

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H", MUMBAI
**BEFORE SHRI ANIKESH BANERJEE, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER**
ITA No. 1043/Mum/2024 (A.Y. 2017-18)

Hindustan Construction Company Ltd.,

Hincon House, LBS Marg,
Vikhroli (W), Mumbai,
Maharashtra – 400 083.
PAN No.: AAACH0968B

..... Appellant

Vs.

PCIT, Mumbai-6,

R. No. 501, 5th floor,
Aayakar Bhavan, M.K. Road,
Mumbai - 400 020.

..... Respondent

Appellant by	:	Shri Kalpesh Unadkat, Ld. AR
Respondent by	:	Shri K. C. Selvamani, Ld. DR
Date of hearing	:	12/08/2024
Date of pronouncement	:	21/10/2024

ORDER

PER GAGAN GOYAL, A.M.:

This appeal by assessee is directed against the order of Ld. PCIT, Mumbai-6, dated 23.02.2024 passed u/s. 263 of the Income Tax Act, 1961 (in short 'the Act') for A.Y. 2017-18. The assessee has raised the following grounds of appeal:-

- 1. On facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax erred in passing an order under Section 263 of the Act beyond the time limit provided for under subsection (2) of Section 263 of the Income Tax Act, 1961*

2. In particular, on the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax erred in basing the initiation of proceedings u/s. 263 of the Act, on the Assessment Order u/s. 143(3) r.w.s 144C of the Act, when in fact the order sought to be revised is the Transfer Pricing Order u/s. 92CA.

2. The brief facts of the case are that the assessee company filed its original return of income on 30.11.2017 declaring NIL income after claiming current year's loss of Rs. 575,58,00,642/-. There after the assessee revised its return of income on 28.03.2018 declaring NIL income after claiming revised current year's loss at Rs. 554,06,76,059/-. The case of the assessee was selected for scrutiny under CASS for complete scrutiny on the following issues:

- i). Double Taxation relief u/s. 90/91 of the Act;
- ii). Refund Claim;
- iii). Deduction and deposit of T.D.S.;
- iv). Expenses incurred for earning exempt income;
- v). Sales turnover/ Receipts;
- vi). Customs duty paid;
- vii). Foreign Remittances;
- viii). Income from House Property;
- ix). Foreign Assets;
- x). International Transactions;
- xi). Closing Stock and
- xii). Loss from currency fluctuations.

3. A reference u/s. 92CA (1) of the Act was made to the DCIT, TPO 2(2) (2), Mumbai also. The TPO vide his order dated: 29.01.2021 u/s. 92CA (3) of the Act proposed adjustments on account of international transactions amounting to Rs. 5,56,92,508/-. This adjustment proposed by the TPO was challenged before the

Ld. DRP, which in turn confirmed the adjustments proposed vide order dated: 31.01.2022. Ultimately, the case of the assessee was assessed u/s. 143(3) r.w.s. 144C(13), 144B of the Act at Rs. 89,21,28,893/- before set off of current year's loss of Rs. 554,06,76,059/-. The ultimate income was assessed at loss of Rs. (-) 464, 85, 47,166/-.

4. Thereafter, a notice u/s. 263 of the Act was issued by the office of the Principal Commissioner of Income Tax (PCIT), Mumbai-6 vide dated: 11-11-2022. Copy of the Notice is reproduced herein below for ready reference as under:

NOTICE FOR THE HEARING

To,

M/s./Mr./Ms.

Subject: Notice for Hearing in respect of Revision proceedings u/s 263 of the THE INCOME TAX ACT, 1961-Assessment Year 2017-18.

In this regard, a hearing in the matter is fixed on 29/11/2022 at 12:00 PM. You are requested to attend in person or through an authorized representative to submit your representation, if any alongwith supporting documents/information in support of the issues involved (as mentioned below). If you wish that the Revision proceeding be concluded on the basis of your written submissions/representations filed in this office, on or before the said due date, then your personal attendance is not required. You also have the option to file your submission from the e-filing portal using the link: incometaxindiaefiling.gov.in OME TAX DEPARTMEN

1. In your case, Transfer Pricing order u/s 92CA(3) of the Income-tax Act, 1961, was passed on 29.01.2021 after making adjustments to the tune of Rs. 5,56,92,508/- to arm's length price of international transactions entered into by you with your Associated Enterprises (AEs), during A.Y 2017-18. Subsequently, order u/s 143(3) r.w.s 144C (13) r.w.s 144B of the Act, dated 10.02.2022 was passed for the said A.Y determining the total income at Rs. (-) 4, 64, 85, 47,166/-.

2. However, on perusal of the records, pertaining to Transfer Pricing proceedings, it was noticed, that you had large receivables of Rs. 112, 68, 40,425/- from the Associated Enterprises (AEs). However, while finalizing the Transfer Pricing proceedings, these

receivables were remain to be verified and thus the arm's length price in respect of these transactions was also remain to be determined.

3. As per the provisions of section 263 of the Act, if any assessment order passed by the Assessing Officer is found erroneous and prejudicial to the interests of revenue, the same can be revised under u/s 263 of the Act, to protect the interest of the Revenue. In the instant case, order dated 29.01.2021 passed by the TPO u/s 92CA(3) of the Act, has been passed without making inquiries or verification which should have been made while determining arm's length price of the international transaction carried out by the assessee with its Associated Enterprises. Therefore, the consequent order passed u/s 143(3) r.w.s 144C (13) r.w.s 144B of the Act dated 10.02.2022 is erroneous in so far as it is prejudicial to the interest of the revenue. Therefore, the same is required to be set-aside on the above issue by invoking the provisions of section 263 of the Act. Hence, it is requested to show-cause as to why the said order should not be quashed/set-aside for fresh adjudication after considering the facts as discussed above.

4. In this connection, you are hereby given an opportunity of being heard and your case is fixed for hearing/making submission online on or before 29/11/2022 at 12.00 PM. In case of non-compliance, it will be presumed that you have no objection to the proposed revision u/s 263 of the Act, of the assessment order passed by the Assessing Officer u/s. 143(3) r.w.s 144 C(13) of the Act on 10.02.2022.

5. It is observed that the Ld. PCIT-6 wants to revise the order of the AO which was passed based on the order of the TPO u/s. 92CA (3) of the Act. Ultimately, the Ld. PCIT passed the order u/s. 263 of the Act vide order dated: 23.02.2024, wherein he issued certain directions to the AO, i.e. to send a reference again to the TPO in terms of his order mentioned (supra). The assessee being aggrieved with this order of the Ld. PCIT preferred the present appeal before us.

6. We have gone through the Order of the AO passed u/s. 143(3) r.w.s. 144C (13), 144B of the Act along with the order of the TPO passed u/s. 92CA (3) of the Act, Order of the DRP and order of the Ld. PCIT u/s. 263 of the Act along with the show cause notice issued u/s. 263 of the Act. The moot questions for our consideration were whether the order passed by the Ld. PCIT u/s. 263 of the Act is within the time limit prescribed and whether the Ld. PCIT can revise the order of

TPO passed u/s. 92CA (3) of the Act in the guise of revising the assessment order passed u/s. 143(3) r.w.s. 144C (13), 144B of the Act (Based on the adjustments proposed by the TPO u/s. 92CA (3) of the Act). For clarity on the issue and adjudication we deem it fit to reproduce the provisions of section 263 of the Act as under:

Section- 263, Income-tax Act, 1961

Revision of orders prejudicial to revenue.

263. (1) *The 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 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, 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 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 Officer 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;

- (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 Officer 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 Officer 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.*

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.

7. In view of the above it is observed that final assessment order was passed only after considering the proposed adjustments of TPO made u/s. 92CA (3) of the Act. Here it is pertinent to mention that provisions of section 144C of the Act are relevant to be discussed looking at the factual matrix of the case as under:

Section - 144C, Income-tax Act, 1961.

Reference to dispute resolution panel.

144C. (1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation which is prejudicial to the interest of such assessee.

(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,—

- (a) file his acceptance of the variations to the Assessing Officer; or
- (b) file his objections, if any, to such variation with,—
 - (i) the Dispute Resolution Panel; and
 - (ii) The Assessing Officer.

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

- (a) the assessee intimates to the Assessing Officer the acceptance of the variation; or
- (b) No objections are received within the period specified in sub-section (2).

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

- (a) the acceptance is received; or
- (b) The period of filing of objections under sub-section (2) expires.

(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:—

- (a) draft order;
- (b) objections filed by the assessee;
- (c) evidence furnished by the assessee;
- (d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;**
- (e) records relating to the draft order;
- (f) evidence collected by, or caused to be collected by, it; and
- (g) Result of any enquiry made by, or caused to be made by, it.

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

- (a) make such further enquiry, as it thinks fit; or
- (b) Cause any further enquiry to be made by any income-tax authority and report the result

of the same to it.

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

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

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

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

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

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

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 or section 153B, the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

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

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

(14B) The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of issuance of directions by the dispute resolution panel, so as to impart greater efficiency, transparency and accountability by—

- (a) *eliminating the interface between the dispute resolution panel and the eligible assessee or any other person to the extent technologically feasible;*
- (b) *optimising utilisation of the resources through economies of scale and functional specialisation;*
- (c) *Introducing a mechanism with dynamic jurisdiction for issuance of directions by dispute resolution panel.*

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

Provided that no direction shall be issued after the 31st day of March, 2025.

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

(15) For the purposes of this section,—

- (a) *"Dispute Resolution Panel" means a collegiums comprising of three Principal Commissioners or Commissioners of Income-tax constituted by the Board for this purpose;*
- (b) ***"eligible assessee" means,—***
 - (i) ***any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and***
 - (ii) ***any non-resident not being a company, or any foreign company:***

Provided that such eligible assessee shall not include person referred to in sub-section (1) of section 158BA or other person referred to in section 158BD.]

(16) The provisions of this section shall not apply to any proceedings under Chapter XIV-B.

8. In view of the above, it can be safely concluded that the assessment order under consideration and being considered for the purposes of section 263 of the Act consists of TPO report u/s. 92CA (3) of the Act, Draft Assessment order u/s.

144C (1) of the Act, Directions of the Ld. DRP u/s. 144C (5) of the Act. In addition to this it is pertinent to mention here that as per section 144(8) of the Act, the Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

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

9. As per section 144C (13) upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 or section 153B of the Act, the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received. Now, in our opinion the ultimate assessment order has already been passed so many channels of verification/examination including a committee of three commissioners (DRP). The assessment order under consideration for the purposes of section 263 of the Act is certainly being safe guarded by the provisions of section 263, explanation 1, and clause (c) of the Act as under:

“(c) where any order referred to in this sub-section and passed by the Assessing Officer 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.”

10. In view of the above, this fact is not under challenge that the order of the TPO passed u/s. 92CA (3) of the Act and draft order again consisting of TPO's order was challenged by the assessee before the Ld. DRP and the same has been thoroughly examined and considered by the Ld. DRP u/s. 144C (7) and (8) of the Act. Now, the Ld. PCIT if wants to gain another inning to verify the assessment order of the assessee it will be highly unfair and will be a violation of section 263 of the Act itself [Explanation-1 and Clause (c)].

11. Being a final fact finding authority, it is our Ernst responsibility to curtail such type of practice being adopted by the Revenue, may be due to ignorance of law. In view of the above, we quash the notice issued u/s. 263 of the Act and set-aside the order of the Ld. PCIT passed u/s. 263 of the Act.

12. **In the result, the appeal of the assessee is allowed.**

Order pronounced in the open court on 21st day of October 2024.

Sd/-

(ANIKESH BANERJEE)
JUDICIAL MEMBER

Mumbai, दिनांक/Dated: 21/10/2024

Dhananjay, Sr. PS

Sd/-

(GAGAN GOYAL)
ACCOUNTANT MEMBER

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.

3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai