

**IN THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai**

**Before Shri B. Ramakotaiah, Accountant Member
and Shri Amit Shukla, Judicial Member**

ITA No.4007/Mum/2010
(Assessment year: 2005-06)

Essar Steel Limited, Group
Taxation, Essar House, No.11
K.K. Marg, Mahalaxmi,
Mumbai-400034
PAN: AAACE 1741 P
(Appellant)

Vs. Addl. Commissioner of
Income Tax 5(1) Aayakar
Bhavan, Mumbai
(Respondent)

Assessee by: Shri Vijay Mehta
Department by: Shri Ajeet Kumar Jain

Date of Hearing: 22/10/2012
Date of Pronouncement: 31/10/2012

ORDER

Per Bench.

This is an assessee's appeal against the order of the CIT-5, Mumbai, dated 29/03/2010 under section 263 of the Income Tax Act. The short issue for consideration is whether the CIT-5 is correct in invoking the jurisdiction under section 263 for setting aside the order of Assessing Officer u/s 143(3) dated 01.01.08 which was passed in consonance with the TPO's order determining the arms length price for certain transactions.

2. Briefly stated, assessee filed return of income on 31.10.2005 declaring taxable income at Nil and book profit under section 115JB at ₹.59,82,70,426/-. Subsequently the return was revised declaring nil income and book profit under section 115JB at Nil. In the scrutiny proceedings, as assessee has sold some shares and claimed long term Capital Loss, AO referred the matter to the TPO-I(3) for determination of arm's length price for these transactions. During the year assessee sold 10,700 equity shares in PT Essar

Dhananjaya in Indonesia to M/s. Essar Global Ltd, Mauritius, a non-resident associate concern of assessee. TPO-I(3) after analyzing the issue and rejecting the net asset value adopted by assessee while supporting the sale price however, considered that the most appropriate method is the PE method and determined the arm's length price and the value of the share at USD7197.22 per share. Therefore, he arrived at the cost of total sale price at ₹335.61 crores. As assessee has sold the shares at ₹.33.36 crores this resulted in enhancement of total income by ₹.302.24 crores. TPO order was dt. 22-11-07. AO following the provisions of the order have to adopt this value. However, in the meantime noticing that there was an error in computing the PE ratio of Essar Steel Ltd, TPO passed an order u/s 154 read with 92CA(5) dt.19-12-07 reducing the Arm Length price to ₹.44,99,23,887/- thereby the difference in shares worked out at ₹.11,62,46,042/-. As against the capital loss claimed at ₹.19.04 crores, the Long Term Capital loss was determined at ₹.7.41 crores which could not be adjusted from any other source and was allowed to be carried forward by the order of AO dated 1.1.2008.

3. Subsequently the DIT (TP-I) vide his letter No. DIP (TP)-I/Mum/Revision/2007-08 dated 28.12.2007 forwarded a proposal submitted by the TPO for considering action under section 263 of the Income Tax Act. It was the contention of the TPO that the transfer pricing order dated 22.11.2007 rejecting the net asset value (NAV) method was not correct and the correct method should have been to determine under NAV method according to which the rectified arms length price would come to US\$ 2454.46 and yield method would arrive at US\$ 964.87, thereby the average value per share would come to US\$ 1709.46. This would result in under valuation of Rs. 34,72,05,236/-. Accordingly, the CIT was requested to initiate proceedings u/s 263 on the TPO order which according to

the TPO was erroneous and prejudicial to the interest of the Revenue.

4. The CIT following the above request from the DIT initiated proceedings under section 263 and issued a show cause notice to assessee seeking its comments, why proceedings under section 263 could not be initiated. In the show cause notice it was clearly stated that the Transfer Pricing Officer has pointed out that the arm's length price transactions has been erroneously under determined by him by ₹.34.72 crores which was prejudicial to the interest of the Revenue. Assessee filed its objections which were summarized by the CIT in page-5 of the order under section 263. The CIT after considering the issue and relying on various case law set aside the order of AO holding that it is erroneous in so far as AO has not adopted arm's length price as determined by the TPO, therefore, prejudicial to the interest of the Revenue. Therefore, he set aside the assessment order with a direction to reframe the same after considering the observations given above (in the order under section 263) and after giving assessee a reasonable opportunity of being heard. This was challenged by assessee in the present appeal.

5. The learned Counsel referred to the provisions of section 92CA(4) to submit that AO after receipt of the order under sub-section 3 of section 92CA has proceeded to compute the total income of assessee in conformity with the arm's length price as determined by the TPO. Referring to the orders passed by the TPO, it was submitted that the TPO originally determined a higher amount as arm's length price and having noticed an error in computation passed an order under section 154 which was forwarded to AO and AO in compliance to the provisions of sub-section 4 of 92CA adopted the same value. Therefore, the order of AO which was subject matter of revision by the CIT does not suffer any mistake or error.

6. Another contention was that in Page 2 of the CIT's order reference was made to the revised order of TPO-I(3) on the basis of which the CIT directed AO to revise the computation, whereas there is no such order by the TPO-I(3). It was the submission that once a reference was made by AO during the assessment proceedings which culminated by the order of the TPO dated 22.11.2007 the TPO cannot revise his own order unless there was any other reference. There was no order passed by the TPO after conclusion of proceedings therefore, reference to the revised order of the TPO by the CIT while initiating proceedings u/s 263 itself is factually wrong. In support, he filed the order of the assessment passed by AO consequent to the proceedings under section 263 to submit that even the revised assessment order there is no reference to revised TPO order. It was the contention that internal communication between the DIT and the CIT cannot be considered as an order. Since the original order passed by the TPO which is valid even as of now, has been complied with by AO, there cannot be any modification of the said order and any other action taken by AO is in violation of provisions of section 92CA(4).

7. The next contention of the AR was that the learned CIT has not applied his mind while coming to the satisfaction that there was an erroneous order as at the time of initiation itself he referred to the non existing revised TPO order and while passing the order also he referred to the revised order of the TPO and directed AO to adopt the same order which in fact does not exist. Therefore, the order is bad in law.

8. The next submission of the Counsel was that even on merit when there are two views possible, to value either on net asset value or on price earning method and TPO adopted one method on one of the possible view, there cannot be any action under section 263 as held by the Hon'ble Supreme Court in the case of CIT vs. Max India Limited, 295 ITR 282(SC). He also questioned the jurisdiction of the

CIT to revise the order of AO u/s 143(3) which is in conformity with the order of the TPO as per section 92CA(4), whereas the proposal by the TPO is to initiate action under section 263 on the TPO order itself.

9. The learned DR however, in reply submitted that according to the Board Circular, the orders of the TPO are approved by the DIT. Therefore, the CIT has jurisdiction to revise the order of AO under section 263 when it is pointed out that there was error in computation of Arms length price by the TPO himself. He relied on the Coordinate Bench decision in the case of Sun Microsystems India Pvt. Ltd vs. CIT in ITA No. 661(Bang.)2007 dated 29th March, 2011. He also referred to the Hon'ble Supreme Court decision in the case of T.N. Civil Supplies Corporation Ltd vs. CIT, 260 ITR 82 (SC) to submit that the CIT has power to revise the order which was passed on the directions of superior authority either under section 144A or section 144B. He referred to the facts to submit that the CIT has validly invoked the jurisdiction under section 263 to set aside the order of AO.

10. The learned Counsel in reply relied on the amended provisions of section 92CA(4) to submit that the words "having regard to" has been amended w.e.f. 1.6.2007 and mandated that AO has to proceed to compute in conformity with the arms length price as determined by TPO. Therefore, when AO has complied with the arms length price determined by the TPO, there cannot be any error in the order so as to revise under section 263.

11. We have considered the issue and examined the record. There is no dispute with reference to the fact that assessee has sold some shares it was holding in PT Essar Dhananjaya in Indonesia to M/s. Essar Global Ltd, Mauritius. It has claimed long term capital loss at ₹.19,04,35,383/-. It filed valuers report wherein the valuer adopted the average of net asset value and price earning value to support assessee sale price. The RBI also approved the sale based on the

valuer's report. In assessment proceedings, AO referred the matter to the TPO-I(3) for determination of arms length price on these sale transactions. The TPO after analyzing the issue, in his order dt. 22-11-07 running to 23 pages, rejected the net asset value adopted by the valuer and discussed the most appropriate method vide Para 7.6 and determined the arms length price at ₹.335,61,06,459/-. Subsequently, he noticed an error in calculation and vide order dated 19.12.2007 he modified the order invoking 92CA(5) and determined the arms length price at ₹.44,99,23,887/-. As assessee has shown sale value at ₹.33,36,76,364/- the enhancement proposed as per the TPO order dated 19.12.2007 at ₹.11,62,47,523/- was adopted by AO in the assessment order dated 01.01.2008.

12. The entire issue boils down to the reference by the CIT to the revised order of the TPO-I(3) which was stated to have been forwarded to the CIT by the DIT(TP-I) via his letter No. DIP(TP)-I/Mum/Revision/2007-08 dated 28.12.2007. Even though the learned CIT referred to the revised order of the TPO, there is no such revised order on record, except a proposal by the TPO to the DIT that the value according to net asset value should have been determined and average price could have been taken (Reasons for consideration for revision under section 263 by the TPO were placed in the paper book at Page Nos. 40 to 45). This indicate that after passing the order under section 154, the TPO sent a proposal for rectification of the said order dated 22.11.2007. A proposal by the TPO clearly indicates that the order under section 92CA(3) dated 22.11.2007 that was rectified the order under section 92CA(5) r.w. section 154 dated 19.12.2007, be considered for revision under section 263. However, instead of revising the TPO order as proposed, the learned CIT revised the order passed by AO under section 143(3) dt. 01.01.2008. In our view, the CIT erred in revising the assessment order whereas the proposal is for revising the TPO

order. This action of the CIT cannot be considered as appropriate action as so long the order of the TPO dated 22.11.2007 was not revised and was binding on AO under section 92CA(4). There is no point in directing AO to follow the revised TPO order which was not in existence. Even as seen from the order under section 143 r.w.s. 263 by the AO, there is no fresh reference to the TPO nor there was any revised order by the TPO. Therefore, under the provisions of section 92CA(4) since AO followed the order of the TPO, there is no error in the order dated 01.01.2008 passed by AO.

13. We are not considering the issue whether the TPO order could be revised by the CIT or by the DIT as that issue is not before us at this moment. As seen from the provisions, the CIT has no jurisdiction over the TPO administratively and therefore, the CIT could not have revised the order under section 92C(3) passed by the TPO. Whether the DIT can revise the order which he himself has approved as per the Board Circular can only be examined when such issue arises but for deciding this issue, we can safely conclude that the order of the CIT revising the assessment order dated 1.1.2008 passed under section 143(3) is not erroneous or prejudicial to the interests of the Revenue, as it complied with the order of TPO u/s 92CA(4).

14. Whether the order passed by the TPO is correct on the method adopted is a subject matter of opinion as TPO has clearly stated in the order passed on 22.11.2007 that the net asset value adopted by assessee cannot be accepted and he went on to determine the price on price earning Method. Whether the TPO is right in stating that average price of net asset value and price earning method value (valuation arrived at in the proposal for revision under section 263) is a debatable issue on which two opinions can be formed. The Hon'ble Supreme Court in the case of CIT vs. Max India Limited, 295 ITR 282 has considered the phrase 'prejudicial to the interests of the Revenue' as under:

“The phrase “prejudicial to the interests of the Revenue” in section 263 of the Income-tax Act, 1961, has to be read in conjunction with the expression “erroneous” order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when the Assessing Officer adopts one of two courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Assessing Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the Revenue, unless the view taken by the Assessing Officer is unsustainable in law”.

15. Respectfully following the above, where two views are possible and the TPO has taken one possible view the proceedings under section 263 cannot be invoked. Even otherwise, in this case instead of initiating proposal on TPO order as suggested, the CIT initiated the proceedings under AO's order which is not erroneous or prejudicial to the interests of the Revenue, as AO sincerely followed the mandate of provisions of section 92CA in proceeding to compute the total income under sub section 4 of section 92CA in conformity with the arms length price so determined by the TPO. As the provisions of section 92CA(4) have been amended w.e.f. 1.6.2007 which used the word “shall” AO is bound to follow the TPO's order determined under sub section 3 (which was itself modified by an order under sub section-5) of 92CA. Accordingly, we do not see any error in the order of AO so that it can be considered as erroneous and prejudicial to the interests of the Revenue.

16. The learned DR referred to the order of the ITAT in Sun Microsystems India Pvt. Ltd in ITA No. 661(Bang.)/2007. The assessment year therein was assessment year 2002-03 and the TPO order was dated 24.03.2005. At that time the relevant provisions of section 92CA(4) empowers AO to compute the total income 'having regard to' the arms length price. It was not a mandatory provision, therefore under those provisions invoking of power under section 263 by the CIT was upheld. However, provisions of section 92CA(4)

were modified w.e.f. 1.06.2007. So long as the order under section 92CA(3) by the TPO was available on record, AO has no other option than to follow the same which AO did in this case. Accordingly reliance on the above decision cannot be accepted in view of the change in the provisions.

17. The learned DR also relied on the decision of the Hon'ble Supreme Court in the case of T.N. Civil Supplies Corporation Ltd vs. CIT, 260 ITR 82 (SC) to submit that the CIT has power to revise the order passed by AO on the directions of the superior authority. Reliance on this case also is misplaced in the sense that the issue involved in that appeal was whether the order passed by the Income Tax Officer was prejudicial to the interests of the Revenue when the same was passed with the approval of the IAC under section 144B. In that case the CIT was the superior authority to the IAC. Therefore, on the set of facts the Hon'ble Supreme Court held that there is no scope for limiting the order passed by the Income Tax Officer under section 263 to exclude the orders passed by the Income Tax Officer on the directions of the superior authority either under section 144A or under section 144B. In this present case, no such issue arises as the CIT wrongly invoked the proceedings under section 263 on AO's order when the proposal by the TPO itself is for initiating the proceedings under section 263 on the TPO order under section 92CA(3). Therefore, we are not persuaded by the arguments of the DR that the order of the TPO can also be revised. For these reasons, we are of the opinion that the order passed by the CIT cannot be justified on the facts of the case and accordingly the same was set aside.

18. Before parting, we would like to observe that there seems to be no clarity about the authority who has to modify the TPO order in case, any order of TPO is prejudicial to the interests of Revenue. CIT cannot exercise jurisdiction over TPO as TPO functions separately under the Director of Income Tax (TP). In our view the

DIT should have initiated the proceedings under section 263 on the order of the TPO instead of sending proposal to the CIT for revising the order of the TPO. Be that as it may, the CIT, however, wrongly initiated the proceedings on the assessment order under section 143(3) which was in conformity with the TPO order under section 92CA(3). As there is no revised TPO order in this case, the order of CIT holding the order of AO u/s 143(3) dtd.01-01-08 as erroneous and prejudicial to the interests of revenue can not be upheld.

19. In the result appeal filed by assessee is allowed and the order of the CIT u/s 263 is set aside.

Order pronounced in the open court on 31st October, 2012.

Sd/-
(Amit Shukla)
Judicial Member

Sd/-
(B. Ramakotaiah)
Accountant Member

Mumbai, dated 31st October, 2012.

Vnodan/sps

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The concerned CIT(A)*
4. *The concerned CIT*
5. *The DR, "K" Bench, ITAT, Mumbai*

By Order

Assistant Registrar
Income Tax Appellate Tribunal,
Mumbai Benches, MUMBAI