

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.108/Coch/2018 : Asst.Year 2012-2013

M/s.Apollo Tyres Limited 3 rd Floor, Areekal Mansion Near Manorama Junction Panampilly Nagar Kochi – 682 036. PAN : AAACA6990Q.	Vs.	The Addl.Commissioner of Income-tax, Corp.Range 1 Kochi.
(Appellant)		(Respondent)

Appellant by : Sri.Salil Kapoor & Ms.Ananya Kapoor

Respondent by : Sri. A.Santham Bose, CIT-DR

Date of Hearing : 25.09.2018	Date of Pronouncement : 03.10.2018
-------------------------------------	---

ORDER

Per George George K., JM

This appeal at the instance of the assessee is directed against the order of the Commissioner of Income-tax, passed u/s 263 of the I.T.Act. The relevant assessment year is 2012-2013.

2. The grounds raised read as follows:-

1. *Learned Commissioner of Income tax went wrong in reopening the assessment under section 263 of the Income tax Act. The AO had considered the aspects now made the subject matter of Revision u/s.263 before issuing the Draft Assessment order. There is no error prejudicial to the interest of revenue warranting reopening under section 263. The proceedings requires to be dropped.*

2. *Learned Commissioner of Income tax erred in setting aside the draft assessment order issued under section 143(3) r.w.s.144C of the I.T Act. The Hon.ITAT has in the appellant's own case for A Y 2010-11 (ITA No.222/Coch/2016) held that the draft assessment order cannot be revised u/s.263 of the IT Act.*

3. *Notwithstanding the above the Learned CIT went wrong in setting aside the assessment to examine disallowance under section 40(a)(ia) of the LT Act in respect of payment to persons on account of R&D expenditure Rs.4,92,42,256/-.*

4. *Notwithstanding the ground relating to reopening u/s.263, the CIT erred in setting aside the assessment to examine the disallowance u/s.40(a)(ia) of the IT Act, in respect of expenses incurred for testing of tyres outside India amounting to Rs.3,27,61,904/-.*

5. *For these and other grounds that may be further adduced at the time of hearing, the order of the Ld.Commissioner of Income tax requires to be modified suitably."*

3. The only issue that is raised in this appeal is whether the Administrative Commissioner has jurisdiction to pass order u/s 263 of the I.T.Act as against draft assessment order. The learned Counsel for the assessee has submitted that in assessee's own case for assessment year 2010-2011 in ITA No.222/Coch/2016 (order dated 10.01.2017) had held that draft assessment order cannot be revised u/s 263 of the I.T.Act. The learned Departmental Representative present was duly heard.

4. We have heard the rival submissions and perused the material on record. The Cochin Bench of the Tribunal in assessee's own case for assessment year 2010-2011 had held that draft assessment order cannot be revised u/s 263 of the I.T.Act. It is informed that the said order (supra) of the Tribunal in assessee's own case is pending adjudication before the Hon'ble High Court.

4.1 We also noticed that the Delhi Bench of the Tribunal in the case of Bausch & Lomb India Pvt.Ltd. v. ACIT in ITA No.1399/Del/2017 (order dated 25.08.2017) was of the view that the Administrative Commissioner does not have power to revise the draft assessment order. The relevant finding of the Delhi Bench of the Tribunal in the case of Bausch & Lomb India Pvt.Ltd. (supra) reads as follows :-

12. Now, we espouse the other contention of the ld. AR that if there was some mistake in the order of the TPO or the draft order, then the remedy was with the CIT to revise the order u/s 263 and not in making the enhancement by the DRP. This contention deserves to be repelled because section 263(1) clearly provides that the CIT 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 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 etc., revise the order. What is the subject matter of revision is an order of the AO and that too, if it is prejudicial to the interest of the revenue. An order can be prejudicial to the interest of the revenue only when it crystallizes the liability of the assessee to pay and notice of demand is issued, which in the opinion of the authority is prejudicial to the interest of the revenue. If no final liability, pursuant to which a demand notice can be issued, is capable of determination at that stage, such a draft order ceases to be characterized as an `order' capable of revision u/s 263. A draft order precedes the order. Only when a draft order is either not objected to by the assessee or is approved by the DRP, that the final order is passed determining the liability of the assessee, post which, a notice of demand is issued.

13. A draft order, as such, is not appealable, except to be challenged by the assessee before the DRP, which exercises the power, inter alia, to make enhancement. The very rationale in the giving the power of enhancement to the DRP is to correct the draft order to the extent it is prejudicial to the interest of the revenue. Once this power is given to the DRP and the draft order cannot be characterized as an order, there cannot be any

question of the CIT exercising a parallel power u/s 263 to revise such a draft order. We, therefore, jettison the arguments raised by the ld. AR challenging the power of the DRP to direct the addition on account of transfer pricing adjustment on account of intra group services in the facts and circumstances of the extant case.”

4.2 In view of the above orders of the Tribunal, we hold that the CIT is not justified in invoking his revisionary jurisdiction u/s 263 of the I.T.Act as against the draft assessment order, which in this case already merged with the final assessment order dated 25.01.2017. It is ordered accordingly.

5. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced on this 03rd day of October, 2018.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 03rd October, 2018.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The Pr.CIT Kochi
4. The CIT (TP-2) Bangalore
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin