

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1', NEW DELHI**

Before Sh. Saktijit Dey, Judicial Member

Dr. B. R. R. Kumar, Accountant Member

ITA No. 7552/Del/2017 : Asstt. Year : 2012-13

ACTIA (India) Pvt. Ltd., 1, Dakshineswar, 10, Hailey Road, New Delhi-110001	Vs	Pr. CIT-1, New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AADCA6944R		

Assessee by : None

Revenue by : Sh. Mrinal Kumar Das, Sr. DR

Date of Hearing: 05.01.2022

Date of Pronouncement: 10.01.2022

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order of Id. PCIT-1, New Delhi dated 05.06.2017.

2. Following grounds have been raised by the assessee:

"1. That the learned Pr. Commissioner of Income Tax-1, New Delhi has erred both in law and on facts in passing order under section 263 of the Income Tax Act, 1961 whereby assessment completed under section 143(3) vide order dated 19.02.2016 is set-aside with regard to computation of Arm's Length Price with the direction to the Assessing Officer to complete the assessment on the basis of Arm's Length Price determined by TPO under section 92C(3) of the Act in accordance with the provisions of section 92C(4) of the Act.

2. That the learned Pr. Commissioner of Income Tax-1, New Delhi has failed to appreciate that the assessment framed by the Assessing Officer was as per the position in law then prevailing at the time the assessment order was passed under section 143(3) on

19.02.2016 , that prior to amendment in sub-section (4) of Section 92CA by the Finance Act,2016 w.e.f. 01.06.2016 ,on receipt of order under sub-section (3) the Assessing Officer had to compute the total income of the assessee under sub-section) having regard to the arm's length price determined by TPO and post amendment in conformity with the arm's length price as so determined by the TPO.

3. That in circumstances of the case and in law, the order passed u/s 263 by the Pr. Commissioner of Income Tax is based upon incorrect application of law."

3. For the sake of convenience and ready reference, the entire Assessment Order is reproduced below:

"Return showing loss of Rs. (-) 1,94,11,676/- was e-filed on 27.11.2012. On selection of case for scrutiny, notice U/s 143(2) of the Income Tax Act, 1961 was issued on 12.08.2013 by the erstwhile Cir. 1(1), New Delhi. Subsequently, notice U/s 142(1) of the Income Tax Act, 1961 and questionnaire was also issued. In compliance to the statutory notices, Shri Promad Kapoor, FCA attended from time to time and furnished written submissions and required details called for. These were examined and case was discussed with them.

During the year under consideration, the assessee has declared revenue from operations of Rs. 13,04,42,261/-. The assessee is engaged in the business of assembling and trading of automotive electronic parts.

During the year under consideration, the assessee entered into international transaction of Rs. 6.53 crores. The details of said transactions were mentioned in Form No. 3CEB filed by the assessee. Therefore, in accordance with the provisions of section 92CA of the Income-tax Act, 1961, the international

transaction entered into by the assessee with the Associated Enterprises was referred to the Transfer Pricing Officer (TPO) for determining the Arm's Length Price with the previous approval of the Commissioner of Income Tax, Delhi-I, New Delhi.

The TPO has passed his order u/s 92CA(3) dated 29.01,2016 wherein he has not drawn any adverse inference in respect of arm's length price of the international transaction for the F.Y 2011-12 pertaining to AY 2012-13. Hence, in view of the above remarks, no cumulative adjustment is being made in respect of international transaction with A.Es.

After carefully considering all facts of the case and also submissions of the assessee, return income of the assessee is accepted and assessed at income of Rs. Nil. Credit of pre-paid taxes/TDS as per 26AS is being proposed to be allowed while computing the tax liability. Interest as per applicable provisions of section 234A/234B/234C/234D is proposed to be charged."

4. Owing to non-addition of the amount adjusted by the TPO in his order passed u/s 92CA by the Assessing Officer, the Id. PCIT passed order u/s 263. The order of the Id. PCIT is as under:

"A perusal of assessment records of the assessee for the AY 2012-13 reveals that the Assessing Officer did not make any such adjustment to the income of the assessee in accordance with the provisions of sub-section (4) of section 92CA of the Act.

The Assessing Officer, in accordance with the provisions of section 92C(4), was under obligation to make addition in conformity with the ALP so determined by the TPO u/s 92C(3) of the Act. The failure

to make the assessment in accordance with the provisions of the Act has rendered the assessment erroneous in so far as prejudicial to the interest of revenue.

Accordingly, proceedings u/s 263 of the IT Act, were initiated and a show cause notice vide this office letter dated 21.03.2017 was issued to the assessee and opportunity of being heard was afforded to the assessee. The showcause notice was issued to the assessee on the last known address through speed post and also through e-mail id available in the last return of income filed i.e. A.Y. 2012-13.

The authorized representative of the company Sh. Pramod Kaput CA attended on 10.04.2017 and the AR, on this date, filed a written submission. The gist of written submission is as under:

"It is a matter of record that there is no lack of enquiry/investigation on the part of the Assessing Officer. The order of the Assessing Officer is neither erroneous nor prejudicial to the interest of revenue. Therefore, the provision of section 263 of the Act cannot be invoked.

The assessee has no control over the way an assessment order is drafted and since, generally, the issues which are accepted by the Assessing Officer do not find mention in the assessment order and only those points are taken note of on which the assessee's explanations are rejected and additions/disallowances are made, the mere absence of the discussion of the order passed by Transfer Pricing Officer (TPO) would not mean that the Assessing Officer had not applied his mind to the said provisions. When a regular assessment is made under Section 143(3), a presumption can be raised that the order has been passed upon an application of mind.

In the facts and circumstances of our case, there is no material to indicate that the Assessing Officer had not applied his mind to the provisions of Section 92CA. no additional facts were necessary on the part of the assessee to furnish before the Assessing Officer for the purpose of construing the provisions of Section 92CA.

It cannot also be said that the Assessing Officer had failed to make any enquiry because no further enquiry was necessary and all the facts were before the Assessing Officer.

In CIT vs. Leisure Wear Exports Ltd. [2010] 46 DTR (Del) 97 Hon'ble Delhi High Court held that power of revision u/s 263 of the Act is not meant to be exercised for the purpose of directing the AO to hold another investigation, without describing as to how the order of the AO is erroneous. Where the assessment order has been passed by the AO after taking into account assessee's submissions and documents furnished by him, and no material is brought on record by the CIT which shows that there was any discrepancy or falsity in the evidence furnished by the assessee, the order of the AO cannot be set aside".

The submission of the AR of the assessee has been examined carefully. The ratio of the judgment relied upon by the AR is not applicable in this case. Hon'ble Delhi High Court in the case of M/s Ranbaxy Laboratories Ltd vs. CIT (ITA No 504 of 2008) has held that "Not taking recourse thereto and passing the order amounted to making assessment without conducting proper inquiry and investigation as enjoyed by law which was also warranted in the facts of this case and, therefore, the Commissioner was right in holding that such assessment was erroneous and prejudicial to the interest of the Revenue".

In view of the decision of Hon'ble Delhi High Court in the case of M/s Ranbaxy Laboratories Ltd. vs. CIT (ITA No. 504 of 2008), the assessment order dated 19.02.2016 is held to be erroneous and prejudicial to the interest of Revenue.

The assessment is set-aside to the extent to TPO, with regard to computation of Arm Length Price, with the direction to the Assessing Officer to complete the assessment on the basis of Arm Length Price determined by TPO u/s 92C(3) of the Act in accordance with the provisions of section 92C(4) of the Act after affording an opportunity of being heard to the assessee."

5. The provision of Section 263 is as under:

"Revision of orders prejudicial to revenue.

263. (1) *The 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 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 an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

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 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 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;

(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 Commissioner or Commissioner;

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

(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, National Tax 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."

6. The reference to the TPO to determine the Arm's Length Price is not an empty exercise to be undertaken by the revenue but to bring to tax the difference determined by the TPO with regard to the Arm's Length Price. While the TPO order passed u/s 92CA determine upward adjustment of Rs.90,33,511/-, we find that the AO has erred in holding that the adjustment by the TPO in respect of international taxation with the AE is Nil. Thus, the order passed by the Assessing Officer is erroneous insofar as it is prejudicial to the interest of revenue. Hence, the Id. PCIT in accordance with the provisions of the Act has given an opportunity of being heard to the assessee, determined the amount of the adjustment made by the TPO that was not brought to tax and set aside the order of the Assessing Officer directing him to rectify the order to the extent of the adjustment made by the TPO. Since, the order of the Id. PCIT has been rightly based on the order of the TPO which has been ignored by the Assessing Officer, we hold that the order of the Assessing Officer is erroneous and prejudicial to the interest of the revenue and hence decline to interfere with the order of the Id. PCIT.

7. In the result, the appeal of the assessee is dismissed.
Order Pronounced in the Open Court on 10/01/2022.

Sd/-

(Saktijit Dey)
Judicial Member

Dated: 10/01/2022

Subodh Kumar, Sr. PS

Sd/-

(Dr. B. R. R. Kumar)
Accountant Member