

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER

IT(TP)A No.832/Bang/2017
Assessment year : 2012-13

Flextronics Technologies (India) Private Limited, Plot No.3, Phase II, SIPCOT Industrial Park, Sandavellure C Village, Sriperumbudur Taluk, Kancheepuram District, Tamil Nadu 602 106. PAN: AAACF 5248E	Vs.	The Assistant Commissioner of Income Tax, Circle 3(1)(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	S/Shri Ajith Kumar Jain & Siddhesh Chaughale, CAs
Respondent by	:	Shri Pradeep Kumar, CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	04.12.2018
Date of Pronouncement	:	31.12.2018

ORDER

Per N.V. Vasudevan, Vice President

This appeal by the assessee is against the final order of assessment dated 31.01.2017 passed u/s. 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 [“the Act”] by the ACIT, Circle 3(1)(1), Bangalore in relation to assessment year 2012-13.

2. There is a delay of 7 days in filing the appeal by the assessee which has been explained as owing to the absence of the Managing Director in the country at the time when the appeal was due to be filed before the Tribunal. The director of assessee has filed an affidavit in this regard. We accept the reasons for the delay of 7 days in filing the appeal and condone the same.

3. As far as merits of the appeal of the assessee is concerned, the preliminary point that needs to be decided is ground No.2 raised by the assessee in its appeal which reads as follows:-

“Further, based on the facts and circumstances of the present case and in law, the order passed by the learned AO being not in conformity with the directions issued by the Hon’ble DRP under section 144C(5) of the Act, is not bad in law and void.”

4. The facts with regard to ground No.2 are as follows. The assessee is a company engaged in the business of manufacturing and servicing of electronic components and rendering IT enabled services. The assessee filed a return of income for the AY 2012-13 on 30.11.2012 declaring an income of Rs.16,00,860. The assessee is a subsidiary of Flextronics International Asia Pacific Ltd., Mauritius. It rendered manufacturing services to the holding company. Since the transaction of rendering manufacturing services to holding company was an international transaction, the income from such transaction had to be determined having regard to arm’s length Price (ALP) as laid down by the provisions of section 92 of the Act. The AO made a reference to the TPO, who by an order dated 20.01.2016 passed u/s. 92CA of the Act held that the arm’s length price (ALP) of the price received by the Assessee in the international transaction was less than the ALP and addition to the total income of Rs.20,97,79,864 was to be made to the total income of the assessee. The

assessee had also rendered IT Enabled Services (ITeS) to its holding company and the addition on account of determination of ALP in the ITeS segment was also determined by the TPO at a sum of Rs.19,13,97,719. In all, the total addition to the total income on account of adjustment of ALP u/s. 92CA of the Act was a sum of Rs.40,11,77,583. The AO passed a draft order of assessment dated 29.03.2016 incorporating the addition suggested by the TPO on account of determination of ALP. The assessee preferred objections before the DRP.

5. The DRP by its order dated 28.12.2016 gave certain directions to the TPO. The AO thereafter passed the impugned order without incorporating the directions given by the DRP dated 28.12.2016. The following were the relevant observations of the AO in the final order of assessment dated 31.01.2017, which is the order impugned in this appeal.

“Accordingly, adjustments as determined by the TPO to ALP of Rs. 40,11,77,583/-was added to the returned income of the assessee and draft assessment order was passed on 29.03.2016 under the provisions of section 144C of the Income-tax Act, 1961. The assessee based on the draft assessment order filed its objections before the Hon'ble DRP, Bangalore on 29.04.2016. The Hon'ble DRP vide its directions issued u/s. 144C(5) r.w.s.144C(8) of the IT Act dated 28.12.2016 has given relief relating to the TP adjustment.

5. On receipt of direction of Hon'ble DRP a reference was made to TPO for reworking the ALP adjustment as per DRP's direction. The OGE. in respect of DRP's directions connected with the TP adjustments has not been received. **As this is a time barring assessment proceedings the assessment order is passed based on the TP adjustment mentioned in the draft assessment Order.** On receipt of the order giving effect from TP necessary action for a either increase or decrease of the TP adjustment will be done u/s.154 of the IT Act.

6. As the assessee company has furnished inaccurate particulars penalty proceedings u/s.271(1)(c) is initiated separately. Considering the directions issued by the Hon'ble DRP, the assessment is completed as under.

Income as per Return of Income	Nil
Add: TP adjustment	40,11,77,5.83
Less: B/f loss set off	40,11,77,583
Total Assessed Income	Nil
1 Balance Tax Payable	Nil

Issue Demand Notice & Penalty notice accordingly.”

6. At the time of hearing, the Id. Counsel for the assessee addressed arguments on ground No.2 raised in assessee's appeal. It was submitted that the final order of assessment passed by the AO dated 31.01.2017 is bad in law. In this regard, our attention was drawn to the fact that the AO originally passed a draft assessment order on 29.03.2016 wherein he incorporated the TP adjustment as suggested by the TPO in the order passed u/s. 92CA of the Act for the relevant assessment year.

7. The assessee preferred objections before the DRP against the draft order of assessment and the DRP gave its directions vide order 28.12.2016. It was pointed out that as per the provisions of section 144C(5) of the Act, the directions given by the DRP are binding on the AO and in terms of section 144C(13) of the Act, the AO was obliged to pass a final order of assessment in accordance with the directions of the DRP. The Id. Counsel for the assessee pointed out that in the present case, the final order of assessment does not incorporate the directions of the DRP and was a verbatim repetition of the draft order of assessment dated 29.3.2016. It was submitted that as per the provisions of section 144C of the Act, a final order of assessment in conformity with the directions of the

DRP has to be passed within one month from the end of month in which the directions are issued by the DRP. Since the impugned order is not in conformity with the provisions of section 144C of the Act, the same is to be held as bad in law. The Id. Counsel for the assessee placed reliance on the decision of the ITAT Bangalore Bench in the case of *Software Paradigms Infotech (P.) Ltd. v. ACIT [2018] 89 taxmann.com 339 (Bang. Trib.)* wherein on an identical objection, the Tribunal quashed the final order of assessment.

8. The Id. DR, however, while not disputing the factual position as pointed out by the Id. Counsel for the assessee, submitted that fair order of assessment cannot be quashed, but at best it can be set aside directing the AO to pass the final order of assessment in conformity with the DRP's directions. In this regard the learned DR relied on a decision of the ITAT Delhi in the case of *H & M Hennes & Mauritz India (P) Ltd. Vs. ACIT (2012) 25 Taxmann.com 510 (Del)* wherein the Hon'ble Delhi Bench of ITAT remanded the issue back to AO to reconsider issue of transfer pricing in accordance with law.

9. We have considered the rival submissions. We find that on identical facts, this Tribunal in the case of *Software Paradigms Infotech (P.) Ltd. (supra)* has quashed the final order of assessment observing as follows:-

“3.3.1 We have heard the rival contention of both parties in the matter and perused and carefully considered the material on record. The undisputed facts on record, as brought out by the discussions above, is that the AO, as per law, was required to pass the final order of assessment dated 17/1/2014 for asst. year 2009-10 u/s 143(3) r.w.s 144C of the Act in conformity with the directions issued by the DRP u/s 144C(5) of the Act, which are binding on him as per section 144C(10) thereof and within the time prescribed u/s 144C(13) of the Act. We find that instead of passing the final order of assessment as required by law, the AO passed the

impugned final order of assessment dated 17/1/2014 u/s 143(3) r.w.s 92CA of the Act; which, as contended by the id AR, is identical to the draft order of assessment passed on 14/3/2013 by only incorporating this TPO's proposals and , thereby evidently giving the DRP's mandatory directions issued u/s 144C(5) of the Act a complete go-by. In our view, it is factually established that the AO in the final order of assessment dated 17/1/2014 has not given effect to or carried out the binding directions of the DRP as required u/s 144C(10) within the time specified u/s 144C(13) of the Act; which is a clear violation of the binding provisions of sec. 144C(10) and (13) of the Act. Therefore, in our considered opinion, the conduct of the AO/TPO in passing the impugned final order of assessment dated 17/1/2014 is a clear case of defiance and disregard to the binding directions of the higher authorities, i.e, the DRP in the case on hand. In fact, in the impugned order dated 17/1/2014 there is not even a single reference to the DRP's directions issued us/ 144C(5) of the Act vide order dated 30/12/2013.

3.3.2 In the factual and legal matrix of the case on hand, as discussed above, we are of the considered view that the impugned final order of assessment for asst. year 2008-09 passed u/s 143(3) r.w.s 92CA of the Act by the AO, in violation of the express mandatory provisions of sec. 144C(10) and (13) of the Act by not passing the impugned order in pursuance of and in conformity with the binding directions of the DRP issued u/s 144C(5) of the Act, within the time specified for this purpose, has rendered the said impugned final order of assessment unsustainable in law. We, therefore, quash the impugned final order of assessment for asst. year 2009-10 passed by the AO u/s 143(3) r.w.s 92CA of the Act dated 17/1/2014 in the case on hand. We hold and direct accordingly. Consequently, ground No. 17 of assessee's appeal is allowed.”

10. Respectfully following the aforesaid view of the Tribunal, we quash the impugned order of assessment. Since the impugned order of assessment is quashed on the ground that the same is not in conformity with the provisions of section 144C of the Act and further on the ground that the time for passing the final order of assessment is barred by time, we

are of the view that the other issues raised by the assessee in its grounds of appeal and the grounds raised by the revenue in its appeal does not require any consideration. As far as the decision cited by the learned DR in the case of *H & M Hennes & Mauritz India (P) Ltd. (supra)* is concerned, we find that in the said decision, the counsel for the Assessee has in para 3.8 of the said order prayed for setting aside the final order of assessment of AO to pass orders in accordance with the directions of the DRP. Thus, it is a case of concession by the Assessee and not on the basis of arguments advanced by the parties. The law is well settled that a decision on concession of the counsel cannot be regarded as a precedent. Therefore, the decision cited by the learned DR does not support the case of the revenue.

11. In view of the conclusion that the assessment order is null and void, the other grounds of appeal raised by the assessee on merits of the addition made do not require any adjudication.

12. In the result, the appeal of the assessee is allowed.

Pronounced in the open court on this 31st day of December, 2018.

Sd/-

(INTURI RAMA RAO)
Accountant Member

Sd/-

(N.V. VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 31st December, 2018.

/ Desai Smurthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.