IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Smt. Kavitha Rajagopal (JM)

I.T.A. No. 1096/Mum/2022 (A.Y. 2018-19)

DBS Bank India Limited (Successor to DBS Bank Ltd. India Branches) 01st Floor, Express Towers Nariman Point Mumbai-400 021. PAN : AAACT4652J	Vs.	CIT (IT) Room No. 1706 17th Floor Air India Building Nariman Point Mumbai-400 021.
(Appellant)		(Respondent)

Assessee by	Shri Rajan Vora & Shri Nikhil Tiwari
Department by	Ms.Surbhi Sharma
Date of Hearing	23.02.2023
Date of Pronouncement	12.05.2023

O R D E R

Per B.R.Baskaran (AM) :-

The assessee has filed this appeal challenging the revision order dated 17-03-2022 passed by Ld Commissioner of Income tax (IT), Mumbai for assessment year 2018-19. The contention of the assessee is that the impugned revision order is not valid.

2. The facts relating to the case are stated in brief. The assessment of the year under consideration was completed by the assessing officer u/s 143(3) r.w.s 144C(3) of the Act on 06-08-2021. The Ld CIT(IT) examined the assessment record and noticed the assessment of the year under consideration was selected for scrutiny under CASS for certain reasons, which inter alia, included "TP Risk Parameter –International Transactions". He also noticed that the assessee has entered into several international transactions amounting to Rs.279457.28 crores. The Ld CIT(IT) further

noticed that as per Instruction No.3/2016 dated 10-03-2016 issued by CBDT, the AO is mandatorily required to refer the matter of determination of Arms Length Price (ALP) of international transactions to the Transfer pricing Officer (TPO). The Ld CIT(IT) noticed that the AO has not referred the matter of determination of ALP of international transactions to TPO and hence, the AO has failed to follow the CBDT instruction No.3/2016 dated 10-03-2016, which has been issued by CBDT issued u/s 119 of the Act. Hence, the Ld CIT(IT) held that the impugned assessment order is erroneous and prejudicial to the interests of revenue as per clause (c) of Explanation 2 to sec. 263 of the Act. Accordingly, the Ld CIT(IT) initiated revision proceedings u/s 263 of the Act. After providing adequate opportunity to the assessee, the Ld CIT(IT) set aside the impugned assessment order and directed as under:-

> "6. The assessing officer is directed to make a reference to the TPO as stipulated in the instruction 3/2016 para 3.2 and pass assessment order in respect of the international Transactions based on the order of TPO as per law. The assessment order passed u/s 143(3) r.w.s 144C(3) dated 06.08.2021 would be modified in consequence to the extent of implementation of this limited direction in this order u/s 263."

Aggrieved by the revision order so passed by Ld CIT(IT), the assessee has filed this appeal challenging the said revision order.

3. The contentions of the Ld A.R are that

(a) the AO himself has called for details of international transactions during the course of assessment proceedings. Thus the AO has made adequate enquiry and has duly applied his mind on this issue;

(b) the AO did not refer the matter of determination of ALP in the preceding two assessment years, viz., AY 2016-17 and 2017-18. He also did not make any addition towards transfer pricing adjustment.

(c) under the provisions of sec.92CA, the AO **may,** with the previous approval of the Commissioner, refer the computation of arms length price in relation to international transactions, if he considers it necessary or expedient to do so. Since the provisions of sec.92CA uses the word "may", it is the discretion of the AO

either to refer the matter to the TPO or not to refer. It would mean that the AO himself can determine ALP of international transactions.

(d) the CBDT circular cannot override above discussed express provisions of the Act and hence the Ld CIT(IT) was not justified in passing impugned revision order by placing reliance on the Circular issued by CBDT, which is contrary to the provisions of the Act.

3.1 We noticed earlier that the Ld CIT (IT) has placed reliance on an instruction issued by CBDT, which has stated that the Return of income of assessee involving T.P risk is required to be selected for scrutiny and be referred to the TPO. In this regard, it was submitted by Ld A.R that the assessee has complied with the requirements of sec.286 of the Act (provisions governing country-by-country reporting requirements) and accordingly filed Form 3CEAC in terms of Rule 10DDB. This form requires furnishing of basic details in relation to ultimate holding company. Accordingly, it was contended that there was "no T.P risk" in the assessee's international transactions and hence it cannot be said that the return of income of the assessee was selected on "T.P risk parameters". Accordingly, it was contended that, in the absence of T.P risk parameter, there was no requirement, as per the CBDT circular, to refer the matter of determination of ALP to the TPO.

3.2 The Ld A.R further contended that the AO is required to get previous approval of the Principal Commissioner or Commissioner before referring the matter to the TPO. However, the CIT(IT), in his revision order, has directed the AO to refer the matter to the TPO. Further, as per paragraph 3.4 of the Circular, the AO must record his satisfaction that there is an income or a potential of an income arising and/or being affected on determination of ALP of an international transaction, meaning thereby, the AO has to record his satisfaction before referring the matter to TPO. He contended that the Ld CIT(IT) has circumvented above said jurisdictional requirements of recording

satisfaction and also taking prior approval of CIT. It was also contended that the Ld CIT(IT) has extended the time limit for completion of assessment by passing the impugned revision order.

3.3 The Ld A.R placed his reliance on various case laws in support of various contentions raised by him.

4. On the contrary, the Ld D.R submitted that the case of Ld CIT(IT) is that the AO is required to refer the matter of determination of ALP to TPO as per the Instruction no.3/2016 issued by CBDT. Since the circular of CBDT is binding on the AO, he has to mandatorily comply with the instructions given in it. Accordingly, the Ld D.R contended that non-compliance of the instructions issued by CBDT would make the assessment order erroneous and prejudicial to the interests of revenue as per the Explanation 2(c) of sec. 263 of the Act.

5. We heard rival contentions and perused the record. We noticed that the Ld CIT(IT) has invoked Explanation 2 to sec. 263 of the Act. This Explanation introduces a deeming fiction into the provisions, whereby the order shall be deemed to be erroneous and prejudicial to the interests of revenue, if it has been passed under the circumstances mentioned in the Explanation 2. The said Explanation 2 reads as under:-

> Explanation 2.—For the purposes of this section, it is hereby declared that an order passed by 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.

It can be noticed that, as per clause (c) of the above said Explanation, if in the opinion of PCIT or CIT the order has not been made in accordance with any order, direction or instruction issued by the Board u/s 119 of the Act, then the said order is **"deemed to be erroneous in so far as it is prejudicial to the interests of revenue".**

5.1 There should not be any dispute that the legal fiction introduced in the Statute by way of "deeming provision" may deviate from the general understanding of law. A thing which is not true may be deemed to be true under the law, by way of introducing a legal fiction. Hence, it is mandatory for Ld PCIT/CIT to examine the assessment records, inter alia, in terms of situations covered in Explanation 2 (supra) also. In the instant case, we notice that the Instruction no.3/16 issued by CBDT mandates that the AO should refer the matter of determination of ALP of international transactions to TPO. For the sake of convenience, we extract below the above said instruction no.3/2016 issued by CBDT:-

"InstructionNo.3/2016

F.No.500/9/2015-APA-II
Government of India Ministry of Finance Department of Revenue
Central Board of Direct Taxes
Foreign Tax and Tax Research Division-I
APA-II Section

New Delhi, dated10th March, 2016

Subject: Guidelines for Implementation of Transfer Pricing Provisions- Replacement of InstructionNo.15/2015-Regarding

The provisions relating to transfer pricing are contained in Sections 92 to 92F in Chapter X of the Income-tax Act, 1961. These provisions came into force w.e.f. Assessment Year 2002-2003 and have seen a number of amendments over the years, including the insertion of Safe Harbour and Advance Pricing Agreement provisions and the extension of the applicability of transfer pricing provisions to Specified Domestic Transactions.

In terms of the provisions, any income arising from an international transaction or specified domestic transaction between two or more associated enterprises shall be computed having regard to the Arm's Length Price. Instruction No. 3 was issued on 20th May, 2003 to provide guidance to the Transfer Pricing Officers (TPOs) and the Assessing Officers (AOs) to operationalise the transfer pricing provisions and to have procedural uniformity. Due to a number of legislative, procedural and structural changes carried out over the last few years, Instruction No. 3 of 2003 was replaced with Instruction No. 15/2015, dated 16th October, 2015. After the issuance of Instruction No. 15/2015, the Board has received some suggestions and queries, which have been examined in detail. Accordingly, this Instruction is being issued to replace Instruction No. 15 of 2015. This Instruction is applicable for both international transactions and specified domestic transactions between associated enterprises. The guidelines on various issues are as follows:

Reference to Transfer Pricing Officer (TPO)

3.1 The power to determine the Arm's Length Price (ALP) in an international transaction or specified domestic transaction is contained in sub-section (3) of Section 92C. However, Section 92CA provides that where the Assessing Officer (AO) considers it necessary or expedient so to do, he may refer the computation of ALP in relation to an international transaction or specified domestic transaction to the TPO. For proper administration of the Income-tax Act, the Board has decided that the AO shall henceforth make a reference to the TPO only under the circumstances laid out in this Instruction.

3.2 All cases selected for scrutiny, either under the Computer Assisted Scrutiny Selection [CASS) system or under the compulsory manual selection system (in accordance with the CBDT's annual instructions in this regard – for example, InstructionNo.6/2014 for selection in F.Y 2014-15 and Instruction No. 8/2015 for selection in F.Y 2015-16), on the basis of transfer pricing risk parameters [in respect of international transactions or specified domestic transactions or both] have to be referred to the TPO by the AO, after obtaining the approval of the jurisdictional Principal Commissioner of Income-tax(PCIT) or Commissioner of Income-tax(CIT). The fact that a case has been selected for scrutiny on a TP risk parameter becomes clear from a

perusal of the reasons for which a particular case has been selected and the same are invariably available with the jurisdictional AO. Thus, if the reason or one of the reasons for selection of a case for scrutiny is a TP risk parameter, then the case has to be mandatorily referred to the TPO by the AO, after obtaining the approval of the jurisdictional PCIT or CIT.

3.3 Cases selected for scrutiny on non-transfer pricing risk parameters but also having international transactions or specified domestic transactions, shall be referred to TPOs only in the following circumstances:

(a) where the AO comes to know that the taxpayer has entered into international transactions or specified domestic transactions or both but the taxpayer has either not filed the Accountant's report under Section 92E at all or has not disclosed the said transactions in the Accountant's report Wed;

(b) where there has been a transfer pricing adjustment of Rs. 1O Crore or more in an earlier assessment year and such adjustment has been upheld by the judicial authorities or is pending in appeal; and

(c) where search and seizure or survey operations have been carried out under the provisions of the Income-tax Act and findings regarding transfer pricing issues in respect of international transactions or specified domestic transactions or both have been recorded by the Investigation Wing or the AO.

3.4 For cases to be referred by the AO to the TPO in accordance with paragraphs 3.2 and 3.3 above, in respect of transactions having the following situations, the AO must, as a jurisdictional requirement, record his satisfaction that there is an income or a potential of an income arising and/or being affected on determination of the ALP of an international transaction or specified domestic transaction before seeking approval of the PCIT or CIT to refer the matter to the TPO for determination of the ALP:

- where the taxpayer has not filed the Accountant's report under Section 92E of the Act but the international transactions or specified domestic transactions undertaken by it come to the notice of the AO;

- where the taxpayer has not declared one or more international transaction or specified domestic transaction in the Accountant's report filed under Section 92E of the Act and the said transaction or transactions come to the notice of the AO; and

- where the taxpayer has declared the international transactions or specified domestic transactions in the Accountant's report filed under Section 92E of the Act but has made certain qualifying remarks to the effect that the said transactions are not international transactions or specified domestic transactions or they do not impact the income of the taxpayer.

In the above three situations, the AO must provide an opportunity of being heard to the taxpayer before recording his satisfaction or otherwise. In case no objection is raised by the taxpayer to the applicability of Chapter X [Sections 92to 92F] of the Act to these three situations, then AO should refer the international transaction or specified domestic transaction to the TPO for determining the ALP after obtaining the approval of the PCIT or CIT. However, where the applicability of Chapter X [Sections 92 to 92F] to these three situations is objected to by the taxpayer, the AO must consider the taxpayer's objections and pass a speaking order so as to comply with the principles of natural justice. If the AO decides in the said order that the transaction in question needs to be referred to the TPO, he should make a reference after obtaining the approval of the PCIT or CIT.

3.5 In addition to the cases to be referred as per paragraphs 3.2 and 3.3, a case involving a transfer pricing adjustment in an earlier assessment year that has been fully or partially set-aside by the ITAT, High Court or Supreme Court on the issue of the said adjustment shall invariably be referred to the TPO for determination of the ALP.

3.6 Since the provisions of Section 92CA of the Act, inter-alia, refer to the computation of the ALP of the international transaction or specified domestic transaction, it is imperative for the AO to ensure that all international transactions or relevant specified domestic transactions or both, as the case may be, are explicitly mentioned in the letter through which the reference is made to the TPO. In this regard, guidelines as under may be followed:

(a) If a case has been selected for scrutiny on a TP risk parameter pertaining to international transactions only, then the international transactions shall alone be referred to the TPO;

(b) If a case has been selected for scrutiny on a TP risk parameter pertaining to specified domestic transactions only, then the specified domestic transactions shall alone be referred to the TPO; and

(c) If a case has been selected for scrutiny on the basis of TP risk parameters pertaining to both international transactions and specified domestic transactions, then the international

transactions and the specified domestic transactions shall together be referred to the TPO.

Since international transactions may be bench marked together at the entity level due to the inter-linkages amongst them, if a case has been selected for scrutiny on a TP risk parameter pertaining to one or more international transactions, then all the international transactions entered into by the taxpayer-except those about which the AO has decided not to make a reference as per paragraph 3.4-shall be referred to the TPO.

For administering the transfer pricing regime in an efficient manner, it is clarified that though AO has the power under Section 92C to determine the ALP of international transactions or specified domestic transactions, determination of ALP should not be carried out at all by the AO in a case where reference is not made to the TPO. However, in such cases, the AO must record in the body of the assessment order that due to the Board's Instruction on this matter, the transfer pricing issue has not been examined at all.
.....

7. This issues under Section 119 of the Income-tax Act, 1961 and replaces Instruction No. 15 of 2015 with immediate effect. References made to TPOs u/s 92CA of the Act after the issuance of InstructionNo.15/2015, which are not in conformity with this Instruction, may be withdrawn by the concerned PCIT or CIT.

[Sobhan Kar]
Director (APA), Government of India"

5.2 A careful perusal of the above said instruction would show that, as per paragraph 3.2 of the Instruction, the AO is required to refer the matter of determination of ALP of international transactions to the TPO after obtaining approval from PCIT/CIT, if the return of income of the assessee has been selected under "T.P risk" parameter. Further, following directions have also been in the above said Instruction no.3/2016:-

"For administering the transfer pricing regime in an efficient manner, it is clarified that though AO has the power under Section 92C to determine the ALP of international transactions or specified domestic transactions, determination of ALP should not be carried out at all by the AO in a case where reference is not made to the TPO. However, in such cases, the AO must record in the body of the assessment order

> that due to the Board's Instruction on this matter, the transfer pricing issue has not been examined at all."

It is not the case that the assessing officer has recorded above said note in the assessment order for not referring the matter of determination of ALP of transactions to TPO. We notice that the Ld CIT(IT) has recorded a clear finding that the return of income of the assessee, inter alia, on T.P risks parameter.

5.3 We notice that the AO, in the instant case, did not refer the matter of determination of ALP to the TPO as per the mandatory requirement of Instruction No.3/2016. As per clause (c) of Explanation 2 to sec. 263, the order passed without complying with the instruction etc., issued by CBDT u/s 119 of the Act would render the order erroneous and prejudicial to the interests of revenue. Since Explanation 2 is a deeming provision, the same has to be read strictly and in the instant case, in our view, clause (c) of Explanation 2 shall squarely apply to the facts of the present case.

5.4 The Ld A.R has raised many contentions before us. In our view, all those contentions are not required to be addressed in the instant appeal, since the facts of the present case is squarely covered by clause (c) of Explanation 2 to sec. 263 of the Act. The assessee is at liberty to raise all those contentions before the AO in the set aside proceedings. In this view of the matter, we are of the view that various case laws relied upon by the assessee are either not applicable at this stage or distinguishable

6. In view of the foregoing discussions, we are of the view that there is no infirmity or illegality in the impugned revision order passed by Ld CIT(IT). Accordingly, we do not find any merit in the present appeal filed by the assessee.

7. In the result, the appeal filed by the assessee is dismissed.

Pronounced in the open court on 12.5.2023.

Sd/-	Sd/-
(KAVITHA RAJAGOPAL)	(B.R. BASKARAN)
Judicial Member	Accountant Member

Mumbai; Dated : 12/05/2023

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(Judicial)
4. PCIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)

PS ITAT, Mumbai