred to herein supra which has been followed by Co-ordinate Bench of this Court in the matter of M/s. GE Thermometrias India Private Ltd., stated supra. As such we are of the considered view that first substantial question of law raised in the appeal by the revenue in respective appeal memorandum could not arise for consideration particularly when the said issue being no more res integra."

Thus, in the light of aforesaid decision we find merit in this arguments of the assessee. Once, it is concluded that the transaction between assessee company and M/s. Metallurgical Services is not a specified domestic transaction, there is no question of reporting the same in Form 3CEB. The assessee succeeds on ground No.2 of the appeal.

9. The next argument by the Id. Authorized Representative for the assessee is that the transaction between assessee and Exova (UK) Ltd. is not a transaction with “Associated Enterprises” as defined in Chapter-X of the Act, hence, the provisions of section 92B(1) of the Act are not attracted.

It is an admitted fact that the transaction between the assessee and Exova (UK) Ltd. is that of an initial allotment of shares. Except for the suspicion of PCIT there is no document on record to suggest that prior to initial allotment of equity shares, there was any transaction or prior agreement in relation to relevant transaction between the assessee and Exova (UK) Ltd. so as to fall within the meaning of “Associated Enterprises” u/s.92B of the Act or “deemed international transaction” u/s. 92B of the Act. The transaction of initial allotment of equity shares to Exova (UK) Ltd. was between two independent, unrelated entities. Hence, there was no obligation on the part of assessee to report said transaction in Form – 3CEB. It is after initial allotment of equity shares by assessee to Exova (UK) Ltd. (subject to shares holding as specified u/s.92A of the Act) that the entities would be covered by the definition of “Associated Enterprises” and any transaction between the said entities, thereafter would fall within the realm of Chapter –X of the Act. We find merit in ground No.3 of the appeal. The assessee succeeds on the same.

10. The next submission of the assessee is with regard to claim of depreciation on goodwill acquired under slump sale agreement. The arguments of the assessee before the PCIT in respect of depreciation on goodwill is that the goodwill represents all business and commercial information and rights pertaining to the business acquired from the partnership firm. The assets acquired from the M/s. Metallurgical Services inter-alia includes all industrial, commercial, and other licenses, accreditations, technical registration and

certification, all intellectual property rights including trademarks, logo, knowhow, copy rights, software design rights, rights in data base, etc. The intangibles also include existing contracts of purchases, maintenance, vendor contract, etc., transfer of technical expertise employees as well. The assessee in order to substantiate his contentions placed reliance on the following decisions:

- (i) CIT vs Smifs Securities Ltd., 348 ITR 302 (SC);
- (ii) DCIT vs Toyo Engineering India Ltd. vs. DCIT, 18 ITR(T) 159 (Mumbai); &
- (iii) Triune Energy Services Pvt. Ltd. vs DCIT, 237 Taxman 230 (Delhi)

The PCIT after considering the submissions of the assessee concluded that depreciation on goodwill as claimed cannot be allowed to the assessee and restored the issue to Assessing Officer to examine the facts in the light of the observations made.

11. A perusal of the impugned order reveals that the PCIT has disallowed depreciation on Goodwill merely on surmises and conjectures. In so far as the issue of depreciation on Goodwill is concerned, the Hon'ble Apex Court in the case of CIT vs. Smifs Securities Ltd.(supra) has held that Goodwill is an asset under Explanation 3(b)(as applicable to assessment year under appeal) to section 32(1) of the Act and thus, depreciation on Goodwill is allowable. Undisputedly, in the present case the Goodwill has arisen on slump sale of business by partnership firm to the assessee. The said transaction of purchase of business was on mutually agreed terms and conditions. It has been pointed by the assessee that during the course of assessment proceedings a specific query was raised by the Assessing Officer with respect to additional depreciation claimed u/s. 32(1) vide notice u/s. 142(1) of the Act dated 22/08/2016. It is further noted that the Assessing Officer vide notice u/s.142(1) of the Act dated 20/07/2017 (at page 232 of the paper book) had raised specific query with reference to addition of

intangible asset during the year. The assessee in response to the said notice had furnished the details as well as documentary evidences. The reply of the assessee dated 18/08/2017 is at page 229 of the paper book. Thus, this issue was considered and examined by the Assessing Officer during the assessment proceedings. Thus, after examining the issue the Assessing Officer formed an opinion and accepted assessee's claim of depreciation on Goodwill. The PCIT has erred in invoking provisions of Explanation 2 (a) &(b) to section 263 of the Act. We further observe that while deciding this issue of depreciation on Goodwill, the PCIT on one hand gave a conclusive finding that the Goodwill claimed by the assessee is merely an illusory entry in the books of account and, therefore, no depreciation as claimed can be allowed to the assessee, on the other hand PCIT set aside the issue back to the Assessing Officer to examine the facts involved in the light of observations made. The PCIT in fact has given a specific finding on the issue, without examining the assessee's claim of depreciation. The PCIT has thrust his view over the view taken by the Assessing Officer after examining the facts, which is one of the possible views by the legal jurisprudence and the provisions of the Act. The findings given by the PCIT are superfluous, as they are merely based on assumptions hence, unsustainable. We find merit in Ground No.4 of the appeal, ergo, the same is allowed.

12. In the light of our above findings it is unambiguously clear that the PCIT has overstepped in exercising his revisional jurisdiction u/s. 263 of the Act. The two mandatory conditions to be satisfied for exercising revisional powers i.e. the order passed by Assessing Officer should be (i) erroneous and (ii) prejudicial to the interest of Revenue are not concurrently fulfilled in the instant case. Hence, the impugned order is set-aside and the appeal of the assessee is allowed.

13. In the result, the impugned order is set-aside and the appeal of assessee is allowed.

Order pronounced in the open court on **Tuesday** the 13th day of September, 2022.

Sd/-
(G.S. PANNU)

Sd/-
(VIKAS AWASTHY)

अध्यक्ष / PRESIDENT

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/Mumbai, दिनांक/Dated: 13/09/2022

SL/VM Sr.PS

प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai