No sec. 263 revision if due enquiry made regarding non-taxability of income earned outside India by PWC USA

Summary – The Kolkata ITAT in a recent case of Pricewaterhouse Coopers LLP USA., (the Assessee) held that where Assessing Officer had made due enquiries with regard to receipts of assessee from services rendered outside India which receipts were not taxable in India under article 15 of DTAA between India and USA, exercise of jurisdiction under section 263 was not justified

Facts

- The assessee a limited liability partnership firm incorporated under the laws of United States of America (USA) rendered consultancy and technical services and derived income from rendering such services.
- For relevant year the assessee filed return of income electronically declaring total income of Rs. 5.33 crores. The assessee also claimed that a sum of Rs. 10.75 crores which was received by the assessee for services rendered outside India was not chargeable to tax in India as per article 15 of the DTAA between India and USA. Since the return of income was filed electronically, it was not possible for the assessee to file separate computation of income and notes on computation of income. Thus, the assessee filed Notes on computation of Income before the Assessing Officer along with Computation of total income and Tax Audit Report required to be filed under section 44AB in Form 3CB. The assessee also explained as to how the service charges received for services rendered outside India were not chargeable to tax in the Notes on computation of income.
- The Assessing Officer in the assessment order accepted the claim of the assessee that professional services rendered outside India fall within the ambit of independent personal services as laid down in article 15 of DTAA and is therefore not taxable in India and that income earned in India from services rendered in India have been offered to tax entirely by the assessee. Thus, the Assessing Officer has accepted the total income of the assessee as declared in the return of income.
- The Commissioner passed a revisional order under section 263 on ground that there was complete lack of enquiry/verification by the Assessing Officer during scrutiny proceedings and therefore the order passed under section 143(3) was erroneous and prejudicial to the interests of revenue and accordingly set aside the assessment order.
- On appeal to Tribunal:

Held

- The jurisdiction under section 263 has been exercised by the Commissioner on the ground that the Assessing Officer failed to make proper enquiries with regard to the claim of the assessee that a sum of Rs. 10.75 crores which was claimed to be receipts of the assessee in respect of services rendered outside India are not taxable in view of article 15 of DTAA. In this regard along with the computation of total income, as annexure to the computation/statement of income the assessee has given the details of nature of payment, Invoice No., invoice date, gross fees and tax both in US$ and Indian

rupee. In all there were 93 payments. These details are available in the assessee's paper book. These documents had been filed by the assessee along with the computation of total income. It is not in dispute that these documents were available before the Assessing Officer when he completed the assessment. The Assessing Officer in the notice under section 142(1) dated 16-10-2012 has also called for Audited accounts and balance sheet as on 31-10-2010, report of audit under section 44AB. As already observed in a letter dated 21-6-2012 the assessee has clearly taken a stand regarding non-taxability of fees received for services rendered outside India. The Assessing Officer in the order of assessment dated 19-3-2013 has duly taken cognizance of all the details and has come to a conclusion that the income earned from services rendered in India has been offered to tax whereas income arising from services rendered outside India has not been offered to tax. Thus it is clear that the Assessing Officer has made due enquiries with regard to non-taxability of receipts by the assessee for services rendered outside India and applicability of article 15 of DTAA. The Commissioner in the impugned order was of the view that the Assessing Officer ought to have called for the copy of the contract between the assessee and the person to whom the assessee rendered services from USA and also to verify where payments were made to the related parties and also examine the nature of services. It is viewed that this is nothing but a fishing and roving enquiry which is not permitted in exercise of jurisdiction under section 263. The decision of the Bombay High Court in the case of *CIT* v. *Gabriel India Ltd.* [1993] 203 ITR 108/71 Taxman 585 clearly lays down that under section 263, there cannot be any substitution of the Assessing Officer's judgment by judgment of Commissioner. Therefore, the Assessing Officer has made due enquiries with regard to the receipts of the assessee from services rendered outside India which receipts are not taxable in India under article 15 of DTAA. The exercise of jurisdiction under section 263 in this regard is therefore held to be not sustainable and is hereby quashed. The directions given by the Commissioner in his order are therefore held to be unsustainable.

- With regard to the services rendered in India, it is not disputed that this was offered to tax by the assessee and brought to tax by the Assessing Officer. Therefore there cannot be any loss of revenue in this regard. Therefore, it is held that the exercise of jurisdiction in respect of receipts for services rendered in India and the direction of Commissioner as given in his order to examine the contract of the parties is not sustainable and is hereby quashed.
- With regard to the international transaction between the assessee and the associated enterprises, the Commissioner has not cited non-filing of Form No. 3CEB report as a reason for initiating proceedings in the show-cause notice issued under section 263. He has however confronted the assessee in the course of the proceedings under section 263 regarding to the non-filing of such report. Though it has been claimed by the assessee such report was called for by the Assessing Officer in the notice issued under section 142(1) and the same was duly furnished by the assessee, there is no material on record to suggest that the assessee had filed the said report. The finding of the Commissioner in this regard that such report was not filed by the assessee before the Assessing Officer is therefore correct. The said report was filed before the Commissioner in the proceedings

under section 263. In the order passed under section 263, the Commissioner has not *prima facie* found any impact on income of the assessee by reason of international transaction with AE in terms of section 92. He however found on a perusal of TDS reconciliation statement that there were payees reflected in the TDS certificate by name Price Water House, Pricewaterhouse Coopers Pvt. Ltd., Price Waterhouse and Co., Price Waterhouse etc. The Commissioner therefore surmised that there could be some more international transactions with AE and the report disclosing only one international transaction may not be correct. The Commissioner on perusal of Form 3CEB has not drawn any adverse inference. He however directed the Assessing Officer to examine certain other payments to parties having similar name as that of the assessee. For such vague reasons jurisdiction under section 263 could not have been exercised. The jurisdiction under section 263 can be exercised only on a definite finding that the order of the Assessing Officer was erroneous and prejudicial to the interest of the revenue. Such a finding with regard to Form 3CEB in respect of international transaction with associated enterprises has not been spelt out. Moreover the conclusions of the Commissioner in his order regarding international transactions with AE are based purely on surmises and suspicion. Therefore exercise of jurisdiction under section 263 on the ground of non-filing of Form No. 3CEB and the further direction of the Commissioner in the impugned order is also held to be unsustainable.

- In conclusion it is held that the Assessing Officer before concluding the assessment has made enquiries and has take cognizance of material on record. The Commissioner was of the view that the course adopted by the Assessing Officer was not proper. The Commissioner seeks to substitute his view with that of the Assessing Officer without a finding that the order of the Assessing Officer was erroneous and prejudicial to the interest of the revenue. On the facts of the present case it is evident that the Assessing Officer made due enquiries before completing the assessment and order of the Assessing Officer cannot be termed as erroneous for lack of proper enquiry before concluding the assessment. For the reasons stated above the order under section 263 is quashed and appeal of the assessee is allowed.