

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1', NEW DELHI**

**BEFORE SH. R.K PANDA, ACCOUNTANT MEMBER
AND
SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

ITA No.4387/Del/2010
Assessment Year: 2006-07

M/s. Dentsply India (P) Ltd. Plot No. 263, FIES, Patparganj Industrial Area, Delhi-110092	Vs	Income Tax Officer Ward-10(1) New Delhi
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Himanshu Sinha, Advocate
Respondent by	Sh.Sanjay I. Bara, CIT DR

Date of hearing:	15/05/2019
Date of Pronouncement:	24/05/2019

ORDER

PER R.K. PANDA, AM:

1. This appeal filed by the assessee is directed against the order dated 27.08.2010 passed u/s 143 (3) / 144 C of the IT Act 1961 for the A. Y. 2006-07.
2. This appeal was earlier dismissed by the Tribunal for non prosecution. Subsequently the Tribunal vide miscellaneous

application No. 432/Del/2015 order dated 07.10.2016 recalled the order. Hence, this is a recalled matter.

3. Facts of the case, in brief, are that the assessee is a company engaged in the business of trading of dental material, equipment and other related dental instruments. It filed its return of income on 30.11.2006 declaring Nil income which was processed u/s. 143 (1) of the IT Act. Since the assessee has entered into international transactions, the Assessing Officer referred the matter to the TPO u/s. 92CA of the IT Act, 1961 for determining the arms length price of the internal transactions. The TPO vide order dated 29.07.2009 passed u/s. 92CA of the IT Act, 1961 made an adjustment of Rs.2,28,67,960/- to the arms length price of the internal transactions assessee company. The Assessing Officer accordingly passed draft assessment order on 27.11.2009 determining the total income at Nil after adjustment of the unabsorbed depreciation and set off of business loss from the addition proposed by the TPO. The assessee approached the DRP and the DRP vide order dated 03.06.2010 gave directions u/s. 144 C of the Act wherein, the addition suggested by the TPO was upheld. Accordingly the Assessing Officer passed the final order on 27.08.2010.

4. Aggrieved with order of the TPO/AO/DRP, the assessee is in appeal before the Tribunal by raising the following grounds of appeal:-

That the appellant denies its liability to be assessed at gross total income of Rs.3,99,95,452/- and accordingly denies its liability to pay tax, interest, cess and surcharge demanded thereon.

That having regard to the facts and circumstances of the case, Ld. ITO, Ward-10(1) has erred in law and on facts in making addition of Rs.2,07,648/- on account of interest income.

That having regard to the facts and circumstances of the case, Ld. ITO, Ward-10(1) has erred in law and on facts in making addition of Rs.3,120/- on account of late deposit of PF.

4. *That having regard to the facts and circumstances of the case, Ld. ITO, Ward- 10(1) has erred in law and on facts in making additions on the basis of order of TPO u/s 92CA(3) on account of alleged difference in arms length price aggregating to Rs.2,28,67,960/-.*

4A. That in any case and in any view of the matter, action of Ld. ITO in making the aggregate addition of Rs.2,28,67,960/- is contrary to law and facts and the same has been made in violation of principles of natural justice and without giving adequate opportunity of hearing

5. *That the transfer pricing order dated 29-07-2009 passed u/s 92CA(3) by the Addl. CIT, TPO-I(I), New' Delhi is bad in law. contrary to facts, illegal and is not sustainable on various legal and factual grounds such as:-*

(a) *Ld. TPO has legally and factually erred in computing the arms length price by applying the incorrect and arbitrary selection of comparables that too in the incorrect manner and further erred in law and facts in denying the benefit of (+,-) 5% as prescribed in the proviso to section 92CA(3) of the Income Tax Act, 1961.*

(b) *Ld. TPO has erred in law and on facts by incorrectly computing the NPM of the applicant.*

(c) *Ld. TPO has erred in law and on facts by deviating from the comparables*

chosen by his predecessors in the previous years and not giving any reason for departure from the previous comparables and thus erred in not following the well established principles of consistency.

(d) *Ld. TPO has erred in law and on facts by rejecting the comparables company data used by the applicant for establishing the arm's length nature of its international related party transaction in its TP documentation for the year and by determining the same based on current year data for comparable companies, data for financial year 2005-06, despite the fact that the same was not available to the appellant at the time of preparing the TP documentation study report.*

(e) *Ld. TPO has erred in law and on facts by making the TP adjustment to the international related party transaction of the appellant in complete disregard of the fact the said transaction continued to have the same pricing basis during the financial year 2003-04 as well.*

(f) *Ld. TPO has erred in law and on facts by not considering the authenticated data of the comparable companies relevant to the financial year 2005-06 obtained from the registrar of companies web site which was provided by the appellant to the DRP also along with the objections raised before it and Ld. AO also erred as the same were also not considered by the assessing officer before passing the final order.*

6. *That the draft order dated 27-11-2009 passed by the ITO, Ward-10(1), New Delhi is also illegal and is not sustainable on various legal and factual grounds.*

7. *That the order passed by Hon'ble Dispute Resolution System u/s 144C dated 03-06-2010 is also illegal and the same is not sustainable on various legal and factual grounds and the directions issued therein are also contrary to law and facts..*

8. *That the order passed u/s 143(3) dated 27-08-2010 by ITO, Ward-10(1), New Delhi is illegal, contrary to law and facts, barred by limitation and the same is not sustainable on various legal and factual grounds and the additions made therein are also bad in law and against the facts and circumstances of the case.*

9. *That the assessing officer while passing the order has mistakenly considered the income of Rs. 1,69,16,724/- as per ROI instead of Rs. 1,55,75,570/-, which require rectification of mistake apparent on the record.*

10. *That the appellant craves the leave to add, modify, amend or delete any of the grounds of appeal at the time of hearing and all the above grounds are without prejudice to each other.*

5. The assessee has also raised the following additional ground under Rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963 :-

“(1) That on the facts and circumstances of the case and in law, the order passed by the Ld. Assessing Officer (“Ld. AO”) dated August 27, 2010 under section 143(3) of the Income Tax Act, 1961 is bad in law and liable to be quashed since it has been passed after the period of limitation prescribed in the Act.”

6. Relying on various decisions the Ld. Counsel for the assessee submitted that the above ground is purely legal in nature and does not require any fresh verification of facts, therefore, the same should be admitted for adjudication.

7. After hearing both the sides and considering the fact that the additional ground raised by the assessee is purely a legal one and no fresh facts are required to be investigated, the additional ground raised by the assessee is admitted for adjudication.

8. The Ld. Counsel for the assessee submitted that for the relevant AY 2006-07, the assessee's case was selected for scrutiny by the AO. The AO referred the matter to the TPO for determination of Arm's Length Price of the international transactions entered in to by the assessee. The TPO proposed an adjustment of Rs.22867960/- vide order dated July 29, 2009, against which the assessee filed an application before the DRP who upheld the approach adopted by the Ld. TPO, and passed the directions on June 03, 2010. The AO post DRP directions passed the final assessment order on August 27, 2010.

9. The Ld. Counsel for the assessee drew the attention of the Bench to the following chronology of events :-

Particulars	Date	Annexures
Date of the order passed by the Ld. TPO	July 29 2009	Annexure 1
Date of the draft assessment order	December 17 2009	Annexure 2
Filing of application by the Assessee before the Hon'ble DRP	January 20, 2010	Annexure 3
Date of hearing before the Hon'ble DRP	June, 03, 2010	Annexure 4
Date of receipt of directions by the A.O.	June, 03, 2010	Annexure 5
Date of final assessment year	June 17, 2010	Annexure 6
Date of final assessment order	August 27 , 2010	Annexure 7

10. He submitted that provisions of section 144C(13) of the IT Act 1961 provides that the Assessing Officer is required to pass the final assessment order within 30 days from the end of the

month in which the directions passed by the DRP is received by the A.O. However, in the present case, the order has been passed after the end of one month from the date of receipt of directions of the Ld. DRP by the A.O., he submitted that the A.O. received the directions of the Ld. DRP on June 17, 2010. The last date permissible under the Act to pass the final assessment order was accordingly July 30, 2010. However, the final assessment order was passed on August 27, 2010, which is beyond the limitation period stipulated under the Act. Thus, the order of the AO is void-ab-initio, and liable to be quashed as the final assessment order is time barred.

11. We have heard the Ld. Counsel for the assessee and the DR extensively. It was seen from the order sheet entries that the DR was directed a number of times to produce the assessment record for verification of the authenticity of the chronology of events filed by the Ld. Counsel for the assessee. The Ld. Counsel for the assessee submitted that he has inspected the assessment records and the orders are certified by the Assessing Officer which are filed alongwith the additional ground of appeal.

12. On being asked by the bench to the Ld. CIT(DR) as to what has happened to the direction of the bench regarding production of the assessment records, he filed the following written submission :-

“In compliance to the directions of the Hon'ble 1-1 Bench, ITAT, Delhi with respect to the additional grounds of appeal filed by the appellant (copy enclosed), the following letters have been written to the AO in the above mentioned case subsequent to its inspection of records of the above mentioned assessee for the relevant assessment year :

- i. **F.No. CIT(DR)/TP/I-I/ITAT/2018-19/144 dated 04.09.2018**
Vide this letter, the assessing officer has been requested to provide the point wise comments on the additional grounds of appeal alongwith relevant enclosers provided by the assessee during assessment proceedings.
- ii. **F.No.CIT(DR)/TP/I-I/ITAT/2018-19/166 dated 25.09.2018**
Vide this reminder letter , the assessing officer has been requested again to provide the point wise comments on the additional grounds of appeal.
- iii. **F.No.CIT(DR)/TP/I-I/ITAT/2018-19/249 dated 21.01.2019**
Vide this reminder letter, the assessing officer has been once again requested to provide the point wise comments on the additional grounds of appeal.
- iv. **F.No.CIT(DR)/TP/I-I/ITAT/2018-19/277 dated 21.02.2019**
*Vide this reminder letter, the assessing officer has been once again requested to provide the point wise comments on the additional grounds of appeal.
Copies of the above mentioned letters have been enclosed herewith.*

The Assessing Officer, Addl. Commissioner of Income Tax, Special Range-3, New Delhi has sent the following replies:

- i. **F.No. Addl.CIT/Special Range-03/2018-19/263 dated 07.09.2018**
The Assessing Officer intimated that the relevant assessment folder is not readily available in the office and might be in the office of previous assessing officer or kept in the custody of Iron Mountain, our record keeping agency. One month time period is requested.
- ii. **F.No. Addl.CIT/Special Range-03/2018-19 dated 30.01.2019**
The Assessing officer intimated that the relevant assessment folder is not readily available in the office . The AO concerned was requested to hand over the file to the present assessing officer. Simultaneously record keeping agency was also requested, to deliver the same
- iii. **F.No. Addl.CIT/Special Range-03/2018-19/765 dated 21.02.2019**
The Assessing officer intimated that the relevant assessment folder could not be delivered either by the then assessing officer or by the record keeping agency . Record could not be traced with the record keeping agency. Also letter has been written to the concerned charge from where the case had been transferred u/s 127 of the I.T.Act.

The copies of all the above mentioned letters have been enclosed herewith.”

13. We have perused the record and heard both the sides on this issue. It is an admitted fact that the DRP passed the directions u/s. 144 C of the IT Act on 03.06.2010 which is not in

dispute. We find from annexure-6 filed by the Ld. Counsel for the assessee duly certified by Shri Rakesh Kumar, Addl. CIT shows that the directions issued by the DRP on 03.06.2010 was received by the Assessing Officer on 17.06.2010. We find the final assessment order u/s. 143 (3) was passed on 27.08.2010.

14. The provisions of section 144 C (13) reads as under :-

“(13) Upon receipt of the directions issued under sub-section (5), Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153, the assessment without providing any further opportunity of being heard to the Assessee, within one month from the end of the month in which such direction is received.” (emphasis added)”.

15. However, in the present case it is an admitted fact that the final assessment order has been passed after the end of one month from the date of receipt of the directions of the DRP by the Assessing Officer. Therefore, we find merit in the contention of the Ld. Counsel for the assessee that the order passed by the Assessing Officer is void ab initio and liable to be quashed as the final assessment order is time barred. We hold and direct accordingly.

16. However, we would also like to mention here that since the assessment records were not produced being not readily available, therefore, we give liberty to the revenue to file miscellaneous application for recalling of this order as per law in case the revenue is able to show that the dates given by the Ld.

Counsel for the assessee on the basis of certified copies obtained from the department are contrary to facts on record.

17. Since, this appeal was heard on the basis of this additional ground raised at the time of the hearing of the appeal and the other grounds were never argued, therefore, these grounds raised by the assessee are not adjudicated being academic in nature.

18. In the result, the appeal is filed by the assessee is allowed.

Order pronounced in the open court on 24.05.2019.

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-

(R.K PANDA)
ACCOUNTANT MEMBER

Neha

Date:- 24.05.2019

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	24.05.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	