

आयकर अपीलिय अधिकरण
मुंबई पीठ "आई", मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
सुश्री पद्मावती.एस, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
MS. PADMAVATHY.S, ACCOUNTANT MEMBER
आअसं. 1235/मुं/2022 (नि.व. 2018-19)
ITA NO.1235/MUM/2022(A.Y.2018-19)

JP Morgan Chase Bank N.A
J P Morgan Tower, OFF CST Road,
Kalina, Santacruz (East),
Mumbai 400 098

PAN: AAAC-5545-N

..... अपीलार्थी/Appellant

बनाम Vs.

The Commissioner of Income Tax (IT), Mumbai -3,
Room No.1601, 16th Floor,
Air India Building, Nariman Point,
Mumbai – 400 021

.....प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri P.J.Pardiwala, Sr.Advocate with
Shri Madhur Agrawal, Advocate
प्रतिवादीद्वारा/Respondent by : Shri Ajay Kumar Sharma, CIT-DR
सुनवाई की तिथि/ Date of hearing : 07/11/2023
घोषणा की तिथि/ Date of pronouncement : 31/01/2024

आदेश/ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax (IT), Mumbai -3 [in short the 'CIT'] dated 25/03/2022 passed u/s. 236 of the Income Tax Act, 1961 [in short 'the Act'] for the Assessment Year 2018-19.

2. Shri P.J.Pardiwala appearing on behalf of the assessee submitted that the CIT has invoked revisional jurisdiction primarily on the ground that the Assessing Officer was mandatorily required to make reference to the Transfer Pricing Officer (TPO), but the Assessing Officer in violation of CBDT Instructions No.3/2016 dated 10/03/2016 has failed to make reference to the TPO. The Id.Counsel for the assessee pointed that the reasons given by CIT for invoking jurisdiction u/s. 263 of the Act are contrary to the facts on record. The Id.Counsel for the assessee referring to chronology of events tabulated at page 8 and 9 of the Paper Book, pointed that on 01/03/2021 the Assessing Officer wrote to CIT requesting for approval for referring the case to TPO in accordance with CBDT Instructions No.3 of 2016. On 09/03/2021 approval was received from the office of CIT for referring the case to TPO via ITBA Portal. On 20/09/2021 reference was made by the Assessing Officer to the TPO via ITBA Portal. On 24/09/2021 the TPO returned the reference stating that reference received is not valid considering CBDT's Internal Office Memorandum(F No.370142/24/2021-TPL), which provided that the last date to pass transfer pricing order was 31/07/2021 and the said date has elapsed, hence reference cannot be acted upon at this stage. Thereafter, the Assessing Officer on 12/10/2021 made proposal to CIT for initiation of proceedings u/s. 263 of the Act stating that (i) on ITBA Portal the time barring for Assessment Year 2018-19 is still showing as 30/09/2022, and (ii) the final assessment order is prejudicial to the interest of Revenue.

3. In the backdrop of aforesaid facts, the Id.Counsel for the assessee made two fold submissions:

First, challenging validity of impugned order the Id.Counsel for the assessee submits that provisions of section 263 have been invoked by the CIT on proposal of Assessing Officer. The CIT has not formed his independent opinion on the assessment order. He submitted that the provisions of section 263 of the Act cannot be invoked at the behest of Assessing Officer. To support his argument, he placed reliance on the following decisions.

(i) Alfa Laval Lund AB vs. CIT(IT/TP), in ITA NO.1287/Pun/2017 for A.Y 2012-13, decided on 02/11/2021.

(ii)HubtownLtd. vs. PCIT(Central) in ITA No.696/Mum/2021 for A.Y.2015-16, decided on 26/04/2022.

(iii) Multi Commodity Exchange of India Ltd. vs. PCIT in ITA NO.953/Mum/2021 for A.Y.2014-15, decided on 27/04/2022.

(iv) PCIT vs. Reeta Lakhmani, 291 Taxman 358(Cal)

(v) PCIT vs. Sinhotia Metals & Mineral Pvt. Ltd. in GA/1/2019 inITAT/104/2019, decided on 07/01/2022 by Hon'ble Calcutta High Court.

3.1 The second plank of argument by the Id. Counsel for the assessee is wrong appreciation of facts. He submitted that time barring date of the assessment order was 30/09/2022. The Assessing Officer made reference to TPO on 20/09/2021. The period of limitation was extended by virtue of Taxation and Other Laws(Regulation of Amendment of Certain provisions) Act, 2020 (in short 'the TOLA') upto 30/09/2022, hence, the TPO had erred in returning reference made by the Assessing Officer on the ground of time barring. The CIT has invoked Section 263 of the Act on the ground contrary to the facts on record. The CIT held that no reference was made to the TPO by the Assessing Officer. Whereas, the records clearly show that reference was made by the Assessing Officer to the TPO on 20/09/2021 i.e. well within time to

complete assessment as mentioned on ITBA portal. If, the reference was returned by the TPO, whether this would amount to no reference by the Assessing Officer? The Id. Counsel for the assessee asserted that the Assessing Officer made a valid reference to the TPO. If, the TPO has returned the reference, the assessment order cannot be said to be erroneous.

4. Per contra, Shri Ajay Kumar Sharma representing the Department defended the impugned order. He submitted that someone has to bring deficiency in the assessment order to the notice of CIT. Thereafter, the CIT shall examine the record and form an opinion whether the assessment order is erroneous and prejudicial to the interest of Revenue. The Id. Departmental Representative referring to the impugned order pointed that in para – 2 of the order, the CIT has mentioned, “ *It was observed on examination of the records.....*”. Thus, it is evident that the CIT has examined the records. Similar expression has been used in show cause notice u/s. 263 of the Act dated 17/12/2021. He further referred to para 2.2 of the impugned order wherein the CIT has used the expression, “ *.....it was prima-facie seen that the order passed on 16/11/2021 was erroneous and prejudicial.....*”. These expressions used in the impugned order clearly show that the CIT has not exercised revisional powers under section 263 of the Act in a mechanical manner but after examining the records has taken a conscious decision.

4.1 The Id. Departmental Representative further submitted that the reference made by the Assessing Officer to TPO was invalid. Therefore, the CIT used the expression “no reference was made”. The Id. Departmental Representative submitted that the case laws on which assessee has placed reliance are distinguishable on facts. In the case of Alfa Level Lund AB (supra),

Multi Commodity Exchange Pvt. Ltd. (supra) and others, the CIT initiated proceedings u/s. 263 of the Act on mere reference/ proposal by the Assessing Officer without independent examination of records. Hence, the ratio laid down in the aforesaid decisions would not apply to the present case. In the instant case, the CIT after receiving proposal from the Assessing Officer inspected the records applied his independent mind and then exercised powers u/s. 263 of the Act. He further submitted that the reference made by the Assessing Officer to the TPO should be a valid reference. If, such a reference is invalid, the assessment order would be erroneous and prejudicial to the interest of Revenue. Hence, it is very much in the domain of CIT to issue notice u/s. 263 of the Act, were reference to TPO is invalid. To support his submissions, the Id. Departmental Representative placed reliance on the following decisions:

- (i) PCIT vs. SG Asia Holdings (India) Pvt. Ltd., Civil Appeal No.6144 of 2019 decided on 13/08/2019.
- (ii) CIT vs. Paville Projects Pvt. Ltd., 223 LiveLaw (SC) 282
- (iii) Ranbaxy Laboratories Ltd. vs. CIT, ITA 504 of 2008 decided on 18/11/2011

4.2 The Ld. Departmental Representative asserted that the Assessing Officer was required to refer the matter to the TPO latest by 31/07/2021. Whereas, in the present case, the reference was made much after i.e. on 20/09/2021. Referring to Ministry of Finance, OM dated 28/06/2021 he submitted that vide said communication, it was specifically clarified in respect of assessment proceedings for assessment year 2018-19 that the assessment was originally required to be completed till 30/09/2020, which get extended to 30/09/2021

in Transfer Pricing cases. Thus, TP order in such cases is required to be passed 60 days before 30/09/2021 i.e. 31/07/2021. Since, 31/07/2021 does not fall under the window of section 3 of TOLA, no extension is granted by TOLA in such cases. The Ld. Departmental Representative placed on record copy of OM F.No.370142/24/2021-TPL dated 28/06/2021.

5. Rebutting the arguments made on behalf of the Department, the Id. Counsel for the assessee referred to the provisions of section 144A to submit that wherever Legislature wanted to provide assistance of a subordinate officer to the CIT, it has been specifically mention in the section. The provisions of section 263 of the Act provides no such leeway to the CIT, hence, reference by the Assessing Officer to the CIT to initiate proceedings u/s. 263 of the Act is contrary to the provisions of the Act. He further pointed that in the entire impugned order the CIT has not mentioned that records were examined by him. Mere mentioning of the fact that the records were examined does not show that the records were in fact examined by the CIT. The Id. Counsel for the assessee finally submitted that the ITBA Portal shows time barring date for assessment as 30/09/2022. There is contradiction in the stand of the Department. The Id. Counsel for the assessee raised a question as to how reference is not a valid, if, system reflects 30/09/2022 as the last date for passing assessment order. He submitted that the cases/laws on which reliance has been placed by the Id. Departmental Representative are distinguishable. In the said cases no reference at all was made by the Assessing Officer to the TPO, whereas, in the present case the reference was made by the Assessing Officer to the TPO. The Revenue has created unwarranted dispute with regard to validity of reference. The Id. Counsel for the assessee thus, prayed for quashing the impugned order.

6. We have heard rival submissions and have examined orders of authorities below. The assessee has assailed the order of CIT on two counts. The first plank of argument of the assessee is that the CIT has exercised powers u/s. 263 of the Act merely on proposal forwarded by the Assessing Officer without himself examining the records and proper application of mind.

A perusal of section 263(1) of the Act shows that the CIT/PCIT may call for and **examine records** of any proceedings under the Act **and if he considers** any order passed therein is erroneous in so far as prejudicial to the interest of Revenue may pass such order as the circumstances of the case is justified. For exercising revisional jurisdiction u/s. 263 of the Act, the section in the first place mandates examination of records and consideration by the CIT. If, both the pre-conditions are satisfied then only the CIT get key to move ahead in the domain of revisional jurisdiction. The CIT exercising powers u/s. 263 of the Act merely on proposal forwarded by the Assessing Officer without satisfying the pre-conditions stated above is against the spirit of the provisions of the Act. In our considered view, there is nothing wrong, if, the Assessing Officer initiates a proposal for invoking revisional jurisdiction u/s. 263 of the Act and thereafter, the CIT examine the record and after considering the same comes to the conclusion that the order passed by the Assessing Officer is erroneous and prejudicial to the interest of Revenue. The conditions of sub-section(1) to Section 263 of the Act are satisfied if the CIT independently examines the record, apply his mind de hors the fact that the proposal was made by the Assessing Officer.

7. In the instant case, we find that while issuing notice u/s. 263 of the Act dated 17/12/2021 the CIT categorically records "*It is observed on examination*

of records". Thereafter, in the impugned order the CIT in para-2 records similar observation. On further perusal of the impugned order it is palpable that the CIT has applied his mind and formed an opinion on the failures of the Assessing Officer in not referring the matter to the TPO. We have also considered the decision on which the Id. Counsel for the assessee has placed reliance, we find the same to be distinguishable on facts. Thus, the said decisions does not support the case of assessee. We find no force in the submissions of the Ld.Counsel for the assessee that the CIT has adorned revisional powers merely on proposal forwarded by the Assessing Officer. Hence, the first argument of the assessee assailing the impugned order is rejected.

8. The second plank of argument challenging validity of impugned order is that the Assessing Officer had made a reference to the TPO, but the reference was returned by the TPO stating it to be time barred. The CIT in the impugned order has observed that there was no reference by the Assessing Officer. Hence, jurisdiction u/s. 263 of the Act has been exercised on wrong appreciation of facts. Before we proceed further it would be relevant to refer to some of the dates:

Date	Events
01/03/2021	Letter from A.O to CIT(IT),Mumbai-3 requesting for approval for referring the case to the TPO.
09/03/2021	Approval received from the CIT for referring the case to TPO.
20/09/2021	A.O makes reference to the TPO via ITBA Portal.
24/09/2021	TPO returned the reference to A.O stating it to be invalid/time barred, hence, cannot be acted upon.

Indeed, reference was made by the Assessing Officer to TPO, and the said reference was returned on the ground that it was not valid. The provisions of

section 92CA(1) of the Act mandates that the Assessing Officer has to make a reference to the TPO with the previous approval of the PCIT/CIT for computation of the arm's length price in relation to the international transaction. The CBDT Instruction No.3 of 2016 sets out guidelines for implementation of the TP provisions, hence, a reference has to be made by the Assessing Officer to the TPO in accordance with provisions of section 92CA read with CBDT Instruction No.3/2016. The provisions of Section 92CA(3A) specifies the time line for passing of the order by TPO u/s. 92CA(3) of the Act. The TPO has to pass the order u/s. 92CA(3) at any time before 60 days prior to the date of expiry of limitation for completion of the assessment. Any reference made by the Assessing Officer to TPO in deviation in terms of approvals, time line, etc. that has the effect of jeopardizing the assessment would make the reference invalid. Such invalid reference is in fact no reference.

9. In the instant case, the TPO returned reference by placing reliance on Office Memo dated 28/06/2021. The said Office Memo is with regard to limitation period for transfer pricing proceedings particularly for Assessment Year 2018-19. For the sake of completeness, the relevant extract of the Office Memo (supra) is extracted herein below:

"2. In this regard, I have been directed to inform that the comments of TPL Division in the matter as under:

"The section 3 of Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 thereafter referred to as the TOLA") only provides that the action, which in this case is passing of assessment order, which falls under the window given in the said section may be completed by the date given in the said section. The said section does so without amending section 153 of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

(2) For AY 2018-19, the assessment proceedings were originally required to be completed till 30th September 2020 as per the provisions of section 153 of the

Act which gets extended to 30th September 2021 under sub section (4) of section 153 of the Act in Transfer Pricing (hereinafter referred to "TP" cases. Thus the TP order in such cases is required to be passed 60 days before 30th Sept 2021, that is, 31st July 2021. Since 31st July 2021 does not fall under the window of section 3 of TOLA, no extension is granted by TOLA in such cases. The lime limit of final assessment order in cases is defined by the provisions, of the section 153 of the Act only and is, therefore, 30th September, 2021.

*(3) With regard to difficulties faced by the TP Officers in completing TP proceedings and passing TP orders by 31st July 2021. **It is pertinent to reiterate that TOLA does not give the authority to extend the TP time barring date of 31.07,2021 for AY, 2018-19.** The said time barring date can be extended only by means of an ordinance or a legislative amendment which is beyond the purview of the Board."*

[Emphasized by us]

A perusal of the aforesaid Office Memo makes it clear that there is no extension of time for passing the TP order u/s. 92CA(3) of the Act by TOLA.

10. A close examination of sequence of events tabulated above would show that the Assessing Officer had received the approval from the office of CIT on 09/03/2021 i.e. well before the last date for passing of the TP order i.e. 31/07/2021. The Assessing Officer went in slumber and held on to himself the approval from CIT for more than six months. In proceedings under the Act, time is the essence. Thereafter, on 20/09/2021 made reference to TPO, by that time the period to pass the order by the TPO u/s. 92CA(3) of the Act had already elapsed. As is evident from Office Memo the last date for passing the order for TPO was 31/07/2021. The reference made by Assessing Officer to the TPO was clearly time barred and invalid. Such reference is no reference in the eye of law.

11. The Assessing Officer completed the assessment giving a go bye to the mandatory provisions of section 92CA and CBDT Instruction No.3 of 2016. Such an assessment order definitely falls within the meaning of erroneous and

prejudicial to the interest of Revenue as envisaged u/s. 263 of the Act. The Id. Counsel for the assessee has pointed that in ITBA portal the last date for completion of assessment was mentioned as 30/09/2022, therefore, the Assessing Officer has reason to believe that he has still time to make reference. We find no force in the submission of the Id. Counsel for the assessee. The limitation for completion of assessment is to be determined strictly in accordance with the provisions of the Act and not dates mentioned in ITBA portal. The Department had issued Office Memo dated 28/06/2021 (supra) clarifying the doubts over issue of limitation for Transfer Pricing proceedings for Assessment Year 2018-19. It is a settled legal position that Board Circulars, Notifications and OMs are binding on the Assessing Officer. We find no infirmity in the action of CIT in invoking revisional jurisdiction u/s. 262 of the Act in passing the impugned order.

12. In the result, the impugned order is upheld and appeal of assessee is dismissed.

Order pronounced in the open court on Wednesday the 31st day of January, 2024.

Sd/-

(PADMAVATHY. S)

लेखाकार सदस्य/ACCOUNTANT MEMBER

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/Mumbai, दिनांक/Dated: 31/01/2024
Vm, Sr. PS(O/S)

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्तCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि. , मुंबई/DR, ITAT, Mumbai
- 5.. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai