

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH: CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री अमिताभ शुक्ला, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
SHRI AMITABH SHUKLA, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 640/Chny/2023
निर्धारण वर्ष /Assessment Year: 2016-17

Philips Foods India Private Limited,
C-75 / 76, SIPCOT Industrial Complex, Madathoor,
Tuticorin - 628008
[PAN: AABCP7916Q]

The Principal Commissioner of Income Tax,
Madurai-1

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Assessee by

: Shri Ashik Sha, CA,
Mr.Vinay Jain CA,

प्रत्यर्थी की ओर से /Revenue by

: Shri Nilay Baran Som, CIT

सुनवाई की तारीख/Date of Hearing

: 05.09.2024

घोषणा की तारीख /Date of Pronouncement

: 30.09.2024

आदेश / ORDER

PER AMITABH SHUKLA, A.M :

This appeal is filed against the order bearing DIN & Order No.ITBA/REV/F/REV5/2022-23/1051684572(1) dated 30.03.2023 of the Learned Principal Commissioner of Income Tax [herein after "PCIT" for the assessment year 2016-17. Through the aforesaid appeal the assessee has challenged order u/s 263 dated 30.03.2023 passed by PCIT, Madurai-1.

2.0 The Ld. Counsel for the assessee drew our attention to the revision order passed by PCIT, Madurai-1, u/s 263 dated 30.03.2023 to revise assessment order raised by National e-Assessment Centre(NEAC), Delhi, u/s 143(3) r.w.s 144B of the Act for AY-2016-17 dated 04.05.2021. In its original appeal filed alongside Form-36 the appellant had raised three grounds challenging validity of the revisionary proceedings u/s 263 and had also argued on merits of the case alluding that the report of the TPO u/s 92CA(4) was in order and did not require any interference. During the course of present proceedings, the appellant vide its petition dated 24.11.2023 pleaded to file additional grounds challenging the jurisdictional authority of PCIT, Madurai-1.

3.0 Thus the Ld. Counsel for the assessee drew our attention to the additional grounds raised by the assessee vide dated 24.11.2023 whereby it has challenged the jurisdictional authority with the PCIT, Madurai-1 to pass the impugned revisionary order u/s 263 of the Act reproduced hereunder:

“...The Appellant prefers the following Additional Grounds of Appeal, on the facts and in circumstances of the case and in law, without prejudice to one another or the grounds of appeal furnished in the Memorandum of Appeal inform 36:

1. The Impugned Order passed by the Ld. PCIT - 1, Madurai, under section 263 of the Act, is without jurisdiction and lacks the authority of law, in so far as it relates to the amendment of the TP Order passed under section 92CA (3) by the Ld. DCIT, TP, Circle 2(2) Chennai, and is therefore illegal, void-ab-initio, contrary to the provisions of the Income Tax Act, 1961 and is liable to be quashed as such.

2. Without prejudice, the assessment order dated May 04, 2021 passed by the Ld. AO, in conformity with the order of the Ld. TPO as mandated by section 92CA(4) of the Act, is not erroneous in so far as it relates to the arms' length price determined by the Ld. TPO.

The Appellant craves leave to add / modify / alter any additional grounds. The above additional grounds are without prejudice to each other.

The Appellant submits that the omission to raise the aforesaid additional grounds of appeal in the original grounds of appeal was neither deliberate nor willful and prays that the Hon'ble Tribunal may consider it as part of the original grounds of appeal....”

4.0 The Ld. Counsel for the assessee requested admissibility of additional ground on the premise that the assessment was completed by the National e-assessment Center by making reference to TPO for determining arm's length pricing qua International transactions undertaken by the assessee. It was submitted that the impugned report submitted by the TPO forms the basis of the income determined by the Ld. AO u/s 143(3) vide his order dated 04.05.2021. The Ld. Counsel for the assessee argued that the additional grounds raised by it lies at the base of the controversy and in case the same is admitted and adjudicated in favour of the assessee there would apparently be no need to adjudicate the other grounds raised by it. The Ld. Counsel for the assessee submitted that the PCIT, Madurai-1 has invoked his revisionary powers u/s.263 holding the assessment order being erroneous and prejudicial to the interest of the revenue by finding deficiencies, shortcomings etc. in the report of the TPO in this case being Ld. Dy. Commissioner of Income Tax(DCIT), TP, Circle-

2(2), Chennai which was submitted to the Ld. AO being faceless assessing officer of any NeFAC u/s.92CA(4) of the Act vide order dated 01.11.2019. It was submitted that PCIT, Madurai-1 has no authority to invoke revisionary proceedings w.r.t orders passed by TPO and hence he was devoid of any valid jurisdiction. It was submitted that the Ld. PCIT, Madurai-1 had initiated revisionary proceedings u/s 263 of the Act for the impugned assessment years 2016-17 by issuing show cause notice dated 17.02.2023 to the assessee.

5.0 The Ld. Counsel for the assessee drew our attention to contemporaneous provisions of the statute governing section 263, Finance Act 2022, CBTD notification no.60/ 2014/F No.187/29/2014(ITA1 dated 03.11.2014 as well as a catena judicial pronouncements, in support of its contentions.

6.0 The Ld. DR vehemently opposed the admissibility of the additional grounds. Challenging the same Ld. DR has also placed on records its part written submissions. It is the case of the DR that Hon'ble Apex Court decision in the case of NTPC Limited relied upon by the assessee does not renders it an unfettered right to raise any ground in appeal at any point of time. It placed reliance upon the decision of Hon'ble Apex Court in the case of Jute Corporation of India 187 ITR 688 thus it was argued that the appellant has not been able to conclusively satisfy its bona-fide of the

ground raised and why it was not raised earlier. The Ld. DR argued that the assessee fully participated in the assessment proceedings and hence cannot now challenge the revisionary proceedings. It was argued that the reliance of the appellant in the case of Essar Steels Limited reported in 28 taxman.com 232 is misplaced as the views of the Hon'ble ITAT are merely obiter dicta and not ratio decidendi. Accordingly, the Ld. DR contested admission of the additional grounds of appeal.

7.0 We have heard the rival submissions in the light of material available on records and noted that the additional grounds raised by the assessee's case lies at the root of the matter and therefore in the interest of justice, deserves adjudication. It is trite law that the first and foremost thing which a judicial authority including quasi-judicial authority must possess while exercising its lawfully given authority, over any matter, is the availability of jurisdiction. Thus jurisdiction is *sine qua non* for any order passed by any authority. Jurisdiction is not a fact of presumption but it flows from statute and is either available to the authority or not available. Income Tax Act 1961 elaborately endows its taxing authorities with specific jurisdictions with the objective of protecting the interest of revenue. However, it deserves to be noted that the taxing authorities are only empowered to act on matters for which they have been specifically vested with lawful jurisdiction. It is also pertinent to

note that availability of jurisdiction is not a static phenomena but an ever evolving dynamic activity which keeps on changing as per changing times. We have noted that the additional ground raised by the appellant assessee along with accompanying material deserves meritorious consideration and is definitely worthy of judicious adjudication. Therefore, the additional ground raised by the assessee is admitted and we proceed to adjudicate this appeal accordingly.

8.0 The LD. Counsel for the assessee explained us the following factual matrix of the case. It was submitted that Philips Foods India Private Limited is a wholly owned subsidiary of Asian Pacific Rim Seafood Holding, which is ultimately held by Phillips Foods Inc.(PFIN). The Company is involved in processing and export of pasteurized crab meat to its Associated Enterprise ('AEs'). PFIN acts as a contract manufacturing entity which earns a remuneration commensurate its Contract manufacturing operations. The appellant had filed its return of income for AY 2016-17 on November 30, 2016 under Section 139(1) of the Income-tax Act, 1961 declaring a total income of Rs.2,81,88,910/-. The international transactions with Associated Enterprises were duly reported in the Accountant's Report in Form 3CEB filed in accordance with the provisions of Indian Transfer Pricing Regulations contained in sections 92, 92A to 92F of the Income Tax Act, 1961. The return of

income was selected for assessment under section 143(3) of the Act and a corresponding reference was made to the Transfer Pricing Officer ('TPO') under Section 92CA of the Act. Accordingly several notices under section 92CA(2) and 92D(3) read with section 129 were issued to the Appellant with a questionnaire enclosed alongside seeking details with respect to the international transactions of the Appellant. The Appellant made the relevant submissions in response to each of the notices. After examining the documents and submissions furnished by the Appellant, the TPO passed an order dated January 27, 2021 under section 92CA(3) of the Act and subsequently Assessing Officer (AO) passed an order dated May 04, 2021 under section 143(3) of the Act making only an addition towards disallowance of inventory write off, thereby determining an assessed income of Rs.2,91,08,991. It was emphasized that no disturbance was made by the TPO and consequently no addition was made by the Ld. AO to its returned income qua any adverse remarks of the TPO. The Principal Commissioner of Income Tax, Madurai - 1 based on the assessments concluded under for the AYs 2015-16 and 2017-18, opined that the margin retained by Phillips Foods International (Hong Kong) Limited (PFHK)) was much higher when compared to the functions performed by PFHK and accordingly concluded that PFHK must be considered as

the tested party and accordingly an adjustment must be made to PFIN's total income with reference to the 'excess margin retained' by PFHK. During the course of the revisionary proceedings u/s 263 the Ld. PCIT, Madurai-1 issued a show cause notice , relevant part of which is reproduced hereunder:-

“...2 .On verification of the records, it was noticed that your company, M/s.Phillips Foods India Pvt. Ltd. hereinafter referred to as PFIN) is a subsidiary of M/s Asian Pacific Rim Seafood Holding which in turn is a subsidiary of Phillips Foods Inc (hereinafter referred to as PFUS), Further, Phillips Food International Hong Kong (hereinafter referred to as PHFK) is a wholly owned subsidiary of Phillips Foods Holdings (Hong Kong) Limited, which in turn is a subsidiary of Phillips Foods Inc (PFUS). You have submitted that you were supplying Crab meat to PFHK as per the specifications provided under a contract manufacturing agreement and thereby you are acting as a contract manufacturer of crab meat for PFHK. However, on a comprehensive analysis of function, assets and risk (FAR) and financials of PFIN for the FY 2015-16, it is revealed that almost the entire business right from procurement of raw materials, processing and export of crab meat along with the attendant risks and utilization of assets was done by the Indian entity only and not the Hong Kong entity. Although you have claimed in the TP documentation that PFHK has performed the functions of manufacturing, marketing and distribution and borne product and market related risks apart from utilizing the intangible assets of Trademark, Patent and Know-how of PFUS as its Licensee, you have not furnished any details in this regard with evidences and thus the role played by PFHK was not established.

3. Further, on verification of the records for the AY 2015-16, it was noticed that PEHK is the least complex entity vis-à-vis PFIN and it is sandwiched between two AES - Phillips Foods Inc USA (PFUS) and you. But in, the TP documentation provided, it was claimed that you were the least complex entity and therefore chosen as the tested party while determining the ALP of the international transaction. It was also claimed that PFHK performed the functions of manufacturing, marketing and distribution and borne product and market related risks besides claiming to be the Licensee to use Trademark, Patents and Know- how owned by PFUS. On the basis of FAR analysis brought out in the documentation,

PFIN were considered as least complex entity vis-à-vis PFHK and accordingly you were chosen as the tested party.

But despite repeated opportunities, you have not substantiated full and complete details with regard to FAR of PFHK vis-à-vis you in respect of the export sales carried out by your Company to justify the above position.....

5.4 It is clear from the above that PFHK acts as intermediary between your company and PFUS. The Chapter-2 of the OECD guidelines gives the example of intermediary activities where a tax payer purchases goods from an Associated Enterprise and on sales these goods to other associated enterprise as an example of where the berry ratio may be usefully applied. In Such cases both sales and costs of goods are controlled transactions leaving operating expenses as the only reasonably independent accounting line item from which to base a transfer pricing method. For AY 2015-16, accordingly PFHK was considered as the tested party and since the data relating to costs incurred by PFHK was not available, the PLI of GP / sales was adopted and traders in aqua products in Asia pacific region was selected from Bloomberg data base for comparables. Similarly, for the AY-2016-17, PFHK (which acts as intermediary between your company and the PFUS) has to be considered as the tested party and the margins have to be necessarily bench marked against the comparables....”.

9.0 The Ld. Counsel for the assessee argued that the revisionary order u/s 263 of PCIT-1, Madurai has been passed without any lawful jurisdiction vested with the said authority. In support of its contentions the Ld. Counsel for the assessee, inviting our attention, placed on records a copy of CBTD notification no.60/ 2014/F No.187/29/2014(ITA1 dated 03.11.2014 as well as extract of the explanatory notes appended to finance bill 2022 qua amendment brought in the provisions of section 263 w.e.f 01.04.2022.

10.0 The Ld. Counsel for the assessee would make us to believe that the hierarchical chain of commands contained in in the impugned notification

dated 03.11.2014 Supra issued by CBDT clearly postulates that the DCIT/ ACIT (Transfer Pricing) 2(2), Chennai reports to his immediate supervisory authority being additional / joint CIT (Transfer Pricing) 2(2), Chennai who in turn reports to CIT(Transfer Pricing) Chennai. Further CIT(Transfer Pricing) Chennai reports to Chief Commissioner of Income Tax(International taxation) (South Zone) Bangalore. It was submitted that finally the Principal Chief Commissioner of Income Tax (International taxation) at Delhi controls all these subordinate offices up to DCIT/ ACIT (Transfer Pricing) 2(2), Chennai. It was argued that the impugned notification clearly stipulates out superior / subordinate authorities, empowered to exercise authority under the Income Tax Act. The Ld. Counsel for the assessee argued that prior to amendment in section 263 brought in by the Finance Act 2022 w.e.f 01.04.2022, a PCIT was empowered to invoke his revisionary authority in respect of orders passed by an assessing officer. However, with the advent of provisions of 92CA mandating an assessing officer to pass assessment orders after considering the report of the TPO, a question arose as to who would be having revisionary powers u/s 263 over the orders passed by the TPO. The explanatory notes of Finance Act 2022 clarified this situation by mandating that the principle chief commissioner or chief commissioner or commissioner having jurisdiction over transfer pricing matters would

be empowered to invoke revisionary action u/s 263 in respect of TPOs working under its administrative command and control. Thus it was argued that a conjoined reading of the explanatory notes of Finance Act 2022 r.w. notification of CBDT dated 03.11.2014 as well as the amended statute operative from 01.04.2022 clearly provides that only and only the commissioner in this case commissioner of income tax (Transfer Pricing) Chennai would have lawful authority u/s 263 to revise the orders passed by DCIT / ACIT (Transfer Pricing) 2(2), Chennai. It was therefore argued that consequently the revisionary order u/s 263 passed by Ld. PCIT, Madurai-1 is void ab initio and deserves to be quashed. In support of its contentions the Ld. AR relied upon the decision of Hon'ble ITAT, Mumbai in the case of Essar Steel Ltd. reported at 28 taxman.com 232 holding that a CIT who does not has administrative control over the TPO would not be in a position to exercise his revisionary authority u/s 263 qua orders passed by the TPO.

11.0 The Ld. DR fiercely opposed the arguments put forth by the Ld. AR. It was argued that the Ld. PCIT, Madurai-1 had exercised his revisionary authority in respect of assessment order passed by the Ld. AO u/s 143(3) r.w.s 144B dated 04.05.2021 and not the TPO's order. The Ld. DR would make us believe that the amendment by finance act 2022 was effective from 01.04.2022 and hence financial year 2022-2023

was transitional year and such technical mistakes deserves to be ignored. The Ld. DR also argued that the adjustments if any made by the TPO consequent to revisionary order passed by Ld. PCIT, Madurai-1 would not cause much loss to the assessee as in any case it would be accorded sufficient opportunity of being heard.

12.0 We have heard rival submissions in the light of material available on records. Before proceeding further we deem it necessary to examine a specific provisions of section 263 as amended by finance act 2022 effective from 01.04.2022.

“...263. (1) The ⁹⁹[Principal Chief Commissioner or Chief Commissioner or Principal Commissioner] or Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the Assessing Officer ¹[or the Transfer Pricing Officer, as the case may be,] is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, ²[including,—

- (i) an order enhancing or modifying the assessment or cancelling the assessment and directing a fresh assessment; or*
- (ii) an order modifying the order under section 92CA; or*
- (iii) an order cancelling the order under section 92CA and directing a fresh order under the said section].*

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

- (a) an order passed on or before or after the 1st day of June, 1988 by the Assessing Officer ¹[or the Transfer Pricing Officer, as the case may be,] shall include—*
 - (i) an order of assessment made by the Assistant Commissioner or Deputy Commissioner or the Income-tax Officer on the*

basis of the directions issued by the Joint Commissioner under section 144A;

(ii) an order made by the Joint Commissioner in exercise of the powers or in the performance of the functions of an Assessing Officer³[or the Transfer Pricing Officer, as the case may be,] conferred on, or assigned to, him under the orders or directions issued by the Board or by the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner authorised by the Board in this behalf under section 120;

³[(iii) an order under section 92CA by the Transfer Pricing Officer;]

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

(c) where any order referred to in this sub-section and passed by the Assessing Officer³[or the Transfer Pricing Officer, as the case may be,] had been the subject matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Principal Commissioner or Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal.

Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by the Assessing Officer³[or the Transfer Pricing Officer, as the case may be,] shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner,—

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

³[Explanation 3.—For the purposes of this section, "Transfer Pricing Officer" shall have the same meaning as assigned to it in the Explanation to section 92CA.]

(2) No order shall be made under sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed.

(3) Notwithstanding anything contained in sub-section (2), an order in revision under this section may be passed at any time in the case of an order which has been passed in consequence of, or to give effect to, any finding or direction contained in an order of the Appellate Tribunal, the High Court or the Supreme Court.

Explanation.—In computing the period of limitation for the purposes of sub-section (2), the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129 and any period during which any proceeding under this section is stayed by an order or injunction of any court shall be excluded...".

13.0 On perusal of above, it clearly transpires that the principle chief commissioner or chief commissioner or commissioner having jurisdiction over transfer pricing matters has been specifically empowered, w.e.f 01.04.2022, to invoke revisionary action u/s 263 in respect of TPOs working under their administrative command and control. In this regard, we are fully in agreement with legislative intent embedded in the impugned amendment that there did exist a confusion as to who will have real revisionary powers u/s 263 qua orders passed by the TPO. A resolution to this controversy was necessary particularly in view of the notification dated 03.11.2014 which elaborately defined the chain of command right from Principal Chief Commissioner of Income Tax(International Taxation) at the top and the Deputy / Assistant Commissioner of income tax(Transfer Pricing) at the base of pyramid.

Consequently, the law makers proceeded to include a “Transfer Pricing Officer” alongside an assessing officer for authorities in respect of whom revisionary orders can be invoked by the respective principle chief commissioner or chief commissioner or commissioner. It is trite law that when the provisions of the statute are unambiguously clear and do not afford divergent meanings, no interpretation of the same is permissible. We have examined the facts and are convinced that the law has clearly and categorically mandated that w.e.f 01.04.2022 only a principle chief commissioner or chief commissioner or commissioner can exercise revisionary authority in respect of orders passed by Transfer Pricing Officer under their command and control. In this view of the matter, the order passed by Ld. PCIT, Madurai-1 can be taken as an order passed without having any valid lawful jurisdiction. Consequently, the same deserves to meet the fate of getting quashed.

14.0 We are also not inclined to subscribe to the view of the Ld. DR that the order passed by Ld. PCIT, Madurai-1 was not against TPO's order but was against the assessment order passed by the Ld.AO. The show cause notice issued by Ld. PCIT, Madurai-1 referred herein above as well as his order u/s 263 clearly indicates that he is assailing the order of the TPO and the revision of order u/s 143(3) was merely an offshoot of this activity.

15.0 We deem it necessary to extract the concluding part of revisionary order of PCIT, Madurai-1 Supra.

“...In view of the above, I am satisfied that the transfer pricing order u/s. 92CA(3) dated 27.01.2021 passed by the Transfer Pricing Officer and the consequent assessment order u/s 143(3) r.w.s. 144B dated 04.05.2021 for the Asst. Year 2016-17 passed by the Assessing Officer are erroneous in so far it is prejudicial to the interest of the revenue. Therefore, in exercise of powers conferred u/s.263 of the Act, I set aside aforesaid orders for the limited purpose of adjustment of transfer pricing in law. The Assessing Officer shall grant reasonable opportunity of being heard to the assessee before passing the order...”

16.0 Further, we have also noted that an order u/s 263 is only permissible if a revisionary authority demonstrates with sufficient evidences that the order sought to be revised “is erroneous in so far as it is prejudicial to the interest of revenue”. The facts of the present case clearly demonstrates that the order u/s 143(3) r.w.s. 144B passed by the Ld. AO did not suffer from any deficiency so as to classify into the category of an order which “is erroneous in so far as it is prejudicial to the interest of revenue”. No mistake whatsoever has been indicated in the impugned order. Therefore, order u/s 143(3) r.w.s. 144B passed by the Ld. AO did not have any ingredients for any justified exercise of revisionary powers.

In this view of the above matter, we hold the view that the order passed by Ld. PCIT, Madurai-1 u/s 263 dated 30.03.2023 has been passed without any valid jurisdiction and is void ab initio and therefore we quash the impugned order.

17.0 Since the order passed by Ld. PCIT, Madurai-1 u/s 263 dated 30.03.2023 has been held to have been passed without any valid jurisdiction and is void ab initio and therefore quashed by us, we hold that the other grounds of appeal raised by the appellant assessee have become academic in nature and hence are not worthy of any separate adjudication.

18.0 In the result, the appeal of the assessee is allowed.

Order pronounced on 30th, September-2024.

Sd/-

(महावीर सिंह)

(Mahavir Singh)

उपाध्यक्ष / Vice President

Sd/-

(श्री अमिताभ शुक्ला)

(Amitabh Shukla)

लेखा सदस्य / Accountant Member

चेन्नई/Chennai, दिनांक/Dated: 30th, September-2024.

KB/-

आदेश की प्रतिलिपि अग्रेषित/**Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT - Coimbatore
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF