

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A", NEW DELHI
BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER,
AND
SHRI SUDHIR KUMAR, JUDICIAL MEMBER

	ITA NO. 2706/Del/2024	
	A.YR. : 2018-19	
AMAZON WEB SERVICES INDIA PRIVATE LIMITED, BLOCK-3, 14 TH FLOOR, UNIT NOS. 1401 TO 1421, INTERNATIONAL TRADE TOWER, NEHRU PLACE, NEW DELHI – 110 019 (PAN: AAJCA9880A)	VS.	PRINCIPAL COMMISSIONER OF INCOME TAX, DELHI-1, DELHI C.R. BUILDING, I.P. ESTATE, NEW DELHI
(APPELLANT)		(RESPONDENT)

Appellant by : Shri Ajay Vohra, Sr. Adv., Ms. Deepashree Rao, Adv., Sh. Hardeep Singh Chawla, Adv Sh. Samarth Singh Dhumal, CA & Sh. Shubham Gupta, CA

Respondent by : Mr. Javed Akhtar, CIT(DR)

Date of hearing : 08.10.2024
Date of pronouncement : 28.10.2024

ORDER

PER SHAMIM YAHYA, AM :

The Assessee has filed the Appeal against the Order of the Ld. Principal Commissioner of Income Tax, Delhi-1 dated 30.03.2024 passed u/s. 263 of the

Income Tax Act, 1961 (hereinafter referred as Act), relating to assessment year 2018-19 on the following grounds:-

1. That on the facts and circumstances of the case and in law, the order dated 30.03.2024, passed by the Principal Commissioner of Income Tax [‘PCIT’], under section 263 of the Income Tax Act, 1961 (‘the Act’) enhancing the assessment (on one issue) and setting aside the assessment (on some other issues) to the file of the Assessing Officer (‘AO’) and Transfer Pricing Officer (‘TPO’), is without jurisdiction, illegal, bad in law and liable to be quashed.
2. That the PCIT erred in invoking revisionary jurisdiction under section 263 of the Act qua assessment completed by National Faceless Assessment Centre (‘NFAC’) under section 143(3) r.w.s. 144C(3) and 144B of the Act, which is a complete code in itself.
3. That on the facts and circumstances of the case, the impugned order having been passed by the PCIT in undue haste without: (a) considering the submissions filed; and (b) first disposing off the legal objections by passing a separate speaking order, is illegal, bad in law and liable to be quashed/ set aside.
4. That the PCIT erred on facts and in law in exercising revisionary powers under section 263 of the Act on various issues in the impugned order, without satisfying the twin jurisdictional conditions of the assessment order being: (a) erroneous; and (b) prejudicial to the interests of the Revenue and consequently, the impugned order is illegal, bad in law and liable to be quashed.
5. That the PCIT erred in enhancing/setting aside the assessment order by exercising powers under section 263 of the Act, without appreciating that: (a) it was not a case of lack of enquiry on any of the issues raised; (b) the view taken by the assessing officer in respect of the various issues was, in any case, a plausible view; and (c) revisionary proceedings under could not be initiated on a mere ‘change of opinion’.
6. That on the facts and circumstances of the case and in law, the PCIT erred in alleging that the assessment order dated 27.10.2021, was erroneous and prejudicial to the interests of the Revenue in as much as the assessing

officer had not conducted 'in-depth' examination of the issues identified in Computer-Assisted Scrutiny Selection (CASS).

7. That the PCIT erred in setting aside the assessment order (on certain issues) with vague directions, without even recording any prima facie findings on merits, thereby, not demonstrating how and why the final assessment order was erroneous and prejudicial to the interests of the Revenue, qua such issues.
8. That the PCIT failed to appreciate that revisionary proceedings under section 263 of the Act could not be initiated merely to: (a) conduct vague/ roving enquiries; or (b) authorize the assessing officer to conduct roving/ fishing enquiries, by merely setting aside the assessment.

Without Prejudice Qua transfer pricing adjustment

9. That the PCIT erred in issuing vague/ open ended direction to the Transfer Pricing Officer (TPO) to conduct verification/inquiry on 'several issues' {without pin-pointing any specific international transaction) and return finding on correctness of method of benchmarking adopted by the appellant for determination of Arm's length price.
 - 9.1. That the PCIT erred on facts and in law, in exercising revisionary jurisdiction qua transfer pricing order dated 31.07.2021 passed under section 92CA of the Act, despite the fact that PCIT had no such power to revise order passed by the TPO prior to amendment of section 263 of the Act vide Finance Act, 2022 effective from 01.04.2022.
 - 9.2. That the PCIT erred in alleging that the transfer pricing order dated 31.07.2021, was erroneous and prejudicial to the interests of the Revenue inasmuch as the TPO had not: (i) examined any transaction other than marketing support services segment; and (ii) returned any specific finding on adoption of Transactional Net Margin Method (TNMM) as the most appropriate method.
 - 9.3. That the PCIT erred in assuming revisionary jurisdiction under section 263 qua order passed by TPO under section 92CA of the Act under the supervision and directions of CIT- International.
 - 9.4. That the PCIT failed to appreciate that the revisionary jurisdiction under section 263 of the Act is not meant for such perverse/ vague/ open ended directions to the transfer pricing officer to undertake roving/fishing enquiries.

- 9.5. That the PCIT failed to appreciate that all international transactions were duly disclosed in the transfer pricing study and also accepted in the transfer pricing order, after due and adequate inquiries/ investigation and application of mind by the TPO.
- 9.6. That the PCIT erred in exercising revisionary jurisdiction, without appreciating that the transfer pricing order was neither erroneous nor prejudicial to the interests of the Revenue and solely on this ground, without anything more, the impugned order qua the aforesaid issue was without jurisdiction and bad in law.

Qua Customer Contract Payment

10. That the PCIT erred in enhancing the income of the appellant by Rs. 17.95 crores by directing disallowance of payment made to Amazon Web Services, Inc., towards novation of customer contracts.
 - 10.1. That the PCIT erred in alleging, without any basis, that the payment made by the appellant towards novation of customer contracts was sham and not genuine.
 - 10.2. That the PCIT failed to appreciate that payment towards Reseller Agreement and novation of customer contracts were two independent and distinct transactions, consideration for which was determined separately.
 - 10.3. That the PCIT failed to appreciate that the claim of deduction in respect of payment made towards novation of customer contract was accepted in the original assessment order, after due and adequate inquiries/ investigation and application of mind by the assessing officer by way of raising specific queries in respect of the aforesaid issue.
 - 10.4. That the PCIT erred in exercising revisionary jurisdiction, without appreciating that the assessment order was neither erroneous nor prejudicial to the interests of the Revenue and solely on this ground, without anything more, the impugned order qua the aforesaid issue was without jurisdiction and bad in law.

Qua alleged profit from discontinued business

11. That the PCIT erred in vaguely directing the assessing officer to examine details of 'discontinued business' reported in the financial statements and verify tax liability thereon.

- 11.1 That the PCIT failed to appreciate that the aforesaid disclosure related to transfer of data services business of the appellant pertained to immediately preceding year (i.e., AY 2017- 18), which was duly offered to tax in the said year itself.
- 11.2 That the PCIT failed to appreciate that in the absence of any sale transaction being undertaken in the relevant assessment year, the question of verification of tax liability in respect thereof did not arise at all.
- 11.3 That the PCIT erred in exercising revisionary jurisdiction, without appreciating that the assessment order was neither erroneous nor prejudicial to the interests of the Revenue and solely on this ground, without anything more, the impugned order qua the aforesaid issue was without jurisdiction and bad in law.

Qua Share based compensation

That the PCIT erred in vaguely directing the assessing officer to examine allowability of claim of share-based compensation/expense.

That the PCIT erred in invoking revisionary jurisdiction qua the aforesaid issue even after specifically admitting (@ pg 45 of the order) that the entire share-based compensation/expense amounting to INR 38.6 crore was already suo-moto disallowed by the appellant.

That the PCIT erred in exercising revisionary jurisdiction, without appreciating that the assessment order was neither erroneous nor prejudicial to the interests of the Revenue and solely on this ground, without anything more, the impugned order qua the aforesaid issue was without jurisdiction and bad in law.

The Appellant craves leave to add, to amend or vary the above grounds of appeal on or before the date of hearing.

2. Briefly stated facts are that the assessee company has filed the original return of income on 24.11.2018 declaring total income of Rs. 146,49,93,616/- after claiming deduction under Chapter VI-A of Rs. NIL from the gross total income of Rs. 146,49,93,616/-. The case of the assessee company was selected for scrutiny under CASS. The TPO, passed an order u/s. 92CA(3) on 31.7.2021 and suggested an adjustment of Rs. 6,00,00,000/- on account of Marketing

Support Services and made the addition accordingly of the same amount. Further, on perusal of the Profit and Loss account, AO noted that assessee has claimed a sum of Rs. 56,37,98,359/- towards bad debts expenses written off for which the assessee was asked to produce the justification for these expenses. AO in the absence of specific details made the disallowance of Rs. 56,37,98,359/- u/s. 36(i)(vii) and assessed the total income at Rs. 2,08,92,98,638/- vide order dated 27.10.2021 passed u/s. 143(3) r.w.s. 144C(3) read with section 144B of the Act.

3. In exercise of power vested under him under section 263 of the Act the Ld. PCIT perused and examined the records. He referred to the notice u/s. 263 of the Act issued to assessee and assessee's response thereto. He concluded as under:-

“The reply is evasive and assessee continues to state that these details were filed before the AO. Moreover various case laws are being again submitted in his defence. Above submission of assessee has been considered, as also the earlier submissions made. It is therefore seen that though there were multiple reasons for which the case was taken for scrutiny, however they collectively indicated low income in light of international transactions, large refund, large deductions and outward remittance etc. in light of international transactions, large refund, large deductions and outward remittances etc.

The details of Reseller Agreement with AWS Inc. were not verified & inquired into by AO. Since this agreement was non-exclusive with assessee and remittances on this account was also one of the CASS reasons, AO was duty bound to not to restrict himself to obtaining basic document and narration of the deal but it was

AO's primary job in assessment to pursue the inquiry further and unveil the real nature of transaction and examine various terms & conditions & verify the correctness of payments made by assessee to AWS Inc. AO was duty bound to verify and examine the details like how assessee is determining price strategy for its customers, what were localized sales & market strategy, what was impact of global framework, what were sales support services including account management, logistics support, what their terms and conditions etc. All these involved other associate & group concerns in India too. AO was duty bound to examine all these & related transactions & various terms and conditions of this & other agreements/contracts etc. in light of 40A(2)(a) also.

Similarly, AO has not inquired & verified the correctness of expenditure 38.6 cr. of shared based compensation claimed by assessee. Even though assessee has claimed to have himself disallowed a part of shared based compensation, the amount of Rs. 38.6 crores claimed as expenditure should have been examined by AO for its allowability.

Payment of Rs. 17.95 crores to AWS Inc. an account of novation of customer contracts is not inquired by AO. Simply obtaining details & accepting it as such cannot be stated to be application of mind by AO. Infact, as held by Hon'ble High Court, HP in the case of Virbhadra Singh (HUF) v. PCIT (2017) 86 taxmann.com 113, it was held by the Hon'ble High Court that failure on the part of AO to pursue the line of inquiry which should have been done, makes the inquiry non-est.

Customer contract payment of 17.95 crores

It is seen in the submissions of the assessee dated 27.03.2028 that expenditure of Rs. 17.95 crores is on account of 'Novation of customer contracts' and is paid to AWS Inc. for novation of customer contracts.

It is seen that assessee has entered into a Reseller Agreement with AWS Inc. this year and payment of Rs. 657.3 crores of 'fees' is paid for this agreement. As per this agreement AWS Inc. has appointed assessee as non-exclusive seller of standard & automated cloud computing services etc as discussed above in this order. Assessee is also doing Marketing Support Services for the same contract & business of AWS Inc. for which 165,05,64,374/- is separately paid.

So, when for the same business assessee is already entered into Reseller Agreement & also doing Market Support Service payments too, the additional payment of 17.95 crores for novation of existing customers contract is held as not genuine and sham. In fact, the details filed by assessee on 27.03.2024, where in it is stated that 19.95 crores are for novation of customer contracts, makes it is clear that what to talk of capital revenue or expenditure, the expenditure itself is sham. It is only when details are called for and are examined that their true nature is revealed. Perusal of Reseller Agreement filed by assessee clearly shows that the customer's contract are the core, around which rights and obligations of the parties, have been brought out in the agreement.

When AO simply obtained details & accepted all details as submitted without inquiry & verification, the purpose of assessment proceedings gets defeated. The matter of Reseller Agreement before TPO was relating to Arms-length issue of value of this agreement. Novation is a legal term & its meaning is act of replacement of a legitimate existing contract with a new where transfer is mutually agreed by both parties concerned.

The fact is that mutual agreement was already entered by Reseller Agreement & act of replacement of old legal contract from AWS Inc. to assessee was core soul and inherent part of Reseller Agreement. Novation of existing contracts was inherent in Reseller Agreements. Further payment of 17.95 crores for 'Novation of Contracts' is bogus & sham act and not allowable''~expenditure. The substance must take precedence over form, so any document for Novation is held as sham & bogus. The nature of this expenditure is such that it is held to be not wholly and exclusively for business and therefore held to be not allowable expenditure u/s 37.

In view of overall facts of the case and non-inquiry and non-verifications of the issues for which the case was taken for scrutiny by AO/TPO and the above discussion on the issue, the orders of AO/TPO are held erroneous in so far as prejudicial to the interest of revenue as various claims and expenses remained unverified and un-inquired. In view of this the following issues are set aside to the AO/TPO with the following directions in this case:-

1. *It is the case where TPO has passed erroneous order in so far as prejudicial to revenue by not mentioning a line on the various transactions other than marketing support services and not giving any finding on payment of reseller fee, reimbursement of expenses, purchase of customer contracts, provision of services, purchase of assets, reversal of provision of services, provision of relocation of services and tech infra server switches transactions. Therefore, the matter is remanded back to TPO for giving a finding on correctness of value of these other international transactions by a speaking order.*

2. *Further for marketing support services also TPO has accepted the TNMM method as the most appropriate method, while not giving a finding on why other methods like CUP, cost plus, resale price or profit split are not applicable in the instant case. Therefore, since the order of TPO is erroneous on the above grounds, it is held to be prejudicial to the interest of revenue as no verification and inquiry is done on several issues before it, the TPO is directed to give a finding on correctness of the method and compute the ALP for above mentioned various services transactions.*

3. *AO is directed to disallow 17.95 crores claimed as customer contract paymept, as it is not allowable expenditure being not genuine & sham as brought out in detail above. The income is, therefore, enhanced by Rs. 17.95 crores.*

4. *In the note no. 34. of the financial statement the profit from the discontinued business is shown at Rs. 2882 crores on which*

tax expenses of Rs. 1011 crores have been shown. The AO is directed to examine the details of the same and verify its tax liability.

5. Therefore, AO is directed to examine in detail the allowability of the share-based compensation expenditure in view of above discussion.”

4. Aggrieved, the assessee is in appeal before the Tribunal and all grounds related thereto.

5. We have heard both the parties and perused the records.

6. At the time of hearing, on the issue of setting aside the TPO order dated 31.7.2021, Ld. AR has submitted that only PCIT(TP) had jurisdiction to revise TP order. PCIT could have revised TP order, only if such order was passed after 01.04.2022, in view of the amendment made vide Finance, Act, 2022, by referring the CBDT Notification No. 60/2024 & Phillips Foods India : ITA No. 640/Chny/2023 (Chn.Tri.). It was the further contention that even otherwise, all international transaction(s) specifically examined by TPO during assessment and enquiries not restricted to MSS segment alone.

6.1 As regards, issue of setting aside the TPO's order on account of no specific finding on adoption of TNMM for MSS, it was submitted that TP study contained detailed economic analysis for selection to TNMM as MAM, by referring Magneti Marelli Powertrain India Pvt. Ltd. ITA No. 350/2014 (Del) – SLP dismissed Diary No. 15244/2017. TPO made adjustment for MSS segment adopting OP/OC as PLI, evidencing that TPO was satisfied that TNMM was MAM in respect of MSS.

6.2 As regards issue of setting aside the AO's order on the ground that the AO had not examined alleged profit from discontinued business is concerned, the Ld. AR submitted that Data Services Business of assessee sold to Amazon Data Services India Private Limited on a going concern basis w.e.f. 1.12.2016. It was further submitted that the transaction pertains to immediately preceding previous year i.e. AY 2017-18 and capital gains duly offered to tax in Return of Income for AY 2017-18. It was further submitted that Note-34 – Discontinued operations of financial statements referred by PCIT merely disclosed the fact that data services business segment was no longer being presented / reported on account of discontinuance of operations. It was further submitted that the purported profit of Rs. 2,882 million and tax expense of Rs. 1011 million referred by PCIT relates to financial year ended 31st March, 2017 as clearly indicated in the said note.

6.3 As regards issue of setting aside the AO's order by noting that the AO had not examined allowability of share based compensation (SBC) is concerned, it was submitted that SBC cost of Rs. 38,54,25,908 (part of employee benefit expenses), debited in profit and loss account and entire SBC expenses of Rs. 38,54,25,908/- debited to Profit and Loss account already suo moto disallowed by assessee in computation of income. Since entire SBC expense already disallowed in Return of Income, no enquiry remained to be made by AO, since there was no claim per se made by assessee in respect of said expenses.

6.4 As regards issue of setting aside the AO's order on account of direction for enhancement of income by noting that the AO had not examined genuineness of customer contract payments made is concerned, it was submitted that one-time payment of Rs.17,95,20,000 made to AWS Inc. for novation of customer contracts in pursuance of agreement with AWS Inc. Aforesaid payment claimed

as revenue deduction since it was incurred as part of already functioning business and corresponding service fee revenues generated from these contracts was duly offered to tax as income. It was further submitted that Ld. PCIT erred in directing enhancement of income, without appreciating that service fee revenues generated from the aforesaid contracts were duly offered to tax as income by appellant. Ld. PCIT erred in concluding that payment of Rs.17.95 crores towards customer contracts was bogus and sham, without appreciating that payment for customer contracts (*one-time*) and reseller fee [*recurring expense*] were completely independent transactions. Specific and pointed queries repeatedly raised in respect of customer contract payments of Rs.17.95 crores, by not only AO. But also TPO during assessment and copy of customer contract agreement also filed during assessment proceedings. Also, expanded list of the novated customer contracts and the valuation report dated 15.09.2017 obtained to estimate the fair market value of the customer contracts novated in favour of the appellant duly filed before PCIT.

7. The ld. CIT(DR) relied upon the order of the Ld. PCIT.

8. We have heard the rival contentions and perused the material available on record and also gone through the orders of the authorities below.

8.1 As regards, the issue of setting aside the TPO order by the Ld. PCIT on the issue of not examining any international transaction other than marketing support services segment and no specific finding on adoption of TNMM as most appropriate method for MSS are concerned, it has been brought out that only PCIT(TP) had jurisdiction to revise TP order. PCIT could have revised TP order, only if such order was passed after 01.04.2022, in view of amendment made vide Finance Act, 2022 by referring CBDT Notification No. 60/2014 & Philips Foods India in ITA No. 640/Chny/2023 (Chennai Tribunal). Thus, in view of the above

legal position, PCIT had no jurisdiction to set aside the TPO order on the aforesaid issues, hence, on both the issues of setting aside the TPO order, the PCIT's action is hereby quashed.

8.2 As regards the issue of setting aside the AO's order for not examining the alleged profit from discontinued business. It is the submission of the assessee's AR that the profit of Rs. 2,882 million and tax expense of Rs. 1,011 million referred by PCIT relates to financial year ended 31st March, 2017 as clearly indicated in the said note. In this view of the matter, the said transaction did not relate to the year under consideration, hence, there is no question of setting aside the issue in dispute to the file of the AO to examine the same, hence, the action of the PCIT is hereby quashed.

8.3 As regards the issue of non-examination of share-based compensation (SBC) is concerned, it has been submitted that the entire SBC expenditure is already disallowed in the return of income, hence, no enquiry to be made by the AO. Since there was no claim made by the assessee of the said expenses, therefore, there is no question of examination of the same. In this view of the matter, the action of the PCIT on this count is hereby quashed.

8.4 As regards Customer Contract Payments is concerned, we note that during the year under consideration, the assessee entered into an agreement with AWSI for novation of customer contracts to the assessee. The assessee paid an amount of Rs. 179,520,000 to AWSI towards such novation of customer contracts as these would generate revenue for the Company. The aforesaid amount was capitalised in the books of account as an intangible asset out of which Rs.71,808,000 was amortized during the year and debited to the statement of profit and loss account under the head - "Depreciation and amortization expense - Amortization of intangible assets" In the ROI filed for the year under

consideration, the assessee had treated amortisation of Rs.71,808,000/- as non-deductible and added back the same to the total income. It is noted that here that the aforesaid issue of customer contract payment and reseller fees was specifically examined/ investigated not only by the AO but also the TPO. Details of relevant queries raised by the AO and TPO vide notices/questionnaire and information/ replies filed by the assessee in response thereto from time to time.

8.4.1 It is further noted that the specific and pointed queries were repeatedly raised in respect of customer contract payments of Rs.179,520,000, by not only the AO, but also the TPO during the course of assessment and copy of the customer contract agreement was also duly filed by the appellant during the course of assessment. It was only on considering the detailed explanations and supporting documents filed by the assessee that the transaction was accepted as such by the AO/TPO.

8.4.2 In view of the above, it is clear that all the relevant details/documents are available on record and the issue is specifically raised and considered by the concerned officer, under such circumstances, it is not open to the PCIT to exercise revisionary jurisdiction, unless the AO is found to have failed to make inquiries/ verification, which should have been made as per law but were not made; simply because the PCIT differs with the manner of the inquiries/ investigation, revisionary jurisdiction cannot be exercised, hence, the order of the PCIT deserve to be quashed.

9. In the background of the aforesaid discussions, we are of the considered opinion that the impugned order dated 30.03.2024 passed by the Ld. PCIT u/s.

263 of the Act is without jurisdiction and bad in law, hence, the same is hereby quashed.

10. In the result, appeal of the assessee is allowed in the aforesaid manner.

Order pronounced on 28/10/2024.

**Sd/-
(SUDHIR KUMAR)
JUDICIAL MEMBER**

**Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

SRB

Copy forwarded to:-

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

Assistant Registrar