आयकर अपीलीय अधिकरण "सी" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, PUNE

BEFORE SHRI R.S.SYAL, VP AND
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं. / ITA No. 736/PUN/2019
निर्धारण वर्ष / Assessment Year : 2013-14

Nalco Company, USA
C/o. Nalco Water India Limited
238/239, 3rd Floor, Quadra-I,
Panchshil, Magarpatta Road,
Pune-411 028.
PAN : AACCN3661R

.......अपीलार्थी / Appellant

बनाम / V/s.

The Commissioner of Income Tax
(International Taxation/Transfer Pricing),
Pune.

......प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No. 376/PUN/2020
निर्धारण वर्ष / Assessment Year : 2013-14

Nalco Company, USA
C/o. Nalco Water India Limited
238/239, 3rd Floor, Quadra-I,
Panchshil, Magarpatta Road,
Pune-411 028.
PAN : AACCN3661R

.......अपीलार्थी / Appellant

बनाम / V/s.

The Assistant Commissioner of Income Tax
(International Taxation), Circle-2
Pune.

......प्रत्यर्थी / Respondent

Assessee by	:	Shri Ketan Ved
Revenue by	:	Shri Rajiv Kumar

सुनवाई की तारीख / Date of Hearing : 01.12.2021
घोषणा की तारीख / Date of Pronouncement : 06.12.2021

आदेश / ORDER

PER PARTHA SARATHI CHAUDHURY, JM:

These two appeals preferred by the assessee emanates from the orders of the Ld. Commissioner of Income Tax/Assistant Commissioner of Income Tax, Pune dated 29.03.2019 & 10.02.2020 for the assessment year 2013-14 passed u/s.263 & 143(3)/263 read with Section 144C (13) and 153(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') as per the grounds of appeal on record.

2. In ITA No.736/PUN/2019 for the assessment year 2013-14, the assessee has raised following grounds:

> *"**1:0 Re. Validity of order u/s.263:***
>
> *1.1. The Commissioner of Income-tax (International Tax/Transfer pricing) (hereinafter referred to as the 'CIT') has erred in holding that the order dated 20 May 2016 passed by the Assessing Officer u/s.143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') was erroneous and prejudicial to the interest of revenue and in setting aside the same by invoking the powers u/s. 263 of the Act.*
>
> *1.2. The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject the order passed by the Assessing Officer was not erroneous and hence the setting aside of the same by the CIT u/s. 263 of the Act is erroneous and bad in law.*
>
> *1.3. The Appellant submits that the impugned order passed u/s. 263 of the Act by the CIT be struck down.*
>
> *Without prejudice to the aforesaid:*
>
> ***2:0 Re- Taxability of the amount received by the Appellant from its Indian Subsidiary :-***
>
> *2.1. The CIT has erred in holding that the amounts received by the Appellant during the year under consideration from its Indian subsidiary under the Service Agreement is taxable in India as "Royalty" /"Fees for*

Technical Services" under the Act and "Royalty" /"Fees for Included Services" under the Double Taxation Avoidance Agreement between India and USA.

2 :2 The Appellant submits that considering the facts and circumstances of its case and the law prevailing on the subject, the amount received by it during the year under consideration under the Service Agreement does not fall within the purview of the term "Royalty'? "Fees for Included Services" under the Double Taxation A voidance Agreement between India and USA and is therefore not taxable in India and the stand taken by the CIT in this regard is incorrect, erroneous and misconceived.

2:3 The Appellant submits that the action of the CIT in directing the Assessing Officer to re-examine the taxability of the amount received by it during the year under consideration under the Service Agreement is bad in law and hence the same ought to be struck down.

3:0 Re : General:

3.1 The appellant craves leave to add, alter, amend, substitute and /or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal."

3. The Ld. Counsel for the assessee opening his argument submitted that this is a case of revisionary jurisdiction u/s.263 of the Act passed by the Ld. Commissioner of Income Tax and the entire proceedings were initiated at the behest of the Assessing Officer and demonstrating the same, the Ld. Counsel referred to the draft assessment order dated 03.07.2019 in ITA No. 376/PUN/2020 for the assessment year 2013-14 wherein at Para 2, it is stated as under :

"*2. The Office of the ACIT (IT), Circle 1(2) Kolkata sent a proposal for revision u/s.263 of the I.T Act on 06.02.2017. The case was transferred to this charge on 10.09.2018 and the case records was received in this office on 24.09.2018. A formal proposal for revision u/s.263 was sent by JCIT (IT) Pune range to the CIT (IT & TP)- Pune on 30.01.2019, and subsequently, the Commissioner of Income Tax (IT & TP) Pune vide order u/s.263 of the Act dated 29.03.2019 concluded that the order of the Assessing Officer dated 20.05.2016 was an erroneous order which is prejudicial to the interest of revenue and accordingly, set aside the order with direction to analyse all the documents, conduct enquiries on various issues, do verification of facts and conduct necessary investigation, apply the law, examine the various contracts, expenditure incurred by assessee., if any in India to ascertain the actual quantity and extent of services provided by assessee benefit to the recipients (NWIL) by these services etc. and pass a fresh assessment order and re compute the Assessee's income after perusing g legal provisions, making further enquiries as directed and after giving due opportunity to the assessee and perusing the necessary evidence."*

4. That further, the Ld. Counsel also brought to our notice a letter dated 06.02.2017 by ACIT (IT) Circle-1(2), Kolkata where he has written a letter to CIT (IT/TP), Kolkata which is annexed as follows:

(२) द्वितीय तल,
क्र-206, आयकर भवन पूर्व,

Asst. Commissioner of Income-tax
(International Taxation), Circle - 1(2), Kolkata
Room No. 206, 2nd Floor,
Aayakar Bhawan Poorva,
110, Shantipally, Kolkata-700 107.
Office telephone No. 033 24410205
Mail id - Kallol.mistry@incometax.gov.in

No. ACIT(IT)/C-1(2)/Proposal for 263 /2016-17 3/9 Date: 06-02-2017

सेवा में/To
THE CIT (IT& TP), KOLKATA
Aayakar Bhawan poorva,
110, Shantipally,
Kolkata 700110.

Sir, (Through proper channel)

<u>Proposal for revision of the order u/s 263 of the I.T.Act 1961 – matter regarding</u>

कृपया उपरोक्त का संदर्भ लें/ Kindly refer to the above.

2. The order u/s 143(3) of the I.T.Act 1961 was passed in the case of **NALCO COMPANY, USA PAN- AACCN3661R for the A.Y. 2013-14 on 18-05-2016** wherein addition was made on undisclosed interest income reflected in 26AS. Brief fact of the case is that - The Assessee is a foreign company incorporated and existing under the laws of Delaware United States of America (USA). It is a leading provider of integrated water treatment and process water improvement services, chemical and equipment program for industrial and institutional applications and providing intra-group services. The Assessee is also engaged in manufacturing and selling of water treatment chemicals, industrial additives, oilfield chemicals and de-mineralized water in India through its subsidiary company Nalco Water India Limited (herein after referred to as NWIL). The Assessee is a tax resident of the USA in terms of the India-USA DTAA and do not have a Permanent Establishment (PE) in India. The Assessee has in its possession substantial resources in commercial, financial, accounting and other matters which could be employed for the benefit of the individual group companies. Such resources are pooled by the Assessee to provide the best possible services and support to the group entities including that of NWIL and as such entered into service agreements to this effect with NWIL. It has been also agreed upon vide the agreements that in consideration of the services provided, the members will remit payment to the Assessee for the amount and in the currency stated on the applicable invoices raised by the Assessee. During the relevant Financial Year, the Assessee provided the following services to NWIL :-

Insurance and risk management, Treasury, Marketing, Credit and Collection, Operations planning, Supply Chain, Procurement, Safety, healthy & Environment, Information technology, Customer services, Human Resources, Legal & divisional support services **(Energy Services (Upstream),Energy Services (downstream) and I & IS field operations).**

21C

...e Assessee has accordingly received **₹.11,54,95,930/-** from NWIL during the relevant ...ancial year but has shown the income as NIL in its Return of Income. The Assessee is providing various **consultancy and management services** to the Indian subsidiary company by virtue of two separate agreements which are in the nature of **fees for technical services** as per the I.T.Act 1961 and **fees for included services** as per the India US DTAA.

3. In this context, it is to be mentioned that similar services are being provided by the Assessee in the A.Y. 2014-15 and the assessment was completed by the under signed by considering that the gross receipts under service Agreement should be taxable as both Royalty / FIS to the extent –

(i) Royalty to the extent they are imparting commercial know-how and commercial experience in terms of section 9(1) (vi) of the Income Tax Act read with Article 12.3(a)of the India USA DTAA

(ii) Fees for Included Services to the extent they are ancillary and subsidiary to the application or enjoyment of the right, property or **information** provided in terms of section 9(1) (vii) of the Income Tax Act read with Article 12.4 (a) and 12.3(a) of the India - USA DTAA

(iii) Fees for Included Services to the extent they are making available services to the NWIL's personnel as envisaged in the Agreement, in terms of section 9(1) (vii) of the Income Tax Act read with Article 12.4 (b) of the India- USA DTAA.

The gross receipts under service agreement were therefore considered to be taxable at the rate mentioned under Article 12(4) & (5) of the DTAA, as applicable, being the rate of tax under the DTAA vis-a-vis that of Income Tax Act, whichever is more beneficial to the Assessee, in accordance with Section 90(2) of the Income Tax Act. A copy of the Draft Assessment Order for the A.Y. 2014-15 issued to the Assessee is enclosed as Annexure A.

4. In view of the above fact and circumstances of the case it appears that the amount of **₹.11,54,95,930/-** being the gross receipts under service agreement were therefore not considered for charging to tax in India resulted in underassessment of income. It is therefore proposed that necessary remedial measure by way of revision of income u/s 263 of the Income-tax Act may kindly be initiated and suitable order/directions may kindly be given accordingly. In this context, it may kindly be noted that the proceedings **u/s 263** of the Income-tax Act will be **barred by limitation on 31.03.2019.** The relevant Assessment folder (in one part) for the A.Y. 2013-14 is enclosed herewith.

Enclo :- As above.

Yours faithfully,

06/02/2019.

(KALLOL MISTRY/ कल्लोल मिस्त्री)
ACIT (I.T.) Circle – 1(2),Kolkata

5. The JCIT, Range IT, Pune had thereafter, written a letter to CIT(IT/TP) Pune dated 30.01.2019 proposing for revisionary jurisdiction u/s.263 of the Act in the case of the assessee for the assessment year 2013-14 and the said letter is annexed as follows:

JOINT COMMISSIONER OF INCOME TAX,
Range – International Taxation, Pune
2nd Floor, Income Tax Office, B.O. Bhavan, Sector No. 47,
Plot No. 1, Pune Satara Road, Parvati, Pune – 411009.
Phone :- 020-24226647

No. Range-IT / Proposal u/s 263 / 2018-2019 / 1 / 1039 Date :- 30.01.2019

आयकर उप आयुक्त (अंतर्राष्ट्रीय कराधान) सर्कल-2, पुणे का कार्यालय
Office of the Dy. Commissioner of Income Tax (International Taxation) Cir. 2, Pune

To,
CIT(IT & TP), Pune.

Sir,

Subject :- Proposal for revision u/s 263 of the Income Tax Act, 1961 for the A.Y. 2013-2014 in the case of M/s. Nalco Company, USA (PAN – AACCN3661R) for the A.Y. 2013-2014 – regarding -

Reference :- Your Office Letter No. PN / CIT-(IT / TP) / T-22 / 263 / 2018-19 / 451 dated 23.01.2019

Please refer to the above mentioned letter.

2. The case of M/s. Nalco Company, USA was received in the charge of ACIT(IT), Circle-2, Pune on transfer from DCIT(IT), Circle-1(2), Kolkata. It appears that a letter dated 06.02.2017 was written to the CIT(IT&TP), Kolkata by the then ACIT, Circle-1(2), Kolkata to invoke jurisdiction u/s 263 of the Income Tax Act, 1961 and set aside the order u/s 143(3) dated 20.05.2016 passed for the assessment year 2013-2014 as the gross receipts under service agreement of Rs. 11,54,95,930/- was not considered for taxation in India resulting in under assessment of income. Copy of the letter dated 06.02.2017 is enclosed for perusal.

3. On perusal of the records for the assessment year 2014-2015, it is seen that the gross receipts under service agreement amounting to Rs. 18,15,39,759/- has been held to be taxable as both royalty / fees for included services after elaborate discussion. Copy of the order dated 06.02.2017 passed for the assessment year 2014-2015 is enclosed.

4. It is, therefore, submitted that the order u/s 143(3) / 153(1) / 144C(1) dated 20.05.2016 for the assessment year 2013-2014 is both erroneous and prejudicial to the interests of revenue and the same may be set aside to be done afresh de novo in line with the stand taken in the assessment year 2014-2015 after giving adequate opportunity of hearing to the assessee to present its case. The proceedings u/s 263 are getting barred by limitation on 31.03.2019.

Yours faithfully,

sd/-
(MAHADEVAN A.M.K.)
Jt. CIT, Range-IT, Pune.

Copy to :- The ACIT(IT), Circle-2, Pune for information.

31/01/2019

6. The Ld. Counsel for the assessee vehemently submitted that the legal framework as regards the provisions of section 263 of the Act does not permit that the Assessing Officer would recommend the case for assumption of revisionary jurisdiction u/s.263 of the Act by the Commissioner of Income Tax. That it is always the Commissioner of Income Tax u/s.263 of the Act who may call for and examine the record of any proceedings under this Act and if he considers that any order passed 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.

7. Meaning thereby, the entire process of examination of records of assessment whether it is erroneous or prejudicial to the interest of the revenue, this examination and verification has to be done by the Commissioner of Income Tax. This view has been accepted by the Pune Bench of the Tribunal in the case of **Alfa Laval Lund AB Vs. CIT (IT/TP), Pune in ITA No.1287/PUN/2017** for the assessment year 2012-13 dated 02.11.2021 wherein the Tribunal on the similar set of facts and circumstances held and observed as follows:

> *"3. We have heard both the sides through Virtual Court and gone through the relevant material on record. It can be seen from para 4 of the ld. CIT"s order that: "A proposal for revision u/s 263 of the IT Act, 1961 was received from DCIT(IT)-1, Pune through the Jt.CIT(IT), Pune vide letter No. Pn/Jt.CIT(IT)/263/2016-17/61 dated 23.05.2016". It is thus manifest that the edifice of the revision in the extant case has been laid on the bedrock of receipt of the proposal from the AO. At this stage, it would be worthwhile to have a glance at sub-section (1) of section 263 of the Act, which runs as under:-*

"The 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."

4. Sub-section (1) of section 263 of the Act is an enabling provision which confers jurisdiction on the CIT to revise an assessment order which he considers erroneous and prejudicial to the interests of revenue. The process of revision u/s 263 of the Act initiates only when the CIT calls for and examines the record of any proceeding under this Act and considers that any order passed by the AO is erroneous and prejudicial to the interests of the revenue. The twin conditions of – (i) the CIT calling for and examining the record; succeeded by (ii) his considering the assessment order as erroneous etc. – are sine qua non for the exercise of power under this section. The use of the word `and' between the expression `call for and examine the record ...." and the expression `if he considers that any order ... is erroneous ..." abundantly demonstrates that both these conditions must be cumulatively fulfilled by the CIT and in the same order, that is, the first followed by the second. In other words, the kicking in point for invoking jurisdiction u/s 263 is calling for and examining the record of any proceedings under the Act by the CIT leading him to consider the assessment order erroneous etc. A communication from the AO is not `the record of any proceedings under this Act'. To put it simply, the consideration that the assessment order is erroneous and prejudicial to the interests of the revenue should flow from and be the consequence of his examination of the record of proceedings. If such a consideration is not preceded by the examination of record of the proceedings under the Act, the condition for revision does not get magnetized.

5. It is trite that a power which vests exclusively in one authority, can"t be invoked or cause to be invoked by another, either directly or indirectly. Section 263 of the Act confers power on the CIT to revise an assessment order, subject to certain conditions. Instantly, we are confronted with a situation in which the revision was initiated on the basis of the AO sending a proposal to the CIT and not on the CIT suo motu calling for and examining the record of the assessment proceedings and thereafter considering the assessment order erroneous and prejudicial to the interests of the revenue. The AO recommending a revision to the CIT has no statutory sanction and is a course of action unknown to the law. If AO, after passing an assessment order, finds something amiss in it to the detriment of the Revenue, he has ample power to either reassess the earlier assessment in terms of section 147 or carry out rectification u/s 154 of the Act. He can't usurp the power of the CIT and recommend a revision. No overlapping of powers of the authorities under the Act can be permitted. As the revision proceedings in this case have triggered with the AO sending a proposal to the ld. CIT and then the latter passing the order u/s 263 of the Act on the basis of such a proposal, we hold that it became a case of jurisdiction deficit resulting into vitiating the impugned order. Without going into the merits of the case, we quash the impugned order on this legal issue itself.

6. In the result, the appeal is allowed.”

Respectfully, following the same parity of reasoning of the order of the Tribunal referred herein above, when the revision proceedings have been triggered only on basis of proposal being sent by the Assessing Officer to the Ld. Commissioner of Income Tax and the latter passing the order u/s.263 on basis of such proposal, it certainly under the circumstances becomes a case of jurisdiction deficit resulting into vitiating the order. Without going into the merits of the case, we quash the impugned order on this legal ground itself. We allow the grounds of appeal raised by the assessee.

8. In the result, **appeal of the assessee in ITA No.736/PUN/2019 is allowed.**

ITA No.376/PUN/2020
A.Y.2013-14

9. The Ld. Counsel for the assessee submitted that this appeal is consequential to the order passed u/s.263 of the Act. Since the appeal relating to the order passed u/s. 263 of the Act has been decided in favour of the assessee wherein the order u/s.263 is itself quashed, the order passed u/s.143(3) becomes infructuous and therefore, dismissed as such.

10. In the result, **appeal of the assessee in ITA No.376/PUN/2020 for the assessment year 2013-14 is dismissed being infructuous.**

11. In the combined result, **appeal of the assessee in ITA No.736/PUN/2019 is allowed and appeal of the assessee in ITA No.376/PUN/2020 is dismissed.**

Order pronounced on 06th day of December, 2021.

Sd/-	Sd/-
R.S.SYAL	**PARTHA SARATHI CHAUDHURY**
VICE PRESIDENT	**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 06th December, 2021.
SB

<u>आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :</u>

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(IT/TP), Pune.
4. The JCIT, Range-IT, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, **"सी"** बेंच, पुणे / DR, ITAT, "**C**" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.

		Date	
1	Draft dictated on	01.12.2021	Sr.PS/PS
2	Draft placed before author	06.12.2021	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		