

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH KOLKATA

आयकर अपीलिय अधीकरण, न्यायपीठ - "C" कोलकाता,

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.142/Kol/2021
Assessment Year: 2013-14**

M/s. TCG Lifesciences Pvt. Ltd., Block-BN, Plot No. 7, Sector-V, Salt Lake Electronics Complex, Salt lake, Kolkata-700091. (PAN: AABCC0401D)	Vs.	Pr. Commissioner of Income-tax, Kolkata-2.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri A. K. Tibrewal, FCA

Respondent by : Shri Amal Sudhir Kamat, CIT

Date of Hearing : 12.09.2022

Date of Pronouncement : 10.11.2022

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the revision order of Ld. Pr.CIT-2, Kolkata passed u/s. 263 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 26.02.2021 vide Order No. ITBA/REV/F/REV5/2020-21/1031054651(1) passed against the assessment order by the ACIT, Circle-11(2), Kolkata u/s. 143(3) read with section 144C(5) of the Act, dated 28.07.2017.

2. Grounds raised by the assessee are six in numbers all of which relate to assumption of jurisdiction by the Ld. Pr. CIT for invoking the revisionary proceedings u/s. 263 of the Act and passing the impugned order thereon. Grounds are not reproduced for the sake of brevity.

3. Brief of facts as culled out from records are that assessee is engaged in the business of analyze and synthesis of chemical compounds and data processing. It filed its return of income on 30.11.2013 reporting a total income of Rs.13,89,39,620/-. The case was selected for scrutiny assessment through CASS for which statutory notices were issued and duly served on the assessee who complied with the same. The matter was referred to the Ld. Transfer Pricing Officer (TPO) in respect of international transactions reported by the assessee in Form No. 3CEB. Based on the reference made by the Ld. TPO, arms length price (ALP) in respect of international transactions was determined by DCIT, TPO-II, Kolkata by passing an order u/s. 92CA(3) on 28.10.2016 with an upward adjustment to the total income by Rs.8,95,67,833/-. The said upward transfer pricing adjustment included amount of Rs.8,67,68,889/- for interest on loan and Rs.27,98,944/- in respect of guarantee fee on the loan guaranteed on behalf of the Associated Enterprises (AE). Apart from the said transfer pricing adjustment, Ld. AO made certain other disallowances and completed the assessment at total income of Rs.22,77,37,440/-. The assessment order went in appeal before the Coordinate Bench of ITAT, Kolkata in ITA No. 2169/Kol/2017 dated 15.03.2019 wherein addition made in respect of transfer pricing adjustment were deleted by the Coordinate Bench.

4. Ld. Pr. CIT on perusal of the assessment records was satisfied that it is a case of erroneous assessment in so far as it was prejudicial to the interest of revenue. Accordingly, a show cause notice u/s. 263 of the Act was issued on the assessee. Two issues were raised by the Ld. Pr. CIT in the show cause notice which are reproduced as under:

“The assessee company debited depreciation of Rs.903 lakh in P&L A/c which includes fluctuation loss of Rs.175 lakh. However, while claiming depreciation it has deducted depreciation amounting to Rs.14,21,09,590/- which included fluctuation loss of Rs.2,92,71,583/-. This excess fluctuation loss of Rs.1,17,71,583/- (2,92,71,583 - 1,75,00,000/-) being adjusted with the fixed asset

of the assessee resulted in excess claim of depreciation of Rs.17,65,737/- (being 15% of Rs.1,17,71,583/- as no details regarding the adjustment of fluctuation loss is available on records in respect of book depreciation and IT depreciation). However, allowance of excess depreciation claimed has resulted into excess carry forward of MAT credit amounting to Rs.5,72,893/-.

(ii) On perusal of the P&L A/c. it is seen that the assessee credited Guarantee fee of Rs.164 lakh but, as per order u/s.92CA(1) r.w.s. 144C(5) of the Act dated 18.07.2017 the assessee company has received Rs.1,75,52,320/- as Guarantee fee from Lab Vantage Solution Inc. USA (LVSI). However, this excess amount of income regarding Guarantee fee amounting to Rs.11,52,321/- (Rs.1, 75,52,320/- - Rs.1,64,00,000/-) was not verified during the course of assessment proceedings.”

5. First issue relates to claim of depreciation by the assessee which includes foreign exchange fluctuation loss on the long term foreign currency loans capitalized to fixed assets and the second issue relates to arms length price determination of guarantee fee received by the assessee. After taking into account the submissions made by the assessee in this respect, Ld. Pr. CIT arrived at a consideration that AO has merely accepted the claim of assessee without making proper enquiry or investigation thus, the assessment order is erroneous in so far as prejudicial to the interest of revenue. Accordingly, he set aside the assessment order with a direction to the Ld. AO to pass a fresh assessment order after considering the two issues raised by him in the revisionary proceedings. Aggrieved, the assessee is in appeal before the Tribunal.

6. Before us, Shri A. K. Tibrewal, FCA represented the assessee and Shri Amal Sudhir Kamat, CIT, DR represented the department.

7. At the outset, Ld. Counsel for the assessee pointed out that the second issue raised by the Ld. Pr. CIT in the impugned order u/s. 263 of the Act relating to transfer pricing adjustment for guarantee fee received by the assessee, the matter has already been dealt by the Coordinate Bench of ITAT, Kolkata in assessee's own case for the same year in ITA No. 2169/Kol/2017 wherein the addition relating to transfer pricing adjustment made on account of receipt of guarantee fee charged to the

AE was deleted and the appeal of the assessee was allowed vide order dated 15.03.2019. Accordingly, ld. Counsel for the assessee submitted that Ld. Pr. CIT had no jurisdiction to raise this issue in the revisionary proceedings when the higher wisdom has already dealt with it in favour of the assessee.

7.1. On the first issue relating to claim of depreciation, it was submitted by the Ld. Counsel that assessee had availed foreign currency term loans from EXIM Bank for capital expansion spread over years starting from FY 2006-07. There were foreign exchange fluctuations in respect of foreign currency denominated loans, part of which were repaid during the year. He submitted that there is a difference in treatment for the foreign exchange fluctuation in the books of account and in the computation of income under the Act. For the purpose of treatment in books of account, Accounting Standard-11 (AS-11) issued by the Institute of Chartered Accountants of India (ICAI) deals with the 'effect and changes in foreign exchange rates', according to which the exchange fluctuation whether realized or unrealized should be considered and added to the cost of asset. However, for the computation of income under the Act, only the realized loss on exchange fluctuation on repayment of loan is to be considered and added to the cost of fixed assets as per the provisions of section 43A of the Act. Thus, there was a difference in the treatment of foreign exchange fluctuation loss in the books of account which is in compliance with AS-11 and in the computation of income under the Act which is in compliance with section 43A of the Act.

7.2. Ld. Counsel referred to the summary of foreign exchange fluctuation loss/profit both as per books and under the Act for that treatment. Ld. Counsel stated that all these details were duly furnished before the Ld. AO in the assessment proceedings who had examined and verified the same. After having satisfied with the claim of the assessee, it was rightfully allowed by the Ld. AO. For this, Ld. Counsel referred to the notice issued

by the Ld. AO u/s. 142(1) of the Act dated 05.09.2016. In point no. 9, 10 and 19 of the said notice, Ld. AO has categorically sought the details in respect of foreign exchange fluctuation loss of Rs.1.75 Cr. on restatement of long term foreign currency loan which was adjusted with the value of fixed assets and also the claim of depreciation and additional depreciation. The relevant extracts from the notice are reproduced as under:

“9. On perusal of audited books of account, it is seen that there is Foreign Exchange Fluctuation Loss (Rs.1.75 Crore) on restatement of Long Term foreign currency loans, please furnish how it was adjusted with the value of fixed assets.

10. Please furnish detail and notes on “no borrowing cost, being interest for purchase of long term fixed assets was capitalized during the FY 2012-13.

19. Please furnish evidences regarding claim of depreciation & additional depreciation (for major items).”

8. Ld. Counsel submitted that against this query, all the details for the assets acquired and the long term foreign currency loss utilized for the acquisition of assets so also the phase wise exchange loss on long term foreign currency loans capitalized, fixed assets with bill wise details of assets added in the plant and machinery block, were all furnished which are placed in the paper book. Based on these submissions, Ld counsel strongly claimed that detailed enquiry and examination has been made by the Ld. AO in the course of assessment and the allegation by the Ld. Pr. CIT that the order is passed without making enquiries or verifications is baseless, devoid of any merits. He, thus submitted that the assessment order is neither erroneous nor prejudicial to the interest of revenue and, therefore, the impugned order u/s. 263 of the Act ought to be quashed.

9. Per contra, Ld. CIT, DR placed reliance on the order of Ld. Pr. CIT and submitted that no prejudice is caused to the assessee since Ld. Pr. CIT has directed the Ld. AO to examine the issue afresh and pass the assessment order accordingly.

10. We have heard the rival contentions and perused the material available on record. Out of the two issues raised by the Ld. Pr. CIT in the impugned order, we find that the second issue relating to transfer pricing adjustment made by the Ld. TPO on receipt of guarantee fees by the assessee from its AEs has been deleted by the Coordinate Bench of ITAT, Kolkata in assessee's own case for the very same year under consideration vide order dated 15.03.2019 in favour of the assessee. Assumption of jurisdiction by the Ld. Pr. CIT on this issue for invoking the revisionary proceedings u/s. 263 of the Act is not warranted.

10.1. On the first issue relating to claim of depreciation which includes foreign exchange loss on long term foreign currency loan capitalized in respect of additions made towards plant and machinery, we note that Ld. AO has called for all the details by issuing notice u/s. 142 (1) (reproduced above) to which assessee had made detailed submissions explaining its case. On this issue, even before the Ld. Pr. CIT, assessee has submitted in detail, explaining about the difference in treatment of the foreign exchange fluctuation loss of long term foreign currency loss in the books of accounts and in the computation of income under the Act, as narrated above. We have perused the treatment of forex loss as per the books of account which has been added to the cost of fixed assets and also the treatment of the forex loss as per the provisions of section 43A of the Act, based on actual repayment of loan which has been added to the cost of fixed assets. Details submitted by the assessee for the two respective treatments in the form of tables are reproduced as under:

Treatment of Forex loss / (profit) as per tax based on actual repayment of loan which has added to cost of fixed assets in the respective years														
Particulars	Loan amt in INR	Realised Forex loss / (profit)										Total Forex Loss as per Tax		
		FY-05-06	FY-06-07	FY-07-08	FY-08-09	FY-09-10	FY-10-11	FY-11-12	FY-12-13	FY-13-14	FY-14-15		FY-15-16	
Term Loan Exim Bank-USD 21,93,426-PUNE	9,92,27,800		(12,69,714)	3,03,249	8,88,896	1,91,387	16,89,496	21,12,948	-	-	-	-	-	39,15,862
Term Loan Exim Bank-USD 44,50,000-Ph-VI	19,17,11,469			17,11,368	62,90,659	17,12,156	61,88,856	95,48,606	-	-	-	-	-	2,54,51,846
Term Loan Exim Bank-USD 36,45,000-Kilolab	15,00,12,060				48,38,174	30,92,365	43,37,133	91,70,403	1,30,64,336	-	-	-	-	3,45,02,411
Term Loan Exim Bank-USD 35,50,000-Phase-VII	14,90,82,250						33,95,575	84,40,125	1,27,17,875	1,34,93,550	1,72,86,725	-	-	5,53,33,850
Total	59,00,33,579		(12,69,714)	20,14,617	1,20,17,729	49,95,908	1,56,11,061	2,92,71,683	2,57,82,211	1,34,93,550	1,72,86,725	11,92,03,769		

Treatment of Forex loss / (profit) as per books of accounts which has added to cost of fixed assets in the respective years														
Particulars	Loan amt in INR	Forex loss / (profit)										Total Forex Loss as per books		
		FY-05-06	FY-06-07	FY-07-08	FY-08-09	FY-09-10	FY-10-11	FY-11-12	FY-12-13	FY-13-14	FY-14-15		FY-15-16	
Term Loan Exim Bank-USD 21,93,426-PUNE	9,92,27,800	(9,985)	(32,11,559)	(83,46,427)	1,92,33,933	(80,32,764)	(71,286)	34,76,560	8,77,370	-	-	-	-	39,15,862
Term Loan Exim Bank-USD 44,50,000-Ph-VI	19,17,11,469		(27,85,040)	(1,08,27,929)	4,54,82,920	(1,98,10,955)	(9,96,800)	1,07,73,450	26,16,600	-	-	-	-	2,54,51,846
Term Loan Exim Bank-USD 36,45,000-Kilolab	15,00,12,060			(17,93,310)	3,71,69,595	(1,94,11,163)	(9,47,941)	1,13,87,412	45,68,656	35,29,161	-	-	-	3,45,02,411
Term Loan Exim Bank-USD 35,50,000-Phase-VII	14,90,82,250				3,14,74,300	(2,08,95,300)	(20,41,250)	2,00,02,825	94,12,612	1,16,94,488	25,81,560	28,44,615	-	5,53,33,850
Total	59,00,33,579	(9,985)	(59,97,198)	(2,09,87,666)	13,43,60,748	(6,81,50,182)	(40,57,276)	4,57,00,268	1,74,75,239	1,54,23,649	25,81,560	28,44,615	11,92,03,769	

11. We have heard the rival contentions and perused the material on record. Admittedly, it is an undisputed fact that assessee has disclosed the capitalization of forex fluctuation loss on the long term foreign currency loan taken for its capex in its audited financial statements which is in compliance to applicable AS-11. Also, ld. AO had made detailed enquiry on this issue in the assessment proceedings while arriving at the assessed total income under the Act in terms of section 43A. Since forex fluctuation loss on repayment of foreign currency loan was capitalized in accordance with the provisions of section 43A of the Act, ld. AO did not make a separate addition while computing the assessed income of the assessee. Assessee had reiterated these facts before the Ld. PCIT in the revisionary proceedings also. Before us also, Ld. Counsel demonstrated the factual position by corroborative documentary evidences placed on record in the paper book as referred in the discussion and relevant charts reproduced above. Also, the second issue relating to ALP determination of receipt of guarantee fee by the assessee, the coordinate bench of ITAT Kolkata in the case of assessee itself for the very same year under consideration has held in its favor.

12. From the above factual matrix of the issue raised by the ld. PCIT, we find that he has not applied his mind to arrive at a consideration which is erroneous in so far as prejudicial to the interest of the revenue, for passing the impugned order u/s 263 of the Act. We observe that in the course of proceedings u/s 263 of the Act before the Ld. PCIT, assessee had furnished the relevant details and explained the issues raised through the show cause notice by the Ld. PCIT, supporting its contentions by corroborative documentary evidences. It is well settled law that for invoking the provisions of section 263 of the Act, both the conditions that the order must be erroneous and prejudicial to the interest of revenue needs to be satisfied. This ratio stands laid down by various Hon'ble Courts.

13. For this, let us take the guidance of judicial precedence laid down by the Hon'ble Apex Court in the case of Malabar Industries Ltd. vs. CIT [2000] 243 ITR 83(SC) wherein their Lordships have held that *twin* conditions need to be satisfied before exercising revisional jurisdiction u/s 263 of the Act by the CIT. The twin conditions are that the order of the Assessing Officer *must be erroneous and in so far as prejudicial to the interest of the Revenue*. In the following circumstances, the order of the AO can be held to be erroneous order, that is (i) if the Assessing Officer's order was passed *on incorrect assumption of fact*; or (ii) *incorrect application of law*; or (iii) Assessing Officer's order is in *violation of the principle of natural justice*; or (iv) if the order is passed by the Assessing Officer *without application of mind*; (v) if the AO *has not investigated the issue* before him; [*because AO has to discharge dual role of an investigator as well as that of an adjudicator*] then in aforesaid any of the events, the order passed by the AO can be termed as erroneous order. Looking at the second limb as to whether the actions of the AO can be termed as prejudicial to the interest of Revenue, one has to understand what is prejudicial to the interest of the revenue. The Hon'ble Supreme Court in the case of Malabar Industries (*supra*) held that this phrase i.e. "*prejudicial to the interest of the revenue*" has to be read in conjunction with an *erroneous order* passed by the AO. Their Lordships held that every loss of revenue as a consequence of an order of Assessing Officer cannot be treated as prejudicial to the interest of the revenue. When the Assessing Officer adopted one of the courses permissible in law and it has resulted in loss to the revenue, or where two views are possible and the Assessing Officer has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is unsustainable in law.

14. We find that the issue in the present case is purely on facts which are verifiable from the records of the assessee. Examination and verification of the audited financial statements i.e. Balance Sheet and Profit & Loss account of the assessee, perusal of provisions of section 43A of the Act and order of coordinate bench of ITAT Kolkata in assessee's own case (*supra*), reveals the correct state of its affairs in respect of the issue raised in the impugned revisionary proceedings for which both, Id. PCIT and the Id. CIT, DR could not bring any material on record to controvert the verifiable factual position.

15. Accordingly, on the issues raised by the Ld. PCIT in the revisionary proceedings, no action u/s 263 of the Act is justifiable which in our considered view cannot be sustained under the facts and circumstances of the present case and judicial precedents dealt herein above. We, therefore, quash the impugned order u/s 263 of the Act and allow the grounds raised by the assessee.

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

Order is pronounced in the open court on 10th November, 2022

Sd/-
(SANJAY GARG)
JUDICIAL MEMBER

Sd/-
(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

Dated: 10.11.2022

JD, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent.
3. Pr.CIT, Kolkata-2.
4. ACIT, circle-11(2), Kolkata.
5. The DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata