IN THE INCOME TAX APPELLATE TRIBUNAL

PANAJI BENCH : PANAJI

(THROUGH VIRTUAL HEARING AT ITAT : PUNE BENCHES : PUNE)

BEFORE SHRI SATBEER SINGH GODARA, JUDICIAL MEMBER
AND
DR. DIPAK RIPOTE, ACCOUNTANT MEMBER

ITA.No.205/PAN./2019
Assessment Year 2012-2013

Guala Closures India Private Limited, D-1, Sesa Ghor, 20, EDC Complex, Patto, Panaji, Goa – 403 001 PAN AAACG4447J	vs.	The Principal Commissioner of Income Tax, Panaji, Aayakar Bhavan, Plot No.5, EDC Complex, Patto Plaza, Panaji, Goa – 403 001.
(Appellant)		(Respondent)

For Assessee :	Shri Ketan Ved
For Revenue :	Shri P.S. Shivshankar, CIT-DR

Date of Hearing :	10.10.2023
Date of Pronouncement :	13.10.2023

ORDER

PER SATBEER SINGH GODARA, J.M. :

This assessee's appeal for assessment year 2012-2013, arise against the Pr. CIT, Panaji, Goa's Order in F.No. 02/263/Pr.CIT-PNJ/2018-19, dated 30.03.2019, involving proceedings u/s.263 of the Income Tax Act, 1961 (in short "the Act").

Heard both the parties at length. Case file perused.

2. The assessee pleads the following substantive ground in the instant appeal :

1. *"On the facts and in the circumstances of the case and in law, the order passed by the Hon'ble Pr. CIT under section 263 of the Income-tax Act, 1961 ('the Act') is illegal, invalid and even otherwise bad in law.*

2. *The Hon'ble Pr. CIT erred in passing the order under section 253 of the Act without appreciating that section 263 proceedings cannot be exercised where two views are possible and one of the views has been adopted by the Assessing Officer.*

3. *The Hon'ble Pr. CIT erred in passing the order under section 263 of the Act even though theassessment order under section 143(3) r.w.s. 144C dated 30 November 2015 passed by the Assessing Officer was neither erroneous nor prejudicial to the interest of the Revenue.*

4. *The Hon'ble Pr. CIT erred in merely setting aside the assessment order to the file of the Assessing Officer for making a fresh assessment on the issue of royalty expenditure of Rs.31,26,55,634.*

5. *The Hon'ble Pr. CIT erred in not appreciating that the expenditure incurred on royalty wasnot for acquiring or bringing into existence an asset which gives an advantage for the enduring benefit, but instead was in the normal course of business and therefore is revenue expenditure.*

6. *The Hon'ble Pr. CIT erred in making various erroneous unsubstantiated and contrary observations.*

7. *Each one of the above grounds of appeal is without prejudice to the other.*

8. *The Appellant craves leave to add, to amend, to alter, to substitute, and to withdraw any or all of the above grounds of appeal."*

3. Learned counsel representing assessee also seeks to raise an additional ground/argument that since the Assessing Officer had framed his sec.144(3) r.w.s.144C(13) assessment on 30.11.2016 as per the Disputes Resolution Panel ["DRP"] directions, the PCIT herein could not have exercised his sec.263 revision jurisdiction terming the same as an erroneous one, causing prejudice to interest of the Revenue as under :

> *"The assessee-company, engaged in the manufacture of non-refillable plastic closures for liquor bottles, and manufacture of Poly Ethylene Teraphthalate pre-formations, filed its return of income for the A.Y. 2012-13 on 30.11.2012 declaring total income of Rs.96,23,30,850/- . A reference was made to the Transfer Pricing Officer and a Draft Assessment Order u/s 144C of the Income Tax Act, 19G1 was passed on 23.02.2016 determining the total income of Rs.99,48,28,460/- including adjustment u/s*

92C on account of Payment of Management Fees of Rs.3,04,33,012/-. The assessee company filed objections before the Dispute Resolution Panel-2, Bengaluru, and the DRP vide its order dated 09.11.2016 confirmed the order of the TPO. Order u/s 143(3) r.w.s 144C(13) of the Income Tax was passed on 30.11.2016.

2. Subsequently, it was noticed that for the A.Y. 2012-13 the assessee had debited an amount of Rs.31,26,55,634/- towards 'Patents, Royalties and Trade Marks' in the P & L account, at Schedule-29/Other Expenses (Administration & Selling expenses). Acquisition of patents and trademarks, being intangible assets, provide enduring and long term benefits, and were required to be treated as a capital expenditure. The AO had allowed deduction of this expenditure without inquiring into the claim.

3. Accordingly, a notice dated 22.02.2019 was issued to the assessee proposing to pass an appropriate order u/s 263 of the Act, since the assessment order passed by the Assessing Officer was erroneous and prejudicial to the interest of the revenue.

4. In response to the above, Shri Kamlesh Chainani, CA attended on 20.03.2019 and furnished

detailed written submissions, which have been carefully perused. I have gone through the assessment records.

4.1. Firstly, the assessee has argued that the order passed by the Assessing Officer in conformity with the directions of the DRP under section 144C of the Act is not susceptible of being revised in terms of section 263 of the Act.

The Dispute Resolution Panel-2, Bangalore vide order dated 09/11/2016 had confirmed the order of the TPO in which only the Transfer Pricing matters were covered , and the 143(3) order was passed by the Assessing Officer after making the adjustment u/s 92CA of Rs.3,04,33,012/-, being the payment of management fee. It was noticed that the Assessing Officer while passing the order u/s 143(3) r.w.s 144C(13) of the Act had erred in not treating the acquisition of patent and trademark as capital expenditure. Such issue did not come up for consideration before the TPO or the DRP. Therefore, the proceedings u/s 263 have not been invoked in relation to any directions of the DRP.

4.2. Secondly, the assessee has argued that the limitation date for passing the order u/s 263 of the Act was 31.03.2018, since the issues raised in the notice

relate to the draft assessment order passed by the AO on 23.02.2016.

A draft order, as such, is not appealable, except to be challenged by the assessee before the DRP. It is obvious that a draft assessment order cannot be revised u/s 263 of the IT Act. The order proposed to be revised is the final order passed u/s. 263 of the IT Act. The order proposed to be revised is the final order passed u/s 143(3). The date of passing the final order is 31.11.2016 and hence the limitation date is 31.03.2019 and the proceedings u/s 263 are not barred by limitation.

4.3. Thirdly, and essentially, the issue is whether the expenditure incurred by the assessee for acquisition of patent and trademark, is to be treated as capital expenditure. The assessee has quoted various case laws in its favour.

By virtue of definition, capital expenditure is an expenditure, the benefit of which is not fully consumed in the accounting period but spread over several years. Any expenditure, which is undertaken for the purpose of increasing profit either by way of increasing earning capacity or by decreasing costs, is to be treated as capital expenditure.

Similarly, revenue expenditure is defined as the expenditure incurred for the years under consideration, for services of whatever type such as rent, salaries, commission, repair, carriage, etc. It is incurred for carrying on business and to maintain assets in their existing condition. It doesn't increase the profit earning capacity but merely maintains it at existing level. It is used in the sense of immediate or short term benefit.

Several case laws have been cited by the assessee in support of its contention that the assessee is paying royalty for right to use the patent or trademark in the normal course of its business. It goes without saying that the distinction between capital and revenue expenditure must be decided on a case to case basis.

In Alembic Chemical Works Co. Ltd. v. CIT [1989] 177 ITR 377 /43 Taxman 312, the Supreme Court observed as follows :

> *"There is also no single definitive criterion which, by itself, is determinative whether a particular outlay is capital or revenue. The 'once for all' payment test is also inconclusive. What is relevant is the purpose of the outlay and its intended object and effect, considered in a commonsense way having regard to the business realities." (p. 379)*

In the case of this assessee, it is found that the claim of expenses under the head 'Patents, Royalties and Trademarks' of Rs.31,26,55,634/- has been made for the first time. Moreover, the said amount includes Rs.7,34,42,402 for earlier years pursuant to agreements entered into in the current year. It is seen from the two agreements entered between the assessee and (1) Guala Closures Patent BV and (2) Guala Closures SPA, both dated 01.04.2011, that Guala Closures India (i.e. the assessee) had been manufacturing products protected by patents owned by Guala Closures Patent BV, and using trademark 'Guala Closure' owned by Guala Closures SPA, without paying any royalty since 2004. Hence it is evident that the expenditure of Rs.31.26 crores did not pertain wholly and entirely to the business of the FY relevant to AY 2012-13. It is also evident that the AO has allowed the Claim of expenditure without inquiring into the claim, and has not made the verification which should have been made.

5. In view of the above, I hold that the order dated 30.11.2016 passed by the Assessing Officer u/s.143(3) is erroneous in as much as it is prejudicial to the interest of the revenue within the meaning of Section 263 of the Act and I, therefore, cancel the said order.

6. The Assessing Officer is directed to make an order de novo after considering the above mentioned issue of allowability of expenditure of Rs.31,26,55,634/- on the basis of the evidence on record and all evidence in support of the claims of the assessee, after providing due opportunity of being heard to the assessee."

4. Learned CIT-DR could hardly dispute that the assessee's foregoing additional argument goes to root of the matter not requiring any afresh factual verification. We thus accept the assessee's instant additional arguments/ground in very terms.

5. The assessee's next submission before us is that this tribunal's recent coordinate bench's order [2022] 139 taxmann.com 503 [Mumbai-Tribunal] Barclays Bank PLC vs. CIT has already settled the instant legal issue against the department as under :

"12. We have carefully gone through the submissions in the case laws and the records.

13. First, we note that in this case, the assessment order was passed after transfer pricing adjustment were made by the TPO. These have been detailed in the assessment order para '7' of the assessment order referred above. The TP adjustment made by TPO were in total Rs.

83,045,395/-. Assessee had made objection before the DRP and pursuant to DRP direction, the assessment was framed as per section 144C(13).

14. As against the above, Ld.CIT has noted that in this case TPO has not proposed any adjustment. This is contrary to the facts in this case, the above shows that Ld.CIT has eXercised his jurisdiction u/s 263 without properly appreciating the assessment order passed. He also seems to be ignoring the fact that assessee has chosen to file objection before the DRP. When the assessment order has been passed pursuant to the direction of DRP, the appeal from the said assessment order does not lie with the ld.CIT(A), but lies directly to the ITAT as per provision of section 253(d). Now, the issue to be addressed in this case is whether, the Ld.CIT has erred in initiating proceedings u/s. 263 of the Act, when the original assessment order has been passed u/s. 143(3) r.w.s. 144C(13), on the basis of the directions of the Dispute Resolution Panel(DRP).

15. We may gainfully refer to the provision of section 263 in this regard.

> *"263. (1) 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 [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.

Explanation 1.--For the removal of doubts, it is hereby declared that, for the purposes of this sub-section, -

(a) an order passed [on or before or after the 1st day of June, 1988] by the Assessing Officer shall include

(i) an order of assessment made by the Assistant Commissioner [or Deputy Commissioner] or the Income tax officer on the basis of the directions issued by the [Joint] Commissioner under section 144A.

(ii) an order made by the [Joint] Commissioner in exercise of the powers or in the performance of the functions of an Assessing officer

conferred on, or assigned to, him under the orders or directions issued by he Board or by the [Principal] Chief Commissioner or] Chief Commissioner or[Principal Director General or] Director General or[Principal Commissioner or] Commissioner authorized by the Board in this behalf under section 120.

(b) "record" [shall include and shall be deemed always to have included] all records relating to any proceeding under this Act available at the time of examination by the [Principal [Chief Commissioner or Chief Commissioner or Principal] Commissioner or] Commissioner;

(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal [filed on or before or after the 1st day of June, 1988], the powers of the [Principal Commissioner or] Commissioner under this sub-section shall eXtend [and shall be deemed always to have eXtended to such matters as had not been considered and decided in such appeal.]"

16. A reading of the above shows that the Principal Chief Commissioner or Chief commissioner may revise order passed by the AO, if the same is erroneous in so far as prejudicial to the interest of the revenue. The Explanation

1(a) of the Act referred above explains the order passed by the AO which can be subject matter of section 263 revision. The above explanation explains/clarifies that order of the AO in certain cases passed on the direction of certain superior officers can also be subject matter of section 263. The above explanation does not include the order passed under the direction of DRP u/s. 144C(13) of the Act. The legislature in its wisdom has thought it appropriate to include orders passed by the AO under direction u/s. 144A, but not under direction u/s. 144C(13). This is also in accordance with the provisions of the Act contained in section 144C, which we shall detailed at a later stage. The Ld.CIT in this case seems to be quiet conscious of this fact as he has mentioned on one of the issues, that AO has not properly followed the direction u/s. 144A. But, he is quiet silent and has nowhere mentioned that the final assessment order is passed after the direction of DRP. Admittedly, this is not a case, where draft assessment order is being revised. This is a case where final assessment order passed pursuant to the direction of DRP u/s. 144(3) is being revised by Ld.CIT. Ld. Counsel of the assessee in this regard submits that from the Finance Act, 2009, memorandum explaining the rationale behind the insertion of section 144C of the Act by the Finance Bill, 2009 as also the CBDT Circular No. 5 of

2010 dated 3 June 2010 issued explaining the said insertion, the notes on clauses, etc., it can be seen that consequential amendments have been made to various provisions of the Act as a result of insertion of section 144C in the Act. Such consequential amendments have been made to section 131, section 246A and section 253 of the Act. That however, no amendment is made in section 263 of the Act as a consequence of insertion of section 144C of the Act to deem such orders being capable of being revised. That therefore, the memorandum, circular, etc. support the Assessee's stand that once the Assessing Officer passes an order in accordance with the Directions issued by a superior authority (being DRP) the same cannot be revised by the CIT under section 263 of the Act. The above submission has sufficient cogency as our following discussion will further oxygenate the same.

17. It will also be gainful to refer to the provision of section 144C dealing with the reference to DRP.

> *(1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009,*

any variation in the income or loss returned which is prejudicial to the interest of such assessee. (2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,-

(b) file his acceptance of the variations to the Assessing Officer; or

(b) file his objections, if any, to such variation with,-

(i) the Dispute Resolution Panel; and

(ii) the Assessing Officer.

(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if-

(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or

(b) no objections are received within the period specified in sub-section (2).

(4) The Assessing Officer shall, notwithstanding anything contained in section 153 [or section 153B], pass the assessment order under sub-section (3) within one month from the end of the month in which,-

(a) the acceptance is received; or

(b) the period of filing of objections under sub-section (2) expires. (5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment. (6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:-

(a) draft order;

(b) objections filed by the assessee;

(c) evidence furnished by the assessee;

(d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;

(e) records relating to the draft order;

(f) evidence collected by, or caused to be collected by, it; and

(g) result of any enquiry made by, or caused to be made by, it.

(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),-

(a) make such further enquiry, as it thinks fit; or

(b) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.

(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

[Explanation.- For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.]

(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(13). Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 [or section 153B], the assessment without providing any

further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

(14) The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.

(14A) The provisions of this section shall not apply to any assessment or reassessment order passed by the Assessing Officer with the prior approval of the Commissioner as provided in sub-section (12) of section 144BA.

(14b) The central Government may make a scheme, by notification in the Official Gazette, for the purposes of issuance of directions by the dispute resolution panel, so as to impart greater efficiency, transparency and account ability by-

(a) eliminating the interface between the dispute resolution panel and the eligible assessee or any other person to the extent technologically feasible;

(b) optimizing utilization of the resources through economies of scale and functional specialization;

(c) introducing a mechanism with dynamic jurisdiction for issuance of directions by dispute resolution panel.

(14C) The Central Government may, for the purpose of giving effect to the scheme made under sub-section(14B), by notification in the Official Gazette direct that any of the provisions of this act shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notifications.

Provided that no direction shall be issued after the 31st day of March, 2022.

(14D). Every notification issued under sub-section(14B) and sub-section (14C) shall, as soon as may be after the notification issued, be laid before each House of parliament]

(15) For the purposes of this section,-

(a) "Dispute Resolution Panel" means a collegium comprising of three Commissioners of

Income-tax constituted by the Board for this purpose;

(b) "eligible assessee" means,--

(i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and

(ii) any non-resident not being a company, or any foreign company.]

18. A reading of the said section brings to the fore following:-

The assessee has option to go to the DRP by filing objection before it. As per the provisions of section 144C(5) of the Act, the Dispute Resolution Panel (DRP) shall in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

Further, the provisions of sub-section (7) of section 144C empowers the DRP to make any further enquiry or cause any further enquiry to be made by the Income-tax authority as it thinks fit. Explanation to sub-section (8) of

section 144C duly provides that DRP has power to enhance the variation and the power includes to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee. Section 144C(13) provides that upon receipt of the directions issued by DRP, the Assessing Officer shall, in conformity with the directions, complete the assessment without providing any further opportunity of being heard to the Appellant. As noted above, it is now nobody's case that the Assessing Officer has not followed the direction of the DRP and completed the assessment not in conformity with the direction of the DRP. Therefore, the final Assessment order cannot be said to be erroneous. In fact, if the Assessing Officer had made any addition in the final assessment order which were not as per the direction of the DRP, the said assessment order would be held to be invalid and contrary to law.

After the direction of the DRP, if the Assessing Officer would have made any addition or even any enquiry on the issues raised by the PCIT, the same would be contrary to law as being contrary to section 144C(1 3) of the Act. Therefore, there is no question of the PCIT holding that the final assessment Order is erroneous so as to come within

the ambit of 263. Hence the final assessment order can only be erroneous only when the Assessing Officer has not followed the mandate of section 144C(13) of the Act.

"Further, it is a settled legal principle that one cannot do indirectly what one cannot do directly ["Quando aliquidprohibetur eX directo, prohibetur etper obiiquum].

If the AO could not have directly made any change in the final assessment order after the direction of the DRP, then the PCIT also cannot indirectly make any change so as to circumvent the provision of section 144C(13) of the Act. Reliance in this regard is placed on the decision of the Apex Court in the case of Supertech Limited v Emerald Court Owner Resident Welfare Association and Ors. (Misc Application No.1572 of 2021, dated 4.10.2021].

19. Further, the scheme of the Act itself does not provide any interference in the direction of the DRP as the law containing section 144C(13) directs that the AO shall pass an order inconformity with the directions of the DRP without providing any further opportunity of being heard to the assessee. When the Act itself provide, that order has to be passed by the AO without providing any opportunity to the assessee pursuant to the direction of the DRP, the direction given in this order u/s. 263 by the Ld.CIT to the

AO to call for the details of allowability of various deductions claimed by the assessee, in light of the observations discussed by him is quiet contrary to the sanguine provisions of law. Even otherwise, the order passed by the Ld.CIT is an exercise in futility inasmuch as, if the AO proceeds to pass an order by giving the assessee an opportunity of being heard, the same will be against the mandate of section 144C(13). Furthermore, it is also settled law that in assessment u/s. 144C, AO has to invariably pass a draft assessment order and give the same to the assessee for filing objection before DRP. Hence, the direction by the Ld.CIT to the AO to pass an order by-passing the provisions of passing the draft assessment order is also not sustainable in law.

20. Now, we examine the constitution of DRP. As evident from the above, the DRP constitutes a collegium comprising of three Principal Commissioners or Commissioners of Income-tax, the directions given by them is binding upon by the AO. Hon'ble Bombay High Court in the case of Vodafone India Services Pvt.Ltd. vs Union of India & Others 2013 SCC online Bom 1534 has eXpounded upon the proceedings at DRP as under :-

> *"The proceeding before the DRP is not an appeal proceeding but a correcting mechanism in the nature*

of a second look at the proposed assessment order by high functionaries of the revenue keeping in mind the interest of the assessee. It is a continuation of the Assessment proceedings till such time a final order of assessment which is appelable is passed by the Assessing Officer. This also finds support from Section 144C(6) which enables the DRP to collect evidence or cause any enquiry to be made before giving directions to the Assessing Officer under Section 144C(5). The DRP procedure can only be initiated by an assessee objecting to the draft assessment order. This would enable correction in the proposed order (draft assessment order) before a final assessment order is passed. Therefore, we are of the view that in the present facts this issue could be agitated before and rectified by the DRP." [underline ours].

21. The above exposition duly elaborates upon the provisions of the Act contained under section 144C.

22. From the above, it is also apparent that members of the DRP are three in numbers and are individually equivalent in rank to the CIT, who is initiating proceedings u/s. 263 against the order passed by the AO pursuant to their direction. Now as

far as equivalence of single CIT to a 'colliguem of 3 CIT is concerned, it is settled law that bench comprising single persons is not higher/ superior than a collegiums of three persons. Hence, it is abundantly clear that the DRP stands at a higher pedestal than the CIT passing an order alone.

23. Furthermore, we may refer to the decision of Hon'ble Bombay High court in the case of Virendra Kumar Jhamb vs. N.K.Vohra (supra). In this case, the Jurisdictional High Court held that the assessee had approached the DDIT (investigation) under the Direct tax Amnesty Scheme. The CIT had accepted that the taxable income be computed at 8 percent of the total receipts. A second CIT, on scrutiny and verification of the assesses records, found the decision of the earlier CIT to be fair and justifiable. A subsequent CIT, sought to revise the order under section 263, and tax income at 9 percent of the receipts. The Bombay High Court inter alia held that the assessment orders were solely based on the directives of the earlier CITs, and the same could not be revised by the subsequent CIT under section 263.

24. In light of the above discussion and case laws, the case laws referred by the Ld.CIT-DR are not

applicable on the facts of the case. As, we have already noted that the submission of Ld.CIT-DR are at variance with the exposition by Hon'ble Bombay High Court in Vodafone India Services Pvt. Ltd.(supra). The Ld. CIT-DR in his submission has emphasized that proceeding before DRP is akin to appeal before Ld.CIT(A). This is quiet contrary to the Hon'ble Bombay High Court exposition noted above and the other decisions of Hon'ble Jurisdictional High court referred above.

25. The case of Devas Multimedia Pvt. Ltd. (supra) by the Hon'ble Karnataka High Court was in connection with the writ petition filed by the assessee, where assessee has objected to the notice issued u/s. 263 of the Act. Furthermore, Hon'ble High Court has expounded that writ court cannot examine the validity of notice on merits. Furthermore, the said decision has distinguished following decision of Hon'ble Bombay High Court, i) Vodafone Services Pvt. Ltd.(supra) wherein Hon'ble Bombay Court has expounded that proceedings before the DRP is not an appeal proceedings, but correction mechanism in the nature of a second look at the proposed assessment order by high functionaries of revenue (ii)Vodafone India Services Pvt.Ltd. vs. Union of India (2014) 368

ITR 1 (Bom.). In the present case, this Tribunal is under the jurisdiction of Hon'ble Bombay High Court. Hence, we do not have any authority whatsoever to deviate from the exposition of the Hon'ble jurisdictional High Court that the proceedings at DRP is not an appeal proceedings, but a correcting mechanism. Furthermore, the ratio from the Hon'ble Bombay High Court in the case of Virendra Kumar Jamb(supra) also support this view. Hence, the submission of Ld. DR that subject under discussion here has not been subject matter of Hon'ble jurisdictional High Court elaboration is not acceptable. Once, this is accepted, that the assessment order having been corrected by colligeum of three commissioner of income tax, the same can by no stretch of imagination be subject to revision by commissioner of income tax sitting alone. More so, in light of provision of section 144C(13) which clearly mandates that AO has to pass an order in accordance with the direction of the DRP without giving any opportunity to the assessee to so in the present case. If this order passed by the Ld.CIT is upheld and AO starts giving opportunity of hearing to the AO in accordance with the direction of the CIT,

the same will be in violation of the sanguine provision of section 144C(13).

26. Hence, in light of the aforesaid discussions and precedents from Hon'ble jurisdictional High Court, we set aside the orders of Ld.CIT and hold that he cannot legally assume jurisdiction u/s. 263 of the act on an order passed by the AO pursuant to the direction of DRP. This is over and above our other observations in para '14' of this order, where we have noted that Ld.CIT has passed this order without properly appreciating the assessment order. Since, we have quashed assessment order on jurisdiction itself, we are not dealing with the merits of the case.

27. In the result, the appeal by the assessee stands partly allowed."

6. Mr. Ketan Ved accordingly argued in tune with learned coordinate bench's foregoing detailed discussion that once sec.263 Explanation-1(a)(i) does not include an assessment framed u/sec.144C(13) of the Act; the impugned order passed by the PCIT deserve to be quashed as non-est in very terms. He sought to buttress the point that the learned coordinate bench has already examined the issue that one the DRP has got all the jurisdiction to confirm/reduce or enhance the variations in the draft assessment; the impugned

sec.263 jurisdiction would not be sustainable for examining the very issue(s).

7. We do not see any merit in the assessee's contentions based on learned coordinate bench"s order. The first and foremost question as to whether a coordinate bench's order is to be treated as a binding precedent in all circumstances or not, case law CIT vs. B.R. Constructions [1993] 202 ITR 333 (AP) holds that a judicial decision ceases to be a binding precedent if it has not proceeded on correct appreciation of law or facts as under :

> *"37. The effect of binding precedents in India is that the decisions of the Supreme Court are binding on all the subordinate courts. Indeed, article 141 of the Constitution embodies the rule of precedent. All the subordinate courts are bound by the judgments of the High Court. A single judge of a High Court is bound by the judgment of another single judge and a fortiori judgments of Benches consisting of more judges than one. So also, a Division Bench of a High Court is bound by judgments of another Division Bench and Full . A single judge or Benches of High Courts cannot differ from the earlier judgments of co-ordinate jurisdiction merely because they hold a different view on the question of law for the reason that certainty and uniformity in the administration of justice are of*

paramount importance. But, if the earlier judgment is erroneous or adherence to the rule of precedents results in manifest injustice, differing from the earlier judgment will be permissible. When a Division Bench differs from the judgment of another Division Bench, it has to refer the case to a Full Bench. A single judge cannot differ from a decision of a Division Bench except when that decision or a judgment relied upon in that decision is overruled by a Full Bench or the Supreme Court, or when the law laid down by a Full Bench or the Supreme Court is inconsistent with the decision.

38. It may be noticed that precedent ceases to be a binding precedent –

(i) if it is reversed or overruled by a higher court,

(ii) when it is affirmed or reversed on a different ground,

(iii) when it is inconsistent with the earlier decisions of the same rank,

(iv) when it is sub silentio, and

(v) when it is rendered per incuriam.

39. In paragraph 578 at page 297 of Halsbury's Laws of England, Fourth Edition, the rule of per incuriam is stated as follows :

"A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court

of co-ordinate jurisdiction which covered the case before it, in which case it must decided which case to follow; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force."

40. In Punjab Land Development and Reclamation Corporation Ltd. v. Presiding Officer, Labour Court , the Supreme Court explained the expression "per incuriam" thus (at page 36 of 77 FJR) :

"The Latin expression per incuriam means through inadvertence. A decision can be said generally to be given per incuriam when the Supreme Court has acted in ignorance of a pervious decision of its own or when a High Court has acted in ignorance of a decision of the Supreme Court."

42. As has been noticed above, a judgment can be said to be per incuriam if it is rendered in ignorance or forgetfulness of the provisions of a statute or a rule having statutory force or a binding authority. But, if the provision of the Act was noticed and considered before the conclusion arrived at, on the ground that it has erroneously reached the conclusion the judgment cannot be ignored as being per incuriam. In Salmond on

Jurisprudence, Twelfth Edition, at page 151, the rule is sated as follows :

"The mere fact that (as is contended) the earlier court misconstrued a statute, or ignored a rule of construction, is no ground for impugning the authority of the precedent. A precedent on the construction of a statute is as much binding as any other, and the fact that it was mistaken in its reasoning does not destroy its binding force."

7.1. Their lordships' hold in very clear terms that no decision forms a binding precedent if it is not inconformity with the relevant provisions of the statute concerned. We keep in mind the same and advert to sec.263(1) Explanation-(i) (a) of the Act which is found to be only an "inclusive" clause than an exhaustive one. Meaning thereby that this clause (a) to sec.263(1) Explanation(i) only gives an illustration of some of the orders which are included for the purpose of exercising jurisdiction than restricting the scope thereof to these specified orders only. This is indeed coupled with sec.263 Explanation(1)(c) wherein the legislature has only provided the exception to the impugned revision jurisdiction to only those *"matters as had not been considered and decided in such appeal"*. Case law Vodafone India Services Pvt. Ltd., (supra) has already held that the DRP's proceedings are not appellate in nature being only corrective in nature.

8. There is one more significant aspect involved in facts of the instant case. We wish to quote sec.144C(8) read with Explanation thereto that even the DRP jurisdiction in confirming or reducing or enhancing the corresponding issue extends only to the variations proposed in the draft assessment order; whereas the facts before us sufficiently indicate that the PCIT herein has exercised his sec.263 revision jurisdiction on account of lower authorities' failure in not examining the issue of the impugned license-fee/royalty in the relevant previous year made to the holding companies. Meaning thereby, that the said item never formed subject matter of any variation in the draft assessment order which could be taken-up for adjudication in the DRP's proceedings u/sec.144(8) read with Explanation thereto. We thus reject the assessee challenging the PCIT's jurisdiction itself in facts of the instant case u/sec.263 of the Act. We accordingly reject the assessee's contentions seeking to restrict sec.263 revision jurisdiction by adopting stricter interpretation in above terms.

9. Now come merits of the instant issue of assessee having paid license-fee/royalty to its parent company(ies). Learned counsel could hardly dispute that although the assessee is carrying-out it's business activity for the very many preceding assessment years; it has chosen to pay and claim the same as "business expenditure" after having executed the

corresponding agreement in the relevant previous year only. This is indeed coupled with the fact that the aportion of it's payment also covers the preceding assessment years wherein this expenditure was neither covered under any provision nor any corresponding agreement or an anticipated liability; whatsoever. We make it clear that although Mr. Ved tried very hard to convince us in light of page89 in the paper book paragraphs 4 to 4.5 that the TPO's order dated 13.01.2016 had duly examined the issue; he could dispute the clinching fact that there is no enquiry at all at any stage till the final assessment regarding the instant issue vis-à-vis the relevant payments made pertaining to the earlier years, in absence of any supportive evidence. That being the case, this is an instance of clear-cut instance of an inadequate enquiry during assessment attracting PCIT's sec.263 revision in light of Explanation-2 thereof and therefore, the same has been rightly subjected to PCIT's jurisdiction. We also quote Malabar Industrial Company Ltd., vs. CIT [2000] 243 ITR 83 (SC); Rampyari Devi Saraogi vs. CIT [1968] 67 ITR 84 (SC); Taradevi Aggarwal vs. CIT 1973 AIR 254 (SC); Gee Vee Enterprises vs. Addl. CIT [1975] 99 ITR 375 (Del.) and recently reiterated in CIT vs. Paville Projects Pvt. Ltd., [2023] 453 ITR 447 (SC); to reject learned counsel's arguments. The assessee fails in it's instant substantive ground therefore and the Revenue's vehement submissions supporting the same stand accepted.

10. This assessee's appeal is dismissed in above terms.

Order pronounced in the open Court on 13.10.2023.

Sd/-	Sd/-
[DR. DIPAK P. RIPOTE]	[SATBEER SINGH GODARA]
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Pune, Dated 13th October, 2023

VBP/-

Copy to

1.	The applicant
2.	The respondent
3.	The JCIT, Range-1, Panaji.
4.	D.R. ITAT – 'Panaji' Bench, Panaji
5.	Guard File.

//By Order//

//True Copy //

Assistant Registrar, ITAT, Pune Benches,
Pune.