IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : I : NEW DELHI

BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.867/Del/2021
Assessment Year: 2011-12

WSP Consultants India Private Ltd., FC-24, Film City Noida, Sector 16A, Gautam Budh Nagar, Uttar Pradesh – 201301.	Vs	Pr. CIT, Delhi-7, New Delhi.

PAN: AAACW5220F

(Appellant) (Respondent)

Assessee by	:	Shri Himanshu S. Sinha, Shri Bhuwan Dhoopar & Shri Parash Biswal, Advocates
Revenue by	:	Shri Rajesh Kumar, CIT-DR
Date of Hearing	:	22.03.2024
Date of Pronouncement	:	27.03.2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the Assessee against the order dated 31.03.2021 passed u/s 263 of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by Ld. Pr. Commissioner of Income Tax, Delhi -7 (hereinafter referred to as Ld.PCIT or the Revisional Authority) wherein the assessment

order dated 12.11.2018 u/s 254/143(3) r.w.s. 92CA(3) of the Act was found to be erroneous and prejudicial to the interests of the Revenue.

2. The facts, in brief, are that the assessee company is engaged in the business of Engineering Consultancy Services. Return declaring income of Rs.1,06,24,217/- was filed electronically on 30.11.2011 which was processed u/s. 143(1) of the Act. Subsequently the case was selected for scrutiny. During the year under consideration the assessee had entered into international transaction with its associated enterprise. Hence, after necessary approval of Pr. C.I.T., Delhi-IX, New Delhi, in accordance with the provisions of section 92CA of the I.T. Act, 1961, the matter was referred to the TPO for determining the Arm's Length Price (ALP) of the international transaction. The DCIT, TPO-3(1)(1), New Delhi, passed order u/s 92CA(3) of the Act dated 22.01.2015 wherein an adjustment of Rs.6,55,34,938/- was made u/s 92CA(3) of the Act. Accordingly, the draft assessment order u/s 144C of the Act was passed on 25.03.2015 at assessed income of Rs.7,61,59,160/- by making addition of Rs.6,55,34,938/-. The assessee filed objections against the draft assessment order before the DRP on 23.04.2015. The DRP vide its order dated 28.10.2015 passed u/s 144C(5) of the Act directed the TPO/AO to exclude/ include certain companies as comparable for calculating the ALP. After taking into consideration the direction of the DRP, the TPO vide its letter dated 12.11.2015 revised the transfer pricing adjustment to Rs.3,87,54,545/- from

Rs.6,55,34,938/- (as determined earlier vide order u/s 92CA(3) dated 22.01.2015). Assessment order u/s 143(3) r.w.s. 144C of the Act was passed in this case on 30.11.2015 computing total income of the assessee company mentioned as under: -

Income, as declared in ITR			1,06,24,217/-
Additions /disallowances			
(i)	TPO adjustment u/s 92CA(3)		3,87,54,545/-
		Total Income (288A)	4,93,78,760/-

3. Aggrieved with the assessment order dated 30.11.2015 passed u/s 143(3) r.w.s. 144C of the Act, assessee preferred an appeal before the ITAT. The ITAT vide its order dated 15.09.2016 in ITA No.344/Del/2016, set aside the issue before AO/TPO for fresh calculation of ALP. In consequence of the order of ITAT, a reference for calculation of ALP according to direction of the ITAT was made to the DCIT, TPO-(3)(2), New Delhi. The DCIT, TPO-3(3)(2), New Delhi, after considering the merits of the case, proposed adjustment of Rs.1,61,23,309/- on account of difference of ALP by passing order u/s 92CA(3) r.w.s. 254 of the Act, dated 29.10.2018. Accordingly, Assessment order/s 254/143(3) r.w.s. 92CA(3) of the Act was passed on 12.11.2018 and the income was recomputed as under:-

Income, as declared in ITR			Rs. 1,06,24,217/-
Additions/disallowances			
(i)	TPO adjustment u/s 92CA(3), of the Act vide order dated 29.10.2018.		Rs. 1,61,23,309/-
		Total Income	**Rs. 2,67,47,526/-**

4. It may be noted that the TPO reduced the ALP adjustment from Rs.3,87,54,545/- to Rs.1,61,23,309/-, therefore a final assessment order incorporating the adjustments was passed on 12.11.2018.

5. However, Ld. Pr. CIT, on re-examination of the case records and also on perusal of the grounds of appeal taken by the assessee before the Ld. CIT(A), observed that the final assessment order dated 12.11.2018 has been passed without taking into account the Board Circular No 05/2010 dated 03.06.2010 and Circular No. 09/2013 dated 19.11.2013 which has made it mandatory for the AO to pass a draft assessment order under Section 144C of the Act, prior to passing the final assessment order. In view of the above, Ld. PrCIT concluded that the Assessment order was erroneous as well as prejudicial to the interest of revenue. Hence Ld. PrCIT decided to invoke the revisionary jurisdiction as per the provision of Section 263 Act.

6. The assessee was show caused by notice dated 31.07.2019 to which the assessee filed a detailed reply primarily submitting that the assessment order was null and void and *non est* which cannot be subject matter of the revision

and for which judgement of the Hon'ble Supreme Court in the case ***Zuari Cement Limited vs. ACIT in WP No.5557 of 2012*** was relied. The assessee had also taken a plea that appeal is pending before the ld.CIT(A) on the same ground.

7. However, the ld.PCIT was not satisfied and taking recourse to sub-clause (c) of Explanation 2 to Section 263(1) of the Act, the ld.PCIT held the order to be erroneous and prejudicial to the interests of the Revenue. The ld.PCIT observed that the AO has not taken into consideration the CBDT Circular No.05/2010 dated 03.06.2010 and Circular No.09/2013 dated 19.11.2013 which has made it mandatory for the AO to pass a draft assessment order under Section 144C of the Act, prior to passing the final assessment order.

8. The assessee is in appeal before us raising the following grounds:-

> *"The following grounds are independent of and without any prejudice to one another:*
>
> *1. On the facts and circumstances of the case and in law, the order dated March 31, 2021 passed by the Ld. Pr. CIT under section 263 of the Act is beyond jurisdiction, bad in law and void ab initio.*
>
> *2. On the facts and circumstances of the case and in law, the Ld. Pr. CIT erred in exercising revisionary powers under section 263 of the Act, without appreciating that the assessment order dated November 12, 2018 which was sought to be revised by such revisionary action was passed without issuance of a draft assessment order, making the assessment order itself void, bad in law, non-est and a nullity.*
>
> *3. On the facts and circumstances of the case and in law, the Ld. Pr. CIT erred in holding that the assessment order dated November 12, 2018, was erroneous and prejudicial to the interests of the revenue without satisfying the prerequisite conditions of section 263 of the Act.*

The above Grounds of Appeal are without prejudice to each other.

The Appellant craves for leave to amend, vary, omit or substitute any of the aforesaid grounds of appeal or add any further ground of appeal(s) at any time before or at the time of hearing of the appeal."

9. Heard and perused the record. At the time of hearing Ld. DR had pointed that assessee has also approached Hon'ble Delhi High Court challenging the same order u/s 263 of the Act. Ld. AR had countered that both are independent remedy. However, the Bench had observed that having availed alternative here, the assessee may withdraw the Writ for which Ld. AR submitted that same shall be withdrawn. On 22.03.2024 order dated 10.11.2023 is filed showing WP(C) 9636/2019 being withdrawn.

9.1 The ld. AR heavily relied on the judgement of the Hon'ble Andhra Pradesh High Court in the case ***Zuari Cement Ltd. vs. ACIT [TS-271-HC-2013 (AP)-TP]*** and the judgement of the Hon'ble Delhi High Court in the case of ***PCIT vs. Headstrong Services India (P) Ltd. (2021) 125 taxmann.com 262 (Del***), to submit that it is the settled proposition of law that even after remand, the AO has to pass a draft assessment order and by passing a final assessment order, the ld. AO has committed an illegality which make the order *non est* and void. The ld. AR relied on the judgement in ***Gigabyte Technology (India) (P) Ltd. vs. CIT (2020) 121 taxmann.com 301 (Bombay) (HC)*** to submit that when the assessment order itself is non est and void, the revisionary powers u/s 263 of the Act cannot be invoked as that will lead to permitting the AO to extend the period of limitation which is contrary to law.

10. On the other hand, the ld. DR has relied on the judgement of the Hon'ble Madras High Court in the case ***Enfinity Solar Solutions (P) Ltd. vs. DCIT (2021) 129 taxmann.com 172 (Madras)*** to submit that in cases when the Tribunal reinstates the matter to TPO, the AO is not supposed to pass a draft assessment order and there is no illegality in the assessment order. The ld. DR has submitted that the judgements relied on by the ld. AR are not applicable as the same were not in regard to remand proceedings, but, were related to the original proceedings.

11. We have given thoughtful consideration to the matter on record and the case laws cited. It is the admitted state of affairs that the TPO had passed an order dated 29.10.2018 in furtherance of the Tribunal's order of remand dated 15.09.2016 and the TPO had reproduced the relevant part of the order of the Tribunal and we consider it appropriate to reproduce the same as follows:-

> *"2. The relevant Para of the order of Hon'ble ITAT is reproduced hereunder:-*
>
> *"As is evident from ld. DRP's direction, it has accepted the assessee's contention regarding limiting the expenses to the percentage of revenue from the AE i.e. 47%. Thus, though ld. DRP did not accept the segmental analysis submitted by the assessee but in principle agreed that adjustment proposed by ld. TPO is to be limited to the amount of expenses to the percentage of revenue from the AE. Therefore, if certain expenses were not at all incurred with reference to earning of AE's revenue, then those expenses had to be excluded for correct computation of 47% of expenses attributable to AE.*
>
> *This exercise has not been carried out by ld. TPO because no such plea was taken before him. However, the entire data is available on record*

and, therefore, in order to arrive at correct computation the assessee's plea regarding sub-contracting expenses 100% attributable to non AE business has to be examined. The assessee has filed additional evidence in support of its contention and, therefore, it would be in the interest of justice that the additional evidence is admitted for arriving at proper computation of ALP. We, accordingly, admit the additional evidence and restore the matter back to the file of Ld. TPO to examine the assessee's plea in this regard. In case it is found that D&E expenses were attributable 100% to independent third party transaction then the same has to be excluded for computing the operating cost of the assessee because operating cost pertaining to AE only has to be considered."

12. The order of the TPO shows that in compliance of the directions of the Tribunal, a reference was received from the AO and the assessee was given a fresh opportunity of hearing. The assessee had filed additional evidences before the TPO which were taken into consideration by the TPO.

13. Now, when, in the background of the aforesaid facts coming up from the order of the Tribunal in the first round and the observations of the TPO in order dated 29.10.2018, the judgement of the Hon'ble Madras High Court in the case of ***Enfinity Solar Solutions (P) Ltd.*** **(*supra*)** relied on by the ld. DR are considered, there appears to be a factual distinction. In that case the Hon'ble High Court in paras 18 and 19 had made certain relevant observations peculiar to that case and we consider it appropriate to reproduce the same as under:-

"18. Perusal of the above order clarifies that the Income Tax Appellate Tribunal remitted the issue regarding application of the method whether the CUP method or TNMM as a most appropriate method to the file of Assessing Officer to see whether the AE derived any benefit or mark up on the price charged by the vendor for supply of raw materials to assessee's AE, which it has sold to assessee. With these observations, the

Income Tax Appellate Tribunal remitted the issue for selection of appropriate method to Assessing Officer for fresh consideration.

19. Thus, it is not the case, where the entire order is set aside and a direction is issued, remanding the matter to conduct a fresh adjudication of the entire issues by following the procedures contemplated under Section 144C of the Income Tax Act. The Income Tax Appellate Tribunal, in clear terms, directed the Assessing Officer to decide regarding the application of method i.e., whether CUP method or TNMM as a most appropriate method. Thus, a specific issue was directed to be decided by the Assessing Officer and a direction was issued to the Assessing Officer to make it clear that the assessee is at liberty to raise any other grounds in support of the claim of the assessee in this case. The ITAT further held that the matter was remitted. The issue regarding selection of most appropriate method by the Assessing Officer / Transfer Pricing Officer and has not decided other issues raised by the assessee."

14. Thus, the aforesaid observations recorded by the Hon'ble High Court show that it was a case where the entire order was not set aside and it is not a case of fresh adjudication and a specific issue was sent for determination by the AO by way of remittance. However, in the case before us, the Tribunal had admitted the additional evidences of the assessee and restored the matter back to the files of the TPO to examine the assessee's plea on the basis of additional evidences. As observed earlier in para 4, the TPO had made reference to the additional evidences as considered. Thus, the judgement relied by the ld. DR is not applicable to the present facts and circumstances.

14.1 At the same time, by the judgement of the Hon'ble Delhi High Court in the case of ***Headstrong Services India (P) Ltd. (supra)*** the AO was directed to frame the assessment afresh. This judgement of the Hon'ble Delhi High Court in ***Headstrong Services India (P) Ltd. (supra)*** was cited before the Hon'ble

Madras High Court and it appears that for that reason the Hon'ble Madras High Court in paras 18 and 19 had made a distinction in regard to cases in which the entire order is not set aside and a mere direction is issued. We appreciate the arguments of the ld. DR that the judgement of the Hon'ble Andhra Pradesh High Court in the case of ***M/s Zuari Cement Ltd. (supra)*** was not a case where, after remand proceedings, a fresh order was passed, but, that was a case of original assessment being challenged for non-following the provisions of section 144C. However, the Hon'ble Delhi High court judgement in ***Headstrong Services India (P) Ltd. (supra)*** being binding as the precedent has to be followed and the Hon'ble High Court has laid that if the Tribunal direct the AO to decide the matter *denovo*, it means that new hearing of the matter has to be conducted and the complete procedure of section 144C has to be followed which includes passing a draft assessment order.

15. Even otherwise, when the ld. PCIT himself has formed an opinion that the final assessment order dated 12.11.2018 has been passed without taking into account the Board Circular No.05/2010 dated 03.06.2010 and Circular No.09/2013 dated 19.11.2013, which has made it mandatory for the AO to pass a draft assessment order u/s 144C of the Act prior to passing the final assessment order, then, certainly, it cannot be accepted from ld. DR that he would still press that there was no requirement of passing a draft assessment order. Thus the order passes was not in accordance with law.

16. Furthermore, coming to the exercise of jurisdiction by invoking clause (c) of Explanation 2 of Section 263(1) of the Act, it comes up that the same has been inserted w.e.f. 01.06.2015 and the clause (c) provides that in case the assessment order has not been made in accordance with any order, directions or instructions issued by the Board u/s 119 of the Act, the assessment order shall be deemed to be erroneous in so far as it is prejudicial to the interests of the Revenue.

16.1 Now Circular No.05/2010 of CBDT dated 03.06.2010 is in the form of explanatory notes to the provisions of Finance (No.2) Act, 2009 and Circular No.09/2013 dated 19.11.2013 is only making consequential amendments in the explanatory Circular No.05/2010 dated 03.06.2010. We are of the considered view that every circular or communication of the Board cannot be considered to be issued by the Board u/s 119 of the Act, which are meant for issuing orders, instructions and directions and same when issued u/s 119 of the Act specifically mention the fact that Board has invoked the powers of Section 119 of the Act. The explanatory notes to the provisions of Finance Act only explain the substance of the provisions of the concerned Finance Act relating to Direct taxes and may serve as external aid to interpretation of the Finance Act but cannot be considered to be issued u/s 119 of the Act, so as to say that if anything contained therein in the explanatory notes has not been followed by the assessing officer, it will lead to defiance of orders, instructions and

directions issued by the Board u/s 119 of the Act. Thus the exercise of jurisdiction by invoking clause (c) of Explanation 2 of Section 263(1) of the Act, itself was bad.

17. Then reference to 'any order' u/s 263 of the Act is to an assessment order, which otherwise is passed in due course of law and is otherwise a valid and enforceable order and not an order which is *void ab initio*, being not passed in accordance with due course of law. The following judgements, which the ld. AR has relied, also brings forth the settled proposition of law that a *non est* and void order cannot be subject matter to the revisionary proceedings u/s 263 of the Act:-

(i) Gigabyte Technology (India) (P.) Ltd. V. CIT, [2020] 121 taxmann.com 301 (Bombay) (HC);
(ii) DCIT v. Dina Mahabir Re-Rollers Pvt. Ltd. [2022] 135 taxmann.com 338(Patna - Trib.);
(iii) Mohan Jute Bags Mfg. Co. v. PCIT [2021] 131 taxmann.com 309 (Kolkata -Trib.);
(iv) Keshab Narayan Banerjee v. CIT [1998] 101 Taxman 512 (Cal.) (Calcutta-HC);
(v) Westlife Development Ltd. v. Principal Commissioner of Income Tax [2017] 88 taxmann.com 439 (Mum. - Trib.); and
(vi) V. Narayanan v. DCIT, [2010] 127 ITD 133 (Chennai) (Trib. - Full Bench)

18. Thus we are inclined to sustain the grounds raised in appeal. The appeal of the assessee is allowed. The impugned order u/s 263 of the Act is quashed.

Order pronounced in the open court on 27.03.2024.

Sd/-	Sd/-
(SHAMIM YAHYA) ACCOUNTANT MEMBER	(ANUBHAV SHARMA) JUDICIAL MEMBER

Dated: 27th March, 2024.

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Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi