**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"A" BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**
**AND**
**SMT. MADHUMITA ROY, JUDICIAL MEMBER**

| ITA No.781/Bang/2023 |
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| Assessment Year: 2018-19 |

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| M/s. Tokai Rika Minda India Pvt. Ltd.<br>Plot No.365, KIADB Industrial Area<br>Sompura 1st Stage, Dobaspet<br>Nelamangala Taluk, Dobaspet S.O., Sompura<br>Bengaluru 562 111<br>Karnataka<br><br>**PAN NO : AADCT0271C** | **Vs.** | PCIT (Central)<br>Bengaluru |
| **APPELLANT** | | **RESPONDENT** |

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| **Appellant by** | : | Shri K.R. Vasudevan, A.R. |
| **Respondent by** | : | Shri D.K. Mishra, D.R. |

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| **Date of Hearing** | : | 14.12.2023 |
| **Date of Pronouncement** | : | 14.12.2023 |

**O R D E R**

**PER CHANDRA POOJARI, ACCOUNTANT MEMBER:**

This appeal by assessee is directed against order passed by PCIT u/s 263 of the Income Tax Act, 1961 (in short "The Act") dated 17.8.2023. The assessee has raised following grounds of appeal:-

***Transfer Pricing***

*The grounds mentioned hereinafter are without prejudice to one another.*

1. *The Principal Commissioner of Income-Tax (Central) [PCIT]j erred in invoking the powers under Sec. 263 to extend the statutory time limit given to the AO/TPO in completing assessment, which is illegal exercise of power;*

2. *The PCIT erred in invoking the power under Section 263 to cover up the negligence of the AO in performing his duties within the statutory time limit, which is not within the scope of Section 263 of the Act;*

3. *The PCIT erred in invoking Explanation 2 of Section 263, which is not intended to give extension of statutory time limit, which is wrong use of the powers*

*4. The PCIT erred in not appreciating that the AO had commenced the assessment proceedings on 1.10.2019 and yet made a reference to the TPO only on 23.08.2021, after a lapse of 22 months, and erred in making the appellant liable for the negligence of the AO.*

*5. The PCIT erred in not appreciating that the conditions required to be satisfied for invoking the provisions of Section 263 are completely absent in the appellant's case and hence the order passed under Section 263 is wrong on facts and legal principles;*

*The appellant craves leave to add, alter, rescind and modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing of this appeal.*

*For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided*

**2.** The crux of the above grounds is that the ld. PCIT is not justified in invoking the provisions of section 263 of the Act to cover up the negligence of the ld. AO in performing his duty within the statutory time limit, which is not within the scope of section 263 of the Act. In other words, the assessee has challenged the exercise of power by the ld. PCIT u/s 263 of the Act. The ld. A.R. submitted that the assessee is engaged in the business of manufacture of key sets, immobilizers, seatbelts and switches for the automobile industry. It filed its return of income on 30.11.2018 declaring a total income of INR 50,44,93,282/-. The case was selected for scrutiny and notice u/s 143(2) was first issued on 20.09.2019. Subsequently, the following notices u/s 142(1) were also issued:

- Notice u/s 142(1) of the Act dated 08.02.2021
- Notice u/s 142(1) of the Act dated 19.02.2021
- Notice u/s 142(1) of the Act dated 04.03.2021
- Notice u/s 142(1) of the Act dated 17.09.2021
- Notice u/s 142(1) of the Act dated 24.09.2021

**2.1** As can be seen from the assessment order, the hearings were held on 01/10/2019, 15/02/2021, 23/02/2021, 24/02/2021, 24/02/2021, 24/02/2021, 26/02/2021, 11/03/2021. The

assessment order dated 30.09.2021 was passed u/s 143(3) of the Act determining total income of INR 50,52,90,968/- with an addition of INR 7,44,786/- on account of delay in deposit of PF contribution and expenses to the extent of INR 52,800/-. The assessee had reported international transactions and had filed Form 3CEB. The assessment order was silent on the same and there was no mention of any reference made to the TPO. Subsequently, an order under section 263 of the Act was passed by the Principal Commissioner of Income-Tax ("PCIT") dated 17.08.2023 setting aside the order passed by the ld. AO as erroneous and prejudicial to the interest of the revenue as the AO had not followed the CBDT instruction 3/2016 dated 10.03.2016 for making reference to the TPO. Therefore, the order of the AO was set aside for referring the matter to the TPO. From the order of the PCIT, it emerges that the AO had made a reference to the TPO on 23.08.2021 but the TPO did not accept the TP reference for the reason that the time for passing the TP order under Section 92CA has already lapsed on 31.07.2021.

**2.2** He drew our attention to various dates applicable to the assessee's case as follows:

i) The time limit for completing the TP order in this case was as under:

- Time limit for completing the assessment u/s 143(3) - 30.09.2020 {in terms of Proviso to Section 153(1)}
- Time limit for completing the assessment u/s 143(3) rws 92CA - 30.09.2021 {in terms of Proviso to Section 153(1) r.w.s 153(4)}
- Time limit for completing the TP order u/s 92CA - 31.07.2021 {60 days prior to time limit u/s 153(1), as per Sec 92CA(3A)}

ii) The above time limits are not in dispute, as the TPO refused to accept the reference made by the AO, as the time for passing the TP order has already lapsed on 31.07.2021. The PCIT has also not disputed the fact that the time limit for passing the TP order had lapsed, by the time the reference was received.

iii) Hence, this is a case of invalid reference made by the AO to the TPO beyond the statutory period of limitation and not a case of omission to make a reference to TPO

iv) He submitted that the provisions of Sec. 263 have been invoked by the PCIT only because the AO did not refer the matter to the TPO within the time prescribed for completion of the TP order under Section 92CA. This action of the ld. PCIT amounts to invoking the powers of Section 263 to extend the statutory time limit given to the AO/TPO in completing assessment, which is illegal exercise of power.

v) He submitted that the ld. PCIT erred in invoking Section 263 of the Act to cover up the negligence of the AO in performing his duties within the statutory time limit, which is not within the scope of Section 263 of the Act. The assessment proceedings had commenced on 20.09.2019 and yet TPO reference was made only on 23.08.2021, after a lapse of 23 months.

**2.3** He drew our attention to the applicable Legal Principles as follows:

i) Explanation 2(c) to Section 263 of the Act cannot be applied to the facts of the case

ii) Invalid reference by AO to the TPO renders the assessment order non-est in the eye of law, which cannot be revised

under Section 263

iii) Section 263 cannot be invoked to extend statutory limitation period

**2.4** He submitted that the section 263 of the Act thus envisages that before revising an order the CIT/PCIT should first "consider" the order erroneous; and if he finds that it is also prejudicial to the interests of revenue, this becomes the premise on which the revision proceedings must rest.

Erroneous order

**2.5** He submitted that the order should be erroneous. Thus, if any order is not erroneous it could not be subject to revision u/s 263 of the Act.

Prejudicial to the interests of revenue

**2.6** He submitted that the order should be prejudicial to the interests of the revenue. Inter-alia, in the following situations, an order can be said to be prejudicial to the interests of the revenue: –

- Income has been under assessed
- Loss has been over assessed
- Income has been assessed at a lower rate
- Excess deductions, allowances and reliefs have been allowed to assessee.

**2.7** The ld. A.R. submitted that the assessee had furnished all information sought for by the AO during the course of assessment proceedings and the same have been duly considered by the AO. Further, the AO had issued detailed questionnaire raising various issues for which the assessee had responded from time to time and submitted all the details called for.

**2.8** He submitted that the reference to the TPO by the AO was initiated beyond the statutory period provided under Section

92CA(3A) which is a statutory requirement. This is not a case of non-reference to the TPO, but a case of invalid reference made beyond the statutory time limit and the TPO could not accept the reference as the statutory time limit to pass the TP order has already lapsed and a valid TP order could not be passed. Hence, the delayed action of the AO has vitiated the entire assessment proceedings, rendering the assessment order invalid and non-est. Hence, the facts of the case are not covered by Explanation 2(c) of Section 263.

Invalid reference by AO to the TPO renders the assessment order non-est in the eye of law, which cannot be revised under Section 263

**2.9** The ld. A.R. submitted that the Mumbai Tribunal, in the case of M/s. Essar Shipping Limited, ITA NO.3156/MUM/2018 dated 30.9.2019 has held that an invalid reference to the TPO renders the assessment order non-est in law and such invalid orders cannot be revised by invoking the powers of Section 263. The relevant paragraphs from the order are extracted as under:

*24. Admittedly in this case the approval of the Commissioner was obtained on 28.10.2013 which is after the date of reference made by the Assessing Officer to the TPO on 23.10.2013. As there is no valid reference, the extended time limit to pass the Assessment Order as per section 153 would not be applicable and consequently the time limit for completion of assessment u/s. 153(1)(a) will be two years from the end of the Assessment Year. The present Assessment Year involved is 2011-12, the assessment should have been completed on or before 31.03.2014 but in this case the assessment was completed on 10.04.2015 u/s. 144C (1) r.w.s. 143(3) of the Act.*

*25. We further observe that the third proviso to section 153(1) of the Act which gives extended time limit to pass the Assessment Order where a reference under sub section (1) of section 92CA was made, the time limit for completion of assessment was prescribed as three years from the end of the Assessment Year. Even assuming that the extended time limit is available for passing an order under third proviso to sub section (1) of section 153 the outer time limit for passing Assessment Order was 31.03.2015, however the assessment in this case was admittedly made on 10.04.2015 and is beyond the period of limitation making the Assessment Order a nullity.*

*26. We observe that when an impugned assessment order passed u/s. 143(3) was illegal or nullity in the eyes of law, then whether the CIT had a valid jurisdiction to pass an order u/s. 263 to revise the non-est assessment order has come up for consideration before the Coordinate Bench in the case of M/s. Westlife Development Limited (supra) and the Coordinate Bench considering various decisions of the*

*Hon'ble Supreme Court and the Hon'ble High Court's held that, as per law the assessee should be permitted to challenge the validity of order passed u/s. 263 of the Act on the ground that the impugned assessment order was non-est. The Coordinate Bench further following the decision of the Delhi Bench in the case of* ***Krishna Kumar Saraf v. CIT in ITA. No. 4562/Del/2011*** *held that when the original Assessment Order passed u/s. 143 (3) of the Act was null and void in the eyes of law, the Commissioner could not have assumed jurisdiction under law to make revision of a non-est order and therefore the impugned order passed u/s. 263 of the Act by the Commissioner is also nullity in the eyes of law. While holding so the Coordinate Bench observed as under:*

*…….*

*27. We also find that similar view has been taken by Kolkata Bench of the Tribunal in the case of M/s. Classic Flour & Food Processing Pvt. Ltd., v. CIT (supra) wherein a question arouse as to whether the order u/s. 263 of the Act is bad in law for the reason that the proceedings u/s. 147 27 ITA NO.3156/MUM/2018 (A.Y: 2011-12) M/s. Essar Shipping Limited initiated itself was bad in law, the order u/s. 143(3) r.w.s. 147 of the Act was not maintainable since no assessment can be made by making rowing and fishing enquiry and an invalid assessment cannot not be set aside u/s. 263 of the Act. The Tribunal held as under: -*

*…….*

*28. The Delhi Bench of the Tribunal in the case of Supersonic Technologies Pvt. Ltd., v. Pr. CIT (supra) also considered a similar issue as whether assessee can challenge the validity of re-assessment proceedings in the collateral proceedings u/s. 263 of the Act, since the reassessment order itself is bad in law, whether such order can be revised u/s. 263 of the Act. The Tribunal held that since no notice u/s. 143(2) was prepared, issued and served upon the assessee, the assessment framed u/s. 147 of the Act is illegal, invalid and bad in law. Assessee can challenge the validity of re-assessment proceedings in the collateral proceedings u/s. 263 of the Act, therefore since the re-assessment order itself is bad in law the same could not be revised u/s. 263 of the Act.*

**2.10** He submitted that the above decision is applicable to the facts of the assessee's case as under:

i) In the above-mentioned case, there was an invalid reference to the TPO, as the reference to the TPO was made before the approval of CIT was received. In the case of the appellant also, there was an invalid reference to the TPO, as the reference was made beyond the statutory limit for passing order by TPO.

ii) The invalid reference has vitiated the assessment proceedings and has rendered the assessment order as non-

est, in the eyes of law. Section 263 cannot be invoked to revise such orders, which are non-est in law

iii) Even though the assessment order was not challenged, the validity of the assessment order can be challenged in the collateral 263 proceedings

**2.11** The ld. A.R. submitted that Section 263 cannot be invoked to extend the statutory limitation period. He submitted that the Delhi Tribunal, in the case of Aruna Tiwari in I.T.A. No. 90/RPR/2022 dated 18.7.2023 had held that orders rendered non-est in the eyes of law due to limitation cannot be revised under Section 263 to extend the statutory limitation. The relevant paragraphs are extracted as under:

*"We further find that the ITAT, Delhi in the case of Krishan Kumar Saraf Vs. Commissioner of Income Tax, Hissar, ITA No.4562/Del /2011, dated 24.09.2015 had also taken a similar view. It was observed by the tribunal that the CIT cannot revise an order which is non-est in the eyes of law. In the said case the assessee in the course of the appellate proceedings which had originated from the order passed by the CIT under Sec. 263 of the Act had assailed the validity of the order passed u/s 263, for the reason that the notice u/s 143(2) was issued beyond the stipulated time period. The department objected to the aforesaid challenge thrown by the assessee to the validity of the assessment order on the ground that as the assessee had not challenged the assessment order, therefore, the same had attained finality. However, the said contention of the revenue was turned down by the tribunal by relying on the order of the Hon'ble High Court of Delhi in the case of CIT Central-1 Vs. Escorts Farms Pvt. Ltd., 180 ITR 280(Del) on the ground that the CIT could not have revised a non-est order. The relevant observations of the tribunal are for the sake of clarity culled out as under:*

*16. Admittedly the notice u/s 143(2) was issued beyond time and, therefore, the assessment order was bad in law. Ld. CIT(DR)'s submission is that assessee has not challenged the assessment order. However, since the assessee was not aggrieved with the assessment order, therefore, he did not challenge. However, nothing turns on this when we consider the issue in the backdrop of proceedings initiated u/s 263 by ld. Commissioner. The moot point for consideration is as to whether this objection can be entertained at this stage of proceeding or not. In this regard we find that the decision of Hon'ble Delhi High Court in the case of Escorts Farms Pvt. Ltd. (supra), which we have extensively reproduced earlier, clearly supports the assessee's plea.*

*17. There is no quarrel with the proposition advanced by ld. DR that the proceedings u/s 263 are for the benefit of revenue and not for assessee.*

*18. However, u/s 263 the ld. Commissioner cannot revise a non-est order in the eye of law. Since the assessment order was passed in pursuance to the notice u/s 143(2), which was beyond time, therefore, the assessment order passed in pursuance to the barred notice had no legs to stand as the same was non est in the eyes of law. All proceedings subsequent to the said notice are of no consequence. Further, the decision of Hon'ble Madras High Court in the case of CIT Vs. Gitsons Engineering Co. 370 ITR 87 (Mad) clearly holds that the objection in relation to non-service of notice could be raised for the first time before the Tribunal as the same was legal, which went to the root of the matter.*

*19. While exercising powers u/s 263 ld. Commissioner cannot revise an assessment order which is non est in the eye of law because it would prejudice the right of assessee which has accrued in favour of assessee on account of its income being determined. If ld. Commissioner revises such an assessment order, then it would imply extending/granting fresh limitation for passing fresh assessment order. It is settled law that by the action of the authorities the limitation cannot be extended, because the provisions of limitation are provided in the statute.*

*20. In view of above discussion, ground no. 3 is allowed and the revisional order passed u/s 263 is quashed."*

**2.12** He submitted that the above decision is applicable to the facts of the assessee's case as under:

i) In the above-mentioned case, the notice issued u/s 143(2) was beyond time limit, rendering the assessment order non-est. In the case of the appellant also, the reference by the AO to the TPO was beyond the statutory limit for passing the order by TPO.

ii) The delay in making the reference has vitiated the assessment proceedings and has rendered the assessment order as non-est, in the eyes of law.

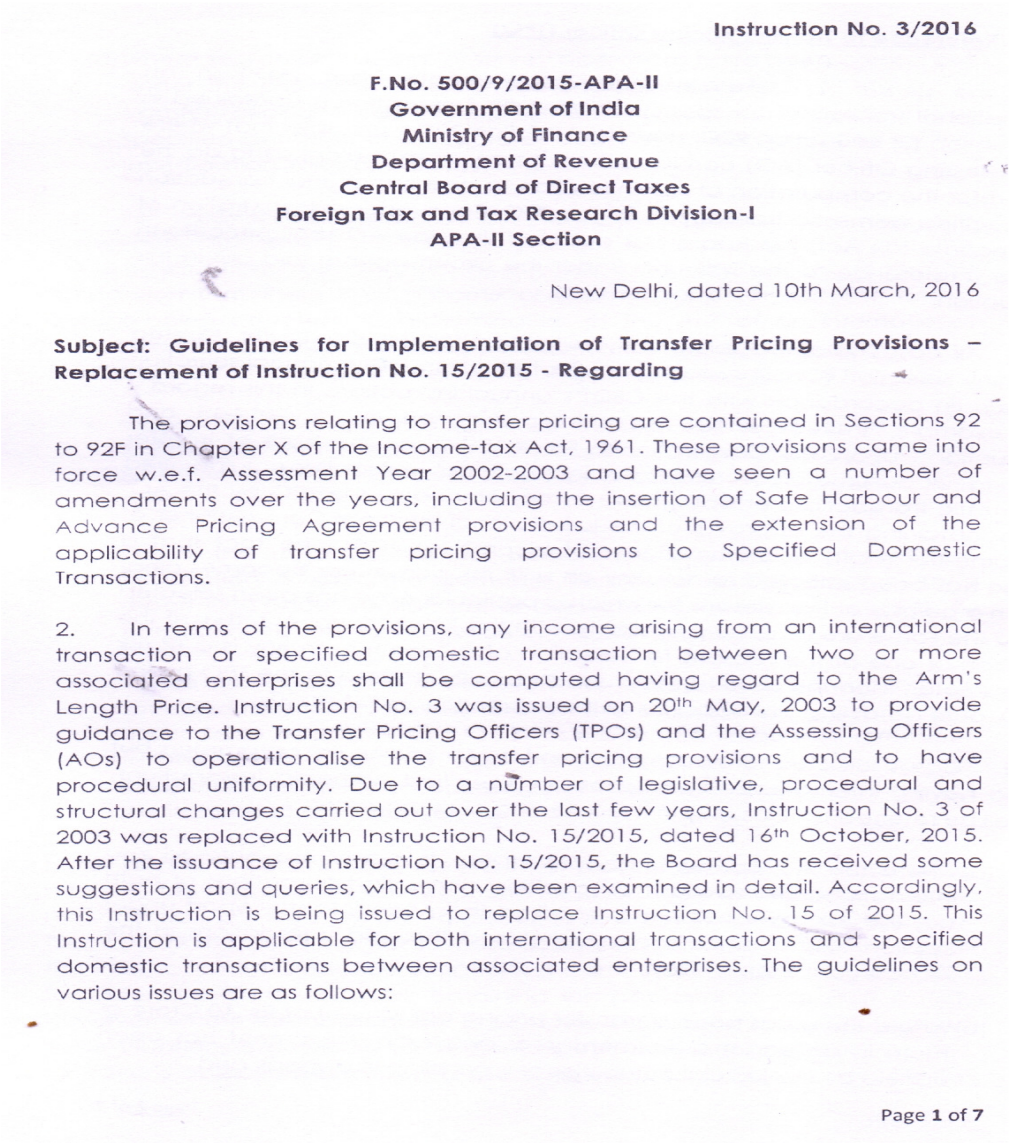
iii) Even though the assessment order was not challenged, the validity of the assessment order can be challenged in the collateral 263 proceedings

iv) Section 263 cannot be invoked for granting fresh limitation for passing fresh TP order.

**3.** The ld. D.R. submitted that the ld. AO is bound by CBDT instruction No.03/2016 dated 10.3.2016 to make reference to the

TPO so as to make TP adjustments in the case of assessee and as such, there was no error in invoking the provisions of section 263 of the Act by ld. PCIT.

**4.** We have heard the rival submissions and perused the materials available on record. At this point, it is pertinent to refer to instruction no.03/2016 of CBDT dated 10.3.2016, which reads as follows:



**Instruction No. 3/2016**

**F.No. 500/9/2015-APA-II**
**Government of India**
**Ministry of Finance**
**Department of Revenue**
**Central Board of Direct Taxes**
**Foreign Tax and Tax Research Division-I**
**APA-II Section**

New Delhi, dated 10th March, 2016

**Subject: Guidelines for Implementation of Transfer Pricing Provisions – Replacement of Instruction No. 15/2015 - Regarding**

The provisions relating to transfer pricing are contained in Sections 92 to 92F in Chapter X of the Income-tax Act, 1961. These provisions came into force w.e.f. Assessment Year 2002-2003 and have seen a number of amendments over the years, including the insertion of Safe Harbour and Advance Pricing Agreement provisions and the extension of the applicability of transfer pricing provisions to Specified Domestic Transactions.

2. In terms of the provisions, any income arising from an international transaction or specified domestic transaction between two or more associated enterprises shall be computed having regard to the Arm's Length Price. Instruction No. 3 was issued on 20th May, 2003 to provide guidance to the Transfer Pricing Officers (TPOs) and the Assessing Officers (AOs) to operationalise the transfer pricing provisions and to have procedural uniformity. Due to a number of legislative, procedural and structural changes carried out over the last few years, Instruction No. 3 of 2003 was replaced with Instruction No. 15/2015, dated 16th October, 2015. After the issuance of Instruction No. 15/2015, the Board has received some suggestions and queries, which have been examined in detail. Accordingly, this Instruction is being issued to replace Instruction No. 15 of 2015. This Instruction is applicable for both international transactions and specified domestic transactions between associated enterprises. The guidelines on various issues are as follows:

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3. **Reference to Transfer Pricing Officer (TPO)**

3.1 The power to determine the Arm's Length Price (ALP) in an international transaction or specified domestic transaction is contained in sub-section (3) of Section 92C. However, Section 92CA provides that where the Assessing Officer (AO) considers it necessary or expedient so to do, he may refer the computation of ALP in relation to an international transaction or specified domestic transaction to the TPO. For proper administration of the Income-tax Act, the Board has decided that the AO shall henceforth make a reference to the TPO only under the circumstances laid out in this Instruction.

3.2 All cases selected for scrutiny, either under the Computer Assisted Scrutiny Selection [CASS] system or under the compulsory manual selection system (in accordance with the CBDT's annual instructions in this regard – for example, Instruction No. 6/2014 for selection in F.Y 2014-15 and Instruction No. 8/2015 for selection in F.Y 2015-16), on the basis of transfer pricing risk parameters [in respect of international transactions or specified domestic transactions or both] have to be referred to the TPO by the AO, after obtaining the approval of the jurisdictional Principal Commissioner of Income-tax (PCIT) or Commissioner of Income-tax (CIT). The fact that a case has been selected for scrutiny on a TP risk parameter becomes clear from a perusal of the reasons for which a particular case has been selected and the same are invariably available with the jurisdictional AO. Thus, if the reason or one of the reasons for selection of a case for scrutiny is a TP risk parameter, then the case has to be mandatorily referred to the TPO by the AO, after obtaining the approval of the jurisdictional PCIT or CIT.

3.3 Cases selected for scrutiny on non-transfer pricing risk parameters but also having international transactions or specified domestic transactions, shall be referred to TPOs only in the following circumstances:

(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;

(b) where there has been a transfer pricing adjustment of Rs. 10 Crore or more in an earlier assessment year and such adjustment has been upheld by the judicial authorities or is pending in appeal; and

(c) where search and seizure or survey operations have been carried out under the provisions of the Income-tax Act and findings regarding transfer pricing issues in respect of international transactions or specified domestic transactions or both have been recorded by the Investigation Wing or the AO.

3.4 For cases to be referred by the AO to the TPO in accordance with paragraphs 3.2 and 3.3 above, in respect of transactions having the following situations, the AO must, as a jurisdictional requirement, record his satisfaction that there is an income or a potential of an income arising and/or being affected on determination of the ALP of an international transaction or specified domestic transaction before seeking approval of the PCIT or CIT to refer the matter to the TPO for determination of the ALP:

- where the taxpayer has not filed the Accountant's report under Section 92E of the Act but the international transactions or specified domestic transactions undertaken by it come to the notice of the AO;

- where the taxpayer has not declared one or more international transaction or specified domestic transaction in the Accountant's report filed under Section 92E of the Act and the said transaction or transactions come to the notice of the AO; and

- where the taxpayer has declared the international transactions or specified domestic transactions in the Accountant's report filed under Section 92E of the Act but has made certain qualifying remarks to the effect that the said transactions are not international transactions or specified domestic transactions or they do not impact the income of the taxpayer.

In the above three situations, the AO must provide an opportunity of being heard to the taxpayer before recording his satisfaction or otherwise. In case no objection is raised by the taxpayer to the applicability of Chapter X [Sections 92 to 92F] of the Act to these three situations, then AO should refer the international transaction or specified domestic transaction to the TPO for determining the ALP after obtaining the approval of the PCIT or CIT. However, where the applicability of Chapter X [Sections 92 to 92F] to these three situations is objected to by the taxpayer, the AO must consider the taxpayer's objections and pass a speaking order so as to comply with the

principles of natural justice. If the AO decides in the said order that the transaction in question needs to be referred to the TPO, he should make a reference after obtaining the approval of the PCIT or CIT.

3.5 In addition to the cases to be referred as per paragraphs 3.2 and 3.3, a case involving a transfer pricing adjustment in an earlier assessment year that has been fully or partially set-aside by the ITAT, High Court or Supreme Court on the issue of the said adjustment shall invariably be referred to the TPO for determination of the ALP.

3.6 Since the provisions of Section 92CA of the Act, *inter*-alia, refer to the computation of the ALP of the international transaction or specified domestic transaction, it is imperative for the AO to ensure that all international transactions or relevant specified domestic transactions or both, as the case may be, are explicitly mentioned in the letter through which the reference is made to the TPO. In this regard, guidelines as under may be followed:

(a) If a case has been selected for scrutiny on a TP risk parameter pertaining to international transactions only, then the international transactions shall alone be referred to the TPO;
(b) If a case has been selected for scrutiny on a TP risk parameter pertaining to specified domestic transactions only, then the specified domestic transactions shall alone be referred to the TPO; and
(c) If a case has been selected for scrutiny on the basis of TP risk parameters pertaining to both international transactions and specified domestic transactions, then the international transactions and the specified domestic transactions shall together be referred to the TPO.

Since international transactions may be benchmarked together at the entity level due to the inter-linkages amongst them, if a case has been selected for scrutiny on a TP risk parameter pertaining to one or more international transactions, then all the international transactions entered into by the taxpayer – except those about which the AO has decided not to make a reference as per paragraph 3.4 - shall be referred to the TPO.

3.7 For administering the transfer pricing regime in an efficient manner, it is clarified that though AO has the power under Section 92C to determine the ALP of international transactions or specified domestic transactions, determination of ALP should not be carried out at all by the AO in a case

where reference is not made to the TPO. However, in such cases, the AO must record in the body of the assessment order that due to the Board's Instruction on this matter, the transfer pricing issue has not been examined at all.

4. **Role of Transfer Pricing Officer (TPO)**

4.1 The role of the TPO begins after a reference is received from the AO. In terms of Section 92CA, this role is limited to the determination of the ALP in relation to international transactions or specified domestic transactions referred to him by the AO. However, if any other international transaction comes to the notice of the TPO during the course of the proceedings before him, then he is empowered to determine the ALP of such other international transactions also by virtue of Section 92CA (2A) and (2B). The transfer price has to be determined by the TPO in terms of Section 92C. The price has to be determined by using any one of the methods stipulated in sub-section (1) of Section 92C and by applying the most appropriate method referred to in Sub-section (2) thereof. There may be occasions where application of the most appropriate method provides results which are different but equally reliable. In all such cases, further scrutiny may be necessary to evaluate the appropriateness of the method, the correctness of the data, weight given to various factors and so on. The selection of the most appropriate method will depend upon the facts of the case and the factors mentioned in Rule 10C. The TPO, after taking into account all relevant facts and data available to him, shall determine the ALP and pass a speaking order.

4.2 The TPO's order should contain details of the data used, reasons for arriving at a certain price and the applicability of methods. It may be emphasised that the application of method including the application of the most appropriate method, the data used, factors governing the applicability of respective methods, computation of price under a given method will all be subjected to judicial scrutiny. It is, therefore, necessary that the order of the TPO contains adequate reasons on all these counts. Copies of the documents or the relevant data used in arriving at the arm's length price should be made available to the AO for his records and the use at subsequent stages of appellate or penal proceedings.

4.3 The TPO, being an Additional/Joint CIT, shall obtain the approval of the jurisdictional CIT (Transfer Pricing) before passing the order. On the other hand, the TPO, being a Deputy/Assistant CIT, shall obtain the approval of

the jurisdictional Additional/Joint CIT before passing the order. The jurisdictional CIT (TP) should assign a limited number of important and complex cases, not exceeding 50, to the Additional/Joint CsIT (TPOs) working in the same jurisdiction. For the selection of such important and complex cases by the CsIT (TP), the concerned CCsIT (International Taxation) shall frame appropriate guidelines.

4.4 In addition to the above, the TPO is required to carry out the Compliance Audit of the Advance Pricing Agreements (APAs) entered into by the Board and the taxpayers in accordance with Rule 10P of the Income-tax Rules.

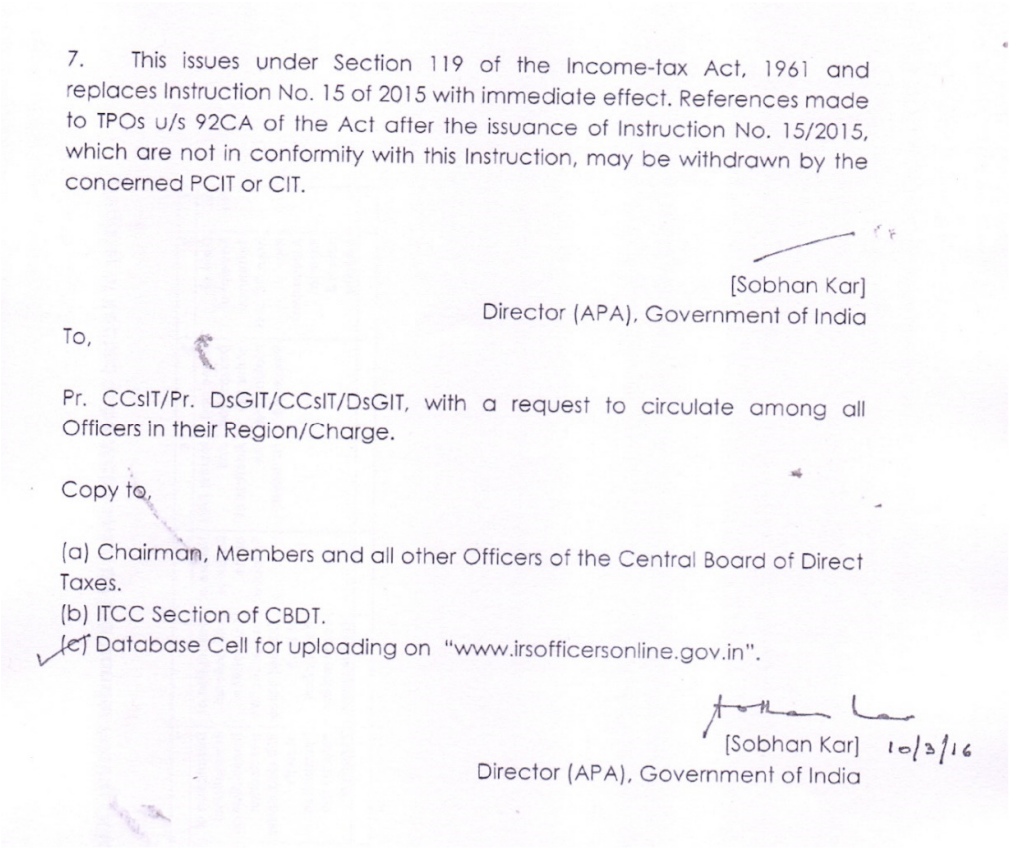
4.5 The TPO is also required to play an important role in respect of Safe Harbour provisions. Whenever a reference is made to the TPO under sub-rule (4) or sub-rule (10) of Rule 10TE of the Income-tax Rules, the TPO has to carefully examine all the facts and circumstances of the taxpayer's exercise of an option for Safe Harbour and pass an order in writing as mandated in sub-rule (6) or sub-rule (11) of the said Rule, respectively.

5. **Role of the AO after Determination of ALP by the TPO**

Under sub-section (4) of Section 92C (read with sub-section (4) of Section 92CA), the AO has to compute the total income of the assessee in conformity with the ALP determined by the TPO under sub-section (3) of Section 92CA.

6. **Maintenance of Data Base**

It is to be ensured by the CIT (TP) that the references received from the AOs by the TPOs in his jurisdiction are dealt with expeditiously and accurate record of all events connected with the whole process of determination of ALP is maintained. This record is to be maintained by each TPO, separately for international transactions and specified domestic transactions, in the formats enclosed as Annexure-I and Annexure-II to this Instruction and the same shall be maintained electronically on the Department's ITBA system as and when the same becomes fully functional. These formats will serve as an important database for future action and also help in bringing about uniformity in the determination of the ALP in identical or substantially identical cases. The CsIT (TP) must ensure that a consolidated report for the entire Charge is generated and stored after the completion of each transfer pricing audit cycle.



7. This issues under Section 119 of the Income-tax Act, 1961 and replaces Instruction No. 15 of 2015 with immediate effect. References made to TPOs u/s 92CA of the Act after the issuance of Instruction No. 15/2015, which are not in conformity with this Instruction, may be withdrawn by the concerned PCIT or CIT.

[Sobhan Kar]
Director (APA), Government of India

To,

Pr. CCsIT/Pr. DsGIT/CCsIT/DsGIT, with a request to circulate among all Officers in their Region/Charge.

Copy to,

(a) Chairman, Members and all other Officers of the Central Board of Direct Taxes.
(b) ITCC Section of CBDT.
(c) Database Cell for uploading on "www.irsofficersonline.gov.in".

[Sobhan Kar] 10/3/16
Director (APA), Government of India

**4.1** In view of the guidelines issued by CBDT in instruction No.03/2016 cited (supra) by not making timely reference to the TPO, the ld. AO had breached the mandatory instructions issued by the CBDT. This issue has also been considered by the Hon'ble Supreme Court in the case of PCIT Vs. S.G. Asia Holdings India Pvt. Ltd. in Civil Appeal No.6144/2019 dated 13.8.2018, wherein held as follows:-

*5. It was submitted by Mr. Mahabir Singh, learned Senior Advocate that the expression ".....the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the Commissioner, refer the computation of the arm's length price in relation to the said international transaction or specified domestic transaction under Section 92C to the Transfer Pricing Officer" occurring in Section 92CA of the Act signified that discretion was vested in the Assessing Officer and it would not be mandatory in even" single case that he must refer the issue of computation of the Arm's Length Price to the TPO[3].*

*6. However, the following expressions employed in Instruction No.3/2003 put the matter in a different perspective: -*

*"... ...The Assessing Officer can arrive at prima facie belief on the basis of these details whether a reference is considered necessary. No detailed enquiries are needed at this stage and the Assessing Officer should not embark upon scrutinizing the correctness or otherwise of the price of the international transaction at this stage... ... If there are more than one transaction with an associated enterprise or there are transactions with more than one associated enterprise the aggregate value of which exceeds Rs.5 crores, the transactions should be referred to the TPO, ... ...*
*Since the case will be selected for scrutiny before making reference to the TPO, the Assessing Officer may proceed to examine other aspects of the case during pendency of assessment proceedings but await the report of the TPO on the value of international transaction before making final assessment.*

…….

*(vi) Role of (he Assessing Officer after receipt of "arm's length price": Under sub-section (4) of section 92C, the Assessing Officer has to compute total income of the assessee having regard to the arm's length price so determined by the TPO."*

*"7. In view of the guidelines issued by the CBDT in Instruction No.3/2003 the Tribunal was right in observing that by not making reference to the TPO, the Assessing Officer had breached the mandatory instructions issued by the CBDT. We do not find the conclusion so arrived at by the Tribunal to be correct.*

*8. However, the Tribunal ought to have accepted the submission made by the Departmental Representative as quoted in para 16.2 of its order and the matter ought to have been restored to the file of the Assessing Officer so that appropriate reference could be made to the TPO. It would therefore, be upto the authorities and the Commissioner concerned to consider the matter in terms of Sub-Section (1) of Section 92CA of the Act.*

*9. We, therefore, allow this Appeal to the aforesaid extent and direct that it would now be upto the Assessing Officer to take appropriate steps in terms of Instruction No.3/2003.*

*10. The appeal is allowed to the aforesaid extent. No costs."*

**4.2** Further, jurisdictional High Court in the case of PCIT Vs. M/s. Obulapuram Mining Company Ltd. in ITA No.100005/2017, ITA No.100022/2017 & others dated 30.9.2020 (Dharwad Bench) has observed as under:

*"14. The judgment in the case of S.G.ASIA is delivered on 13th August, 2019. A reference to the TPO is required to be made under Sub section (1) of Section 92CA. There is no amendment to the said Section. Shri Raghavan is right in his submission to the extent that sub section (4) of Section 92CA has been substituted with effect from 01.06.2007. No authority of the Supreme Court of India is cited to show that the*

*position of law stated in S.G.ASIA has been altered. Therefore, in view of the unambiguous language employed in paragraph No.7 of S.G.ASIA extracted hereinabove, we are of the considered view that Instruction No.3/2003 issued by the CBDT is mandatory."*

**4.3** Thus, it was held that instruction No.03/2016 issued by the CBDT was mandatory.

**4.4** In the present case also, ld. AO has not followed the CBDT Instruction No.03/2016 dated 10.3.2016 in true perspective. Hence, ld. PCIT has invoked the jurisdiction u/s 263 of the Act and set aside the order of the ld. AO for specific purpose of referring the matter to TPO. We do not find any infirmity in the order of the ld. PCIT passed u/s 263 of the Act and the same is confirmed.

**5.** In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 14th Dec, 2023

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(Madhumita Roy)** | **(Chandra Poojari)** |
| **Judicial Member** | **Accountant Member** |

Bangalore,
Dated 14th Dec, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5 Guard file

By order

**Asst. Registrar,**
**ITAT, Bangalore.**

**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"A" BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**
**AND**
**SMT. MADHUMITA ROY, JUDICIAL MEMBER**

| ITA No.781/Bang/2023 |
|---|
| Assessment Year: 2018-19 |

| | | |
|---|---|---|
| M/s. Tokai Rika Minda India Pvt. Ltd.<br>Plot No.365, KIADB Industrial Area<br>Sompura 1st Stage, Dobaspet<br>Nelamangala Taluk, Dobaspet S.O., Sompura<br>Bengaluru 562 111<br>Karnataka<br><br>**PAN NO : AADCT0271C** | **Vs.** | PCIT (Central)<br>Bengaluru |
| **APPELLANT** | | **RESPONDENT** |

| | | |
|---|---|---|
| **Appellant by** | : | Shri K.R. Vasudevan, A.R. |
| **Respondent by** | : | Shri D.K. Mishra, D.R. |

| | | |
|---|---|---|
| **Date of Hearing** | : | 14.12.2023 |
| **Date of Pronouncement** | : | 14.12.2023 |

**O R D E R**

**PER CHANDRA POOJARI, ACCOUNTANT MEMBER:**

This appeal by assessee is directed against order passed by PCIT u/s 263 of the Income Tax Act, 1961 (in short "The Act") dated 17.8.2023. The assessee has raised following grounds of appeal:-

***Transfer Pricing***

*The grounds mentioned hereinafter are without prejudice to one another.*

1. *The Principal Commissioner of Income-Tax (Central) [PCIT]j erred in invoking the powers under Sec. 263 to extend the statutory time limit given to the AO/TPO in completing assessment, which is illegal exercise of power;*

2. *The PCIT erred in invoking the power under Section 263 to cover up the negligence of the AO in performing his duties within the statutory time limit, which is not within the scope of Section 263 of the Act;*

3. *The PCIT erred in invoking Explanation 2 of Section 263, which is not intended to give extension of statutory time limit, which is wrong use of the powers*

*4. The PCIT erred in not appreciating that the AO had commenced the assessment proceedings on 1.10.2019 and yet made a reference to the TPO only on 23.08.2021, after a lapse of 22 months, and erred in making the appellant liable for the negligence of the AO.*

*5. The PCIT erred in not appreciating that the conditions required to be satisfied for invoking the provisions of Section 263 are completely absent in the appellant's case and hence the order passed under Section 263 is wrong on facts and legal principles;*

*The appellant craves leave to add, alter, rescind and modify the grounds herein above or produce further documents, facts and evidence before or at the time of hearing of this appeal.*

*For the above and any other grounds which may be raised at the time of hearing, it is prayed that necessary relief may be provided*

**2.** The crux of the above grounds is that the ld. PCIT is not justified in invoking the provisions of section 263 of the Act to cover up the negligence of the ld. AO in performing his duty within the statutory time limit, which is not within the scope of section 263 of the Act. In other words, the assessee has challenged the exercise of power by the ld. PCIT u/s 263 of the Act. The ld. A.R. submitted that the assessee is engaged in the business of manufacture of key sets, immobilizers, seatbelts and switches for the automobile industry. It filed its return of income on 30.11.2018 declaring a total income of INR 50,44,93,282/-. The case was selected for scrutiny and notice u/s 143(2) was first issued on 20.09.2019. Subsequently, the following notices u/s 142(1) were also issued:

- Notice u/s 142(1) of the Act dated 08.02.2021
- Notice u/s 142(1) of the Act dated 19.02.2021
- Notice u/s 142(1) of the Act dated 04.03.2021
- Notice u/s 142(1) of the Act dated 17.09.2021
- Notice u/s 142(1) of the Act dated 24.09.2021

**2.1** As can be seen from the assessment order, the hearings were held on 01/10/2019, 15/02/2021, 23/02/2021, 24/02/2021, 24/02/2021, 24/02/2021, 26/02/2021, 11/03/2021. The

assessment order dated 30.09.2021 was passed u/s 143(3) of the Act determining total income of INR 50,52,90,968/- with an addition of INR 7,44,786/- on account of delay in deposit of PF contribution and expenses to the extent of INR 52,800/-. The assessee had reported international transactions and had filed Form 3CEB. The assessment order was silent on the same and there was no mention of any reference made to the TPO. Subsequently, an order under section 263 of the Act was passed by the Principal Commissioner of Income-Tax ("PCIT") dated 17.08.2023 setting aside the order passed by the ld. AO as erroneous and prejudicial to the interest of the revenue as the AO had not followed the CBDT instruction 3/2016 dated 10.03.2016 for making reference to the TPO. Therefore, the order of the AO was set aside for referring the matter to the TPO. From the order of the PCIT, it emerges that the AO had made a reference to the TPO on 23.08.2021 but the TPO did not accept the TP reference for the reason that the time for passing the TP order under Section 92CA has already lapsed on 31.07.2021.

**2.2** He drew our attention to various dates applicable to the assessee's case as follows:

i) The time limit for completing the TP order in this case was as under:

- Time limit for completing the assessment u/s 143(3) - 30.09.2020 {in terms of Proviso to Section 153(1)}
- Time limit for completing the assessment u/s 143(3) rws 92CA - 30.09.2021 {in terms of Proviso to Section 153(1) r.w.s 153(4)}
- Time limit for completing the TP order u/s 92CA - 31.07.2021 {60 days prior to time limit u/s 153(1), as per Sec 92CA(3A)}

ii) The above time limits are not in dispute, as the TPO refused to accept the reference made by the AO, as the time for passing the TP order has already lapsed on 31.07.2021. The PCIT has also not disputed the fact that the time limit for passing the TP order had lapsed, by the time the reference was received.

iii) Hence, this is a case of invalid reference made by the AO to the TPO beyond the statutory period of limitation and not a case of omission to make a reference to TPO

iv) He submitted that the provisions of Sec. 263 have been invoked by the PCIT only because the AO did not refer the matter to the TPO within the time prescribed for completion of the TP order under Section 92CA. This action of the ld. PCIT amounts to invoking the powers of Section 263 to extend the statutory time limit given to the AO/TPO in completing assessment, which is illegal exercise of power.

v) He submitted that the ld. PCIT erred in invoking Section 263 of the Act to cover up the negligence of the AO in performing his duties within the statutory time limit, which is not within the scope of Section 263 of the Act. The assessment proceedings had commenced on 20.09.2019 and yet TPO reference was made only on 23.08.2021, after a lapse of 23 months.

**2.3** He drew our attention to the applicable Legal Principles as follows:

i) Explanation 2(c) to Section 263 of the Act cannot be applied to the facts of the case

ii) Invalid reference by AO to the TPO renders the assessment order non-est in the eye of law, which cannot be revised

under Section 263

iii) Section 263 cannot be invoked to extend statutory limitation period

**2.4** He submitted that the section 263 of the Act thus envisages that before revising an order the CIT/PCIT should first "consider" the order erroneous; and if he finds that it is also prejudicial to the interests of revenue, this becomes the premise on which the revision proceedings must rest.

Erroneous order

**2.5** He submitted that the order should be erroneous. Thus, if any order is not erroneous it could not be subject to revision u/s 263 of the Act.

Prejudicial to the interests of revenue

**2.6** He submitted that the order should be prejudicial to the interests of the revenue. Inter-alia, in the following situations, an order can be said to be prejudicial to the interests of the revenue: –

- Income has been under assessed
- Loss has been over assessed
- Income has been assessed at a lower rate
- Excess deductions, allowances and reliefs have been allowed to assessee.

**2.7** The ld. A.R. submitted that the assessee had furnished all information sought for by the AO during the course of assessment proceedings and the same have been duly considered by the AO. Further, the AO had issued detailed questionnaire raising various issues for which the assessee had responded from time to time and submitted all the details called for.

**2.8** He submitted that the reference to the TPO by the AO was initiated beyond the statutory period provided under Section

92CA(3A) which is a statutory requirement. This is not a case of non-reference to the TPO, but a case of invalid reference made beyond the statutory time limit and the TPO could not accept the reference as the statutory time limit to pass the TP order has already lapsed and a valid TP order could not be passed. Hence, the delayed action of the AO has vitiated the entire assessment proceedings, rendering the assessment order invalid and non-est. Hence, the facts of the case are not covered by Explanation 2(c) of Section 263.

Invalid reference by AO to the TPO renders the assessment order non-est in the eye of law, which cannot be revised under Section 263

**2.9** The ld. A.R. submitted that the Mumbai Tribunal, in the case of M/s. Essar Shipping Limited, ITA NO.3156/MUM/2018 dated 30.9.2019 has held that an invalid reference to the TPO renders the assessment order non-est in law and such invalid orders cannot be revised by invoking the powers of Section 263. The relevant paragraphs from the order are extracted as under:

*24. Admittedly in this case the approval of the Commissioner was obtained on 28.10.2013 which is after the date of reference made by the Assessing Officer to the TPO on 23.10.2013. As there is no valid reference, the extended time limit to pass the Assessment Order as per section 153 would not be applicable and consequently the time limit for completion of assessment u/s. 153(1)(a) will be two years from the end of the Assessment Year. The present Assessment Year involved is 2011-12, the assessment should have been completed on or before 31.03.2014 but in this case the assessment was completed on 10.04.2015 u/s. 144C (1) r.w.s. 143(3) of the Act.*

*25. We further observe that the third proviso to section 153(1) of the Act which gives extended time limit to pass the Assessment Order where a reference under sub section (1) of section 92CA was made, the time limit for completion of assessment was prescribed as three years from the end of the Assessment Year. Even assuming that the extended time limit is available for passing an order under third proviso to sub section (1) of section 153 the outer time limit for passing Assessment Order was 31.03.2015, however the assessment in this case was admittedly made on 10.04.2015 and is beyond the period of limitation making the Assessment Order a nullity.*

*26. We observe that when an impugned assessment order passed u/s. 143(3) was illegal or nullity in the eyes of law, then whether the CIT had a valid jurisdiction to pass an order u/s. 263 to revise the non-est assessment order has come up for consideration before the Coordinate Bench in the case of M/s. Westlife Development Limited (supra) and the Coordinate Bench considering various decisions of the*

*Hon'ble Supreme Court and the Hon'ble High Court's held that, as per law the assessee should be permitted to challenge the validity of order passed u/s. 263 of the Act on the ground that the impugned assessment order was non-est. The Coordinate Bench further following the decision of the Delhi Bench in the case of* ***Krishna Kumar Saraf v. CIT in ITA. No. 4562/Del/2011*** *held that when the original Assessment Order passed u/s. 143 (3) of the Act was null and void in the eyes of law, the Commissioner could not have assumed jurisdiction under law to make revision of a non-est order and therefore the impugned order passed u/s. 263 of the Act by the Commissioner is also nullity in the eyes of law. While holding so the Coordinate Bench observed as under:*

*…….*

*27. We also find that similar view has been taken by Kolkata Bench of the Tribunal in the case of M/s. Classic Flour & Food Processing Pvt. Ltd., v. CIT (supra) wherein a question arouse as to whether the order u/s. 263 of the Act is bad in law for the reason that the proceedings u/s. 147 27 ITA NO.3156/MUM/2018 (A.Y: 2011-12) M/s. Essar Shipping Limited initiated itself was bad in law, the order u/s. 143(3) r.w.s. 147 of the Act was not maintainable since no assessment can be made by making rowing and fishing enquiry and an invalid assessment cannot not be set aside u/s. 263 of the Act. The Tribunal held as under: -*

*…….*

*28. The Delhi Bench of the Tribunal in the case of Supersonic Technologies Pvt. Ltd., v. Pr. CIT (supra) also considered a similar issue as whether assessee can challenge the validity of re-assessment proceedings in the collateral proceedings u/s. 263 of the Act, since the reassessment order itself is bad in law, whether such order can be revised u/s. 263 of the Act. The Tribunal held that since no notice u/s. 143(2) was prepared, issued and served upon the assessee, the assessment framed u/s. 147 of the Act is illegal, invalid and bad in law. Assessee can challenge the validity of re-assessment proceedings in the collateral proceedings u/s. 263 of the Act, therefore since the re-assessment order itself is bad in law the same could not be revised u/s. 263 of the Act.*

**2.10** He submitted that the above decision is applicable to the facts of the assessee's case as under:

i) In the above-mentioned case, there was an invalid reference to the TPO, as the reference to the TPO was made before the approval of CIT was received. In the case of the appellant also, there was an invalid reference to the TPO, as the reference was made beyond the statutory limit for passing order by TPO.

ii) The invalid reference has vitiated the assessment proceedings and has rendered the assessment order as non-

est, in the eyes of law. Section 263 cannot be invoked to revise such orders, which are non-est in law

iii) Even though the assessment order was not challenged, the validity of the assessment order can be challenged in the collateral 263 proceedings

**2.11** The ld. A.R. submitted that Section 263 cannot be invoked to extend the statutory limitation period. He submitted that the Delhi Tribunal, in the case of Aruna Tiwari in I.T.A. No. 90/RPR/2022 dated 18.7.2023 had held that orders rendered non-est in the eyes of law due to limitation cannot be revised under Section 263 to extend the statutory limitation. The relevant paragraphs are extracted as under:

*"We further find that the ITAT, Delhi in the case of Krishan Kumar Saraf Vs. Commissioner of Income Tax, Hissar, ITA No.4562/Del /2011, dated 24.09.2015 had also taken a similar view. It was observed by the tribunal that the CIT cannot revise an order which is non-est in the eyes of law. In the said case the assessee in the course of the appellate proceedings which had originated from the order passed by the CIT under Sec. 263 of the Act had assailed the validity of the order passed u/s 263, for the reason that the notice u/s 143(2) was issued beyond the stipulated time period. The department objected to the aforesaid challenge thrown by the assessee to the validity of the assessment order on the ground that as the assessee had not challenged the assessment order, therefore, the same had attained finality. However, the said contention of the revenue was turned down by the tribunal by relying on the order of the Hon'ble High Court of Delhi in the case of CIT Central-1 Vs. Escorts Farms Pvt. Ltd., 180 ITR 280(Del) on the ground that the CIT could not have revised a non-est order. The relevant observations of the tribunal are for the sake of clarity culled out as under:*

*16. Admittedly the notice u/s 143(2) was issued beyond time and, therefore, the assessment order was bad in law. Ld. CIT(DR)'s submission is that assessee has not challenged the assessment order. However, since the assessee was not aggrieved with the assessment order, therefore, he did not challenge. However, nothing turns on this when we consider the issue in the backdrop of proceedings initiated u/s 263 by ld. Commissioner. The moot point for consideration is as to whether this objection can be entertained at this stage of proceeding or not. In this regard we find that the decision of Hon'ble Delhi High Court in the case of Escorts Farms Pvt. Ltd. (supra), which we have extensively reproduced earlier, clearly supports the assessee's plea.*

*17. There is no quarrel with the proposition advanced by ld. DR that the proceedings u/s 263 are for the benefit of revenue and not for assessee.*

*18. However, u/s 263 the ld. Commissioner cannot revise a non-est order in the eye of law. Since the assessment order was passed in pursuance to the notice u/s 143(2), which was beyond time, therefore, the assessment order passed in pursuance to the barred notice had no legs to stand as the same was non est in the eyes of law. All proceedings subsequent to the said notice are of no consequence. Further, the decision of Hon'ble Madras High Court in the case of CIT Vs. Gitsons Engineering Co. 370 ITR 87 (Mad) clearly holds that the objection in relation to non-service of notice could be raised for the first time before the Tribunal as the same was legal, which went to the root of the matter.*

*19. While exercising powers u/s 263 ld. Commissioner cannot revise an assessment order which is non est in the eye of law because it would prejudice the right of assessee which has accrued in favour of assessee on account of its income being determined. If ld. Commissioner revises such an assessment order, then it would imply extending/granting fresh limitation for passing fresh assessment order. It is settled law that by the action of the authorities the limitation cannot be extended, because the provisions of limitation are provided in the statute.*

*20. In view of above discussion, ground no. 3 is allowed and the revisional order passed u/s 263 is quashed."*

**2.12** He submitted that the above decision is applicable to the facts of the assessee's case as under:

i) In the above-mentioned case, the notice issued u/s 143(2) was beyond time limit, rendering the assessment order non-est. In the case of the appellant also, the reference by the AO to the TPO was beyond the statutory limit for passing the order by TPO.

ii) The delay in making the reference has vitiated the assessment proceedings and has rendered the assessment order as non-est, in the eyes of law.

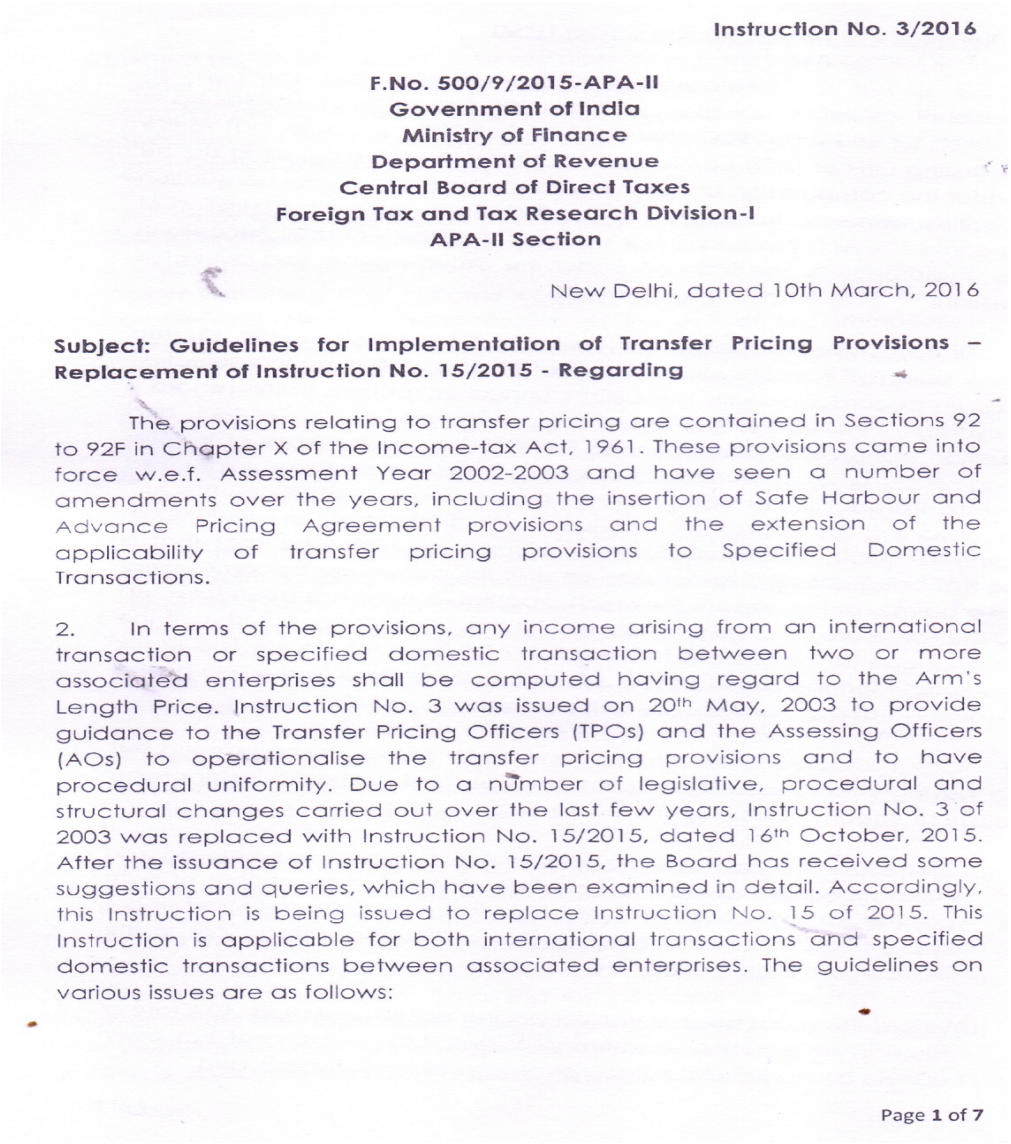
iii) Even though the assessment order was not challenged, the validity of the assessment order can be challenged in the collateral 263 proceedings

iv) Section 263 cannot be invoked for granting fresh limitation for passing fresh TP order.

**3.** The ld. D.R. submitted that the ld. AO is bound by CBDT instruction No.03/2016 dated 10.3.2016 to make reference to the

TPO so as to make TP adjustments in the case of assessee and as such, there was no error in invoking the provisions of section 263 of the Act by ld. PCIT.

**4.** We have heard the rival submissions and perused the materials available on record. At this point, it is pertinent to refer to instruction no.03/2016 of CBDT dated 10.3.2016, which reads as follows:



**Instruction No. 3/2016**

**F.No. 500/9/2015-APA-II**
**Government of India**
**Ministry of Finance**
**Department of Revenue**
**Central Board of Direct Taxes**
**Foreign Tax and Tax Research Division-I**
**APA-II Section**

New Delhi, dated 10th March, 2016

**Subject: Guidelines for Implementation of Transfer Pricing Provisions – Replacement of Instruction No. 15/2015 - Regarding**

The provisions relating to transfer pricing are contained in Sections 92 to 92F in Chapter X of the Income-tax Act, 1961. These provisions came into force w.e.f. Assessment Year 2002-2003 and have seen a number of amendments over the years, including the insertion of Safe Harbour and Advance Pricing Agreement provisions and the extension of the applicability of transfer pricing provisions to Specified Domestic Transactions.

2. In terms of the provisions, any income arising from an international transaction or specified domestic transaction between two or more associated enterprises shall be computed having regard to the Arm's Length Price. Instruction No. 3 was issued on 20th May, 2003 to provide guidance to the Transfer Pricing Officers (TPOs) and the Assessing Officers (AOs) to operationalise the transfer pricing provisions and to have procedural uniformity. Due to a number of legislative, procedural and structural changes carried out over the last few years, Instruction No. 3 of 2003 was replaced with Instruction No. 15/2015, dated 16th October, 2015. After the issuance of Instruction No. 15/2015, the Board has received some suggestions and queries, which have been examined in detail. Accordingly, this Instruction is being issued to replace Instruction No. 15 of 2015. This Instruction is applicable for both international transactions and specified domestic transactions between associated enterprises. The guidelines on various issues are as follows:

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3. **Reference to Transfer Pricing Officer (TPO)**

3.1 The power to determine the Arm's Length Price (ALP) in an international transaction or specified domestic transaction is contained in sub-section (3) of Section 92C. However, Section 92CA provides that where the Assessing Officer (AO) considers it necessary or expedient so to do, he may refer the computation of ALP in relation to an international transaction or specified domestic transaction to the TPO. For proper administration of the Income-tax Act, the Board has decided that the AO shall henceforth make a reference to the TPO only under the circumstances laid out in this Instruction.

3.2 All cases selected for scrutiny, either under the Computer Assisted Scrutiny Selection [CASS] system or under the compulsory manual selection system (in accordance with the CBDT's annual instructions in this regard – for example, Instruction No. 6/2014 for selection in F.Y 2014-15 and Instruction No. 8/2015 for selection in F.Y 2015-16), on the basis of transfer pricing risk parameters [in respect of international transactions or specified domestic transactions or both] have to be referred to the TPO by the AO, after obtaining the approval of the jurisdictional Principal Commissioner of Income-tax (PCIT) or Commissioner of Income-tax (CIT). The fact that a case has been selected for scrutiny on a TP risk parameter becomes clear from a perusal of the reasons for which a particular case has been selected and the same are invariably available with the jurisdictional AO. Thus, if the reason or one of the reasons for selection of a case for scrutiny is a TP risk parameter, then the case has to be mandatorily referred to the TPO by the AO, after obtaining the approval of the jurisdictional PCIT or CIT.

3.3 Cases selected for scrutiny on non-transfer pricing risk parameters but also having international transactions or specified domestic transactions, shall be referred to TPOs only in the following circumstances:

(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;

(b) where there has been a transfer pricing adjustment of Rs. 10 Crore or more in an earlier assessment year and such adjustment has been upheld by the judicial authorities or is pending in appeal; and

(c) where search and seizure or survey operations have been carried out under the provisions of the Income-tax Act and findings regarding transfer pricing issues in respect of international transactions or specified domestic transactions or both have been recorded by the Investigation Wing or the AO.

3.4 For cases to be referred by the AO to the TPO in accordance with paragraphs 3.2 and 3.3 above, in respect of transactions having the following situations, the AO must, as a jurisdictional requirement, record his satisfaction that there is an income or a potential of an income arising and/or being affected on determination of the ALP of an international transaction or specified domestic transaction before seeking approval of the PCIT or CIT to refer the matter to the TPO for determination of the ALP:

- where the taxpayer has not filed the Accountant's report under Section 92E of the Act but the international transactions or specified domestic transactions undertaken by it come to the notice of the AO;

- where the taxpayer has not declared one or more international transaction or specified domestic transaction in the Accountant's report filed under Section 92E of the Act and the said transaction or transactions come to the notice of the AO; and

- where the taxpayer has declared the international transactions or specified domestic transactions in the Accountant's report filed under Section 92E of the Act but has made certain qualifying remarks to the effect that the said transactions are not international transactions or specified domestic transactions or they do not impact the income of the taxpayer.

In the above three situations, the AO must provide an opportunity of being heard to the taxpayer before recording his satisfaction or otherwise. In case no objection is raised by the taxpayer to the applicability of Chapter X [Sections 92 to 92F] of the Act to these three situations, then AO should refer the international transaction or specified domestic transaction to the TPO for determining the ALP after obtaining the approval of the PCIT or CIT. However, where the applicability of Chapter X [Sections 92 to 92F] to these three situations is objected to by the taxpayer, the AO must consider the taxpayer's objections and pass a speaking order so as to comply with the

principles of natural justice. If the AO decides in the said order that the transaction in question needs to be referred to the TPO, he should make a reference after obtaining the approval of the PCIT or CIT.

3.5 In addition to the cases to be referred as per paragraphs 3.2 and 3.3, a case involving a transfer pricing adjustment in an earlier assessment year that has been fully or partially set-aside by the ITAT, High Court or Supreme Court on the issue of the said adjustment shall invariably be referred to the TPO for determination of the ALP.

3.6 Since the provisions of Section 92CA of the Act, *inter*-alia, refer to the computation of the ALP of the international transaction or specified domestic transaction, it is imperative for the AO to ensure that all international transactions or relevant specified domestic transactions or both, as the case may be, are explicitly mentioned in the letter through which the reference is made to the TPO. In this regard, guidelines as under may be followed:

(a) If a case has been selected for scrutiny on a TP risk parameter pertaining to international transactions only, then the international transactions shall alone be referred to the TPO;
(b) If a case has been selected for scrutiny on a TP risk parameter pertaining to specified domestic transactions only, then the specified domestic transactions shall alone be referred to the TPO; and
(c) If a case has been selected for scrutiny on the basis of TP risk parameters pertaining to both international transactions and specified domestic transactions, then the international transactions and the specified domestic transactions shall together be referred to the TPO.

Since international transactions may be benchmarked together at the entity level due to the inter-linkages amongst them, if a case has been selected for scrutiny on a TP risk parameter pertaining to one or more international transactions, then all the international transactions entered into by the taxpayer – except those about which the AO has decided not to make a reference as per paragraph 3.4 - shall be referred to the TPO.

3.7 For administering the transfer pricing regime in an efficient manner, it is clarified that though AO has the power under Section 92C to determine the ALP of international transactions or specified domestic transactions, determination of ALP should not be carried out at all by the AO in a case

where reference is not made to the TPO. However, in such cases, the AO must record in the body of the assessment order that due to the Board's Instruction on this matter, the transfer pricing issue has not been examined at all.

4. **Role of Transfer Pricing Officer (TPO)**

4.1 The role of the TPO begins after a reference is received from the AO. In terms of Section 92CA, this role is limited to the determination of the ALP in relation to international transactions or specified domestic transactions referred to him by the AO. However, if any other international transaction comes to the notice of the TPO during the course of the proceedings before him, then he is empowered to determine the ALP of such other international transactions also by virtue of Section 92CA (2A) and (2B). The transfer price has to be determined by the TPO in terms of Section 92C. The price has to be determined by using any one of the methods stipulated in sub-section (1) of Section 92C and by applying the most appropriate method referred to in Sub-section (2) thereof. There may be occasions where application of the most appropriate method provides results which are different but equally reliable. In all such cases, further scrutiny may be necessary to evaluate the appropriateness of the method, the correctness of the data, weight given to various factors and so on. The selection of the most appropriate method will depend upon the facts of the case and the factors mentioned in Rule 10C. The TPO, after taking into account all relevant facts and data available to him, shall determine the ALP and pass a speaking order.

4.2 The TPO's order should contain details of the data used, reasons for arriving at a certain price and the applicability of methods. It may be emphasised that the application of method including the application of the most appropriate method, the data used, factors governing the applicability of respective methods, computation of price under a given method will all be subjected to judicial scrutiny. It is, therefore, necessary that the order of the TPO contains adequate reasons on all these counts. Copies of the documents or the relevant data used in arriving at the arm's length price should be made available to the AO for his records and the use at subsequent stages of appellate or penal proceedings.

4.3 The TPO, being an Additional/Joint CIT, shall obtain the approval of the jurisdictional CIT (Transfer Pricing) before passing the order. On the other hand, the TPO, being a Deputy/Assistant CIT, shall obtain the approval of

the jurisdictional Additional/Joint CIT before passing the order. The jurisdictional CIT (TP) should assign a limited number of important and complex cases, not exceeding 50, to the Additional/Joint CsIT (TPOs) working in the same jurisdiction. For the selection of such important and complex cases by the CsIT (TP), the concerned CCsIT (International Taxation) shall frame appropriate guidelines.

4.4 In addition to the above, the TPO is required to carry out the Compliance Audit of the Advance Pricing Agreements (APAs) entered into by the Board and the taxpayers in accordance with Rule 10P of the Income-tax Rules.

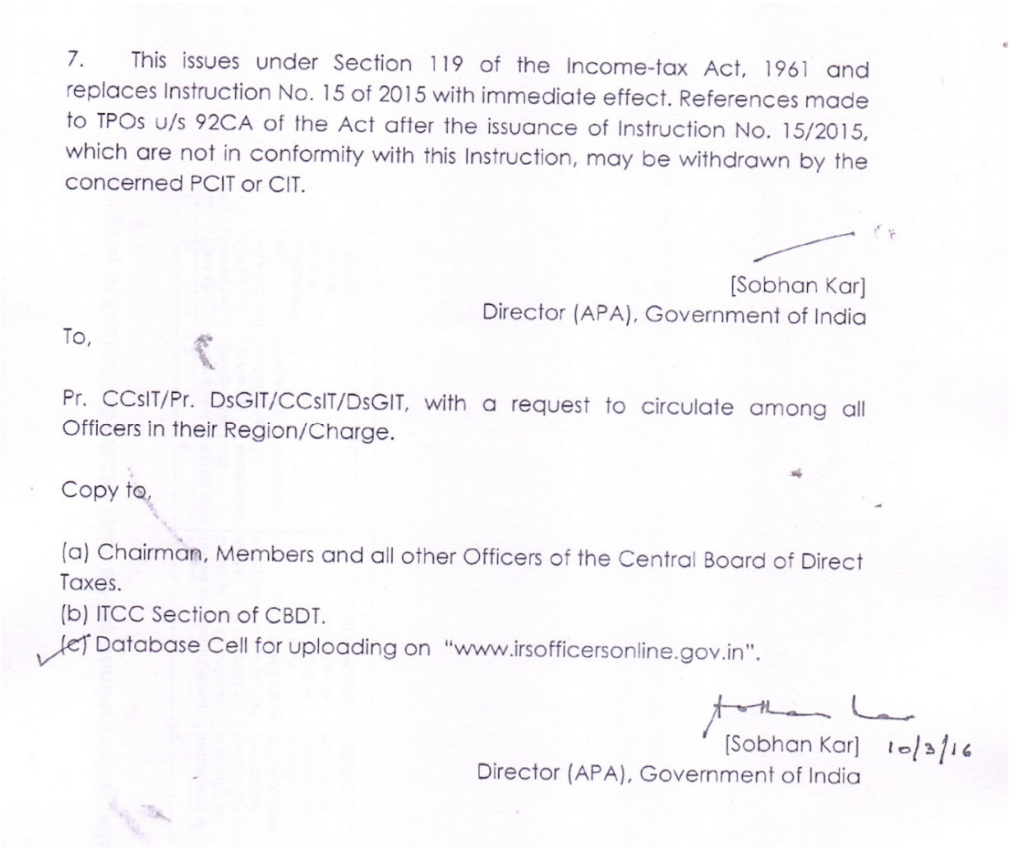
4.5 The TPO is also required to play an important role in respect of Safe Harbour provisions. Whenever a reference is made to the TPO under sub-rule (4) or sub-rule (10) of Rule 10TE of the Income-tax Rules, the TPO has to carefully examine all the facts and circumstances of the taxpayer's exercise of an option for Safe Harbour and pass an order in writing as mandated in sub-rule (6) or sub-rule (11) of the said Rule, respectively.

5. **Role of the AO after Determination of ALP by the TPO**

Under sub-section (4) of Section 92C (read with sub-section (4) of Section 92CA), the AO has to compute the total income of the assessee in conformity with the ALP determined by the TPO under sub-section (3) of Section 92CA.

6. **Maintenance of Data Base**

It is to be ensured by the CIT (TP) that the references received from the AOs by the TPOs in his jurisdiction are dealt with expeditiously and accurate record of all events connected with the whole process of determination of ALP is maintained. This record is to be maintained by each TPO, separately for international transactions and specified domestic transactions, in the formats enclosed as Annexure-I and Annexure-II to this Instruction and the same shall be maintained electronically on the Department's ITBA system as and when the same becomes fully functional. These formats will serve as an important database for future action and also help in bringing about uniformity in the determination of the ALP in identical or substantially identical cases. The CsIT (TP) must ensure that a consolidated report for the entire Charge is generated and stored after the completion of each transfer pricing audit cycle.



7. This issues under Section 119 of the Income-tax Act, 1961 and replaces Instruction No. 15 of 2015 with immediate effect. References made to TPOs u/s 92CA of the Act after the issuance of Instruction No. 15/2015, which are not in conformity with this Instruction, may be withdrawn by the concerned PCIT or CIT.

[Sobhan Kar]
Director (APA), Government of India

To,

Pr. CCsIT/Pr. DsGIT/CCsIT/DsGIT, with a request to circulate among all Officers in their Region/Charge.

Copy to,

(a) Chairman, Members and all other Officers of the Central Board of Direct Taxes.
(b) ITCC Section of CBDT.
(c) Database Cell for uploading on "www.irsofficersonline.gov.in".

[Sobhan Kar] 10/3/16
Director (APA), Government of India

**4.1** In view of the guidelines issued by CBDT in instruction No.03/2016 cited (supra) by not making timely reference to the TPO, the ld. AO had breached the mandatory instructions issued by the CBDT. This issue has also been considered by the Hon'ble Supreme Court in the case of PCIT Vs. S.G. Asia Holdings India Pvt. Ltd. in Civil Appeal No.6144/2019 dated 13.8.2018, wherein held as follows:-

*5. It was submitted by Mr. Mahabir Singh, learned Senior Advocate that the expression ".....the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the Commissioner, refer the computation of the arm's length price in relation to the said international transaction or specified domestic transaction under Section 92C to the Transfer Pricing Officer" occurring in Section 92CA of the Act signified that discretion was vested in the Assessing Officer and it would not be mandatory in even" single case that he must refer the issue of computation of the Arm's Length Price to the TPO[3].*

*6. However, the following expressions employed in Instruction No.3/2003 put the matter in a different perspective: -*

*"... ...The Assessing Officer can arrive at prima facie belief on the basis of these details whether a reference is considered necessary. No detailed enquiries are needed at this stage and the Assessing Officer should not embark upon scrutinizing the correctness or otherwise of the price of the international transaction at this stage... ... If there are more than one transaction with an associated enterprise or there are transactions with more than one associated enterprise the aggregate value of which exceeds Rs.5 crores, the transactions should be referred to the TPO, ... ...*
*Since the case will be selected for scrutiny before making reference to the TPO, the Assessing Officer may proceed to examine other aspects of the case during pendency of assessment proceedings but await the report of the TPO on the value of international transaction before making final assessment.*

…….

*(vi) Role of (he Assessing Officer after receipt of "arm's length price": Under sub-section (4) of section 92C, the Assessing Officer has to compute total income of the assessee having regard to the arm's length price so determined by the TPO."*

*"7. In view of the guidelines issued by the CBDT in Instruction No.3/2003 the Tribunal was right in observing that by not making reference to the TPO, the Assessing Officer had breached the mandatory instructions issued by the CBDT. We do not find the conclusion so arrived at by the Tribunal to be correct.*

*8. However, the Tribunal ought to have accepted the submission made by the Departmental Representative as quoted in para 16.2 of its order and the matter ought to have been restored to the file of the Assessing Officer so that appropriate reference could be made to the TPO. It would therefore, be upto the authorities and the Commissioner concerned to consider the matter in terms of Sub-Section (1) of Section 92CA of the Act.*

*9. We, therefore, allow this Appeal to the aforesaid extent and direct that it would now be upto the Assessing Officer to take appropriate steps in terms of Instruction No.3/2003.*

*10. The appeal is allowed to the aforesaid extent. No costs."*

**4.2** Further, jurisdictional High Court in the case of PCIT Vs. M/s. Obulapuram Mining Company Ltd. in ITA No.100005/2017, ITA No.100022/2017 & others dated 30.9.2020 (Dharwad Bench) has observed as under:

*"14. The judgment in the case of S.G.ASIA is delivered on 13th August, 2019. A reference to the TPO is required to be made under Sub section (1) of Section 92CA. There is no amendment to the said Section. Shri Raghavan is right in his submission to the extent that sub section (4) of Section 92CA has been substituted with effect from 01.06.2007. No authority of the Supreme Court of India is cited to show that the*

*position of law stated in S.G.ASIA has been altered. Therefore, in view of the unambiguous language employed in paragraph No.7 of S.G.ASIA extracted hereinabove, we are of the considered view that Instruction No.3/2003 issued by the CBDT is mandatory."*

**4.3** Thus, it was held that instruction No.03/2016 issued by the CBDT was mandatory.

**4.4** In the present case also, ld. AO has not followed the CBDT Instruction No.03/2016 dated 10.3.2016 in true perspective. Hence, ld. PCIT has invoked the jurisdiction u/s 263 of the Act and set aside the order of the ld. AO for specific purpose of referring the matter to TPO. We do not find any infirmity in the order of the ld. PCIT passed u/s 263 of the Act and the same is confirmed.

**5.** In the result, appeal of the assessee is dismissed.

Order pronounced in the open court on 14th Dec, 2023

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(Madhumita Roy)** | **(Chandra Poojari)** |
| **Judicial Member** | **Accountant Member** |

Bangalore,
Dated 14th Dec, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5 Guard file

By order

**Asst. Registrar,**
**ITAT, Bangalore.**