IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH "A", HYDERABAD

BEFORE SMT. P. MADHAVI DEVI, JUDICIAL MEMBER
AND SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No. 239/Hyd./2019
Assessment Year: 2013-14

M/s Lanco Solar Private Limited C/o P Murali & Co. Chartered Accountants 6-3-655/2/3, Somajiguda Hyderabad 500 082 PAN: AABCL4930G	vs.	The Dy.CIT Circle 16(1) Hyderabad

Stay Application No.92/Hyd/2019
ITA No. 239/Hyd./2019
Assessment Year: 2013-14

M/s Lanco Solar Private Ltd. Hyderabad	Vs.	The Dy.CIT, Circle 16(1) Hyderabad
(Appellant)		**(Respondent)**

Assessee by : Sh. Murali Mohan Rao, A.R.
Revenue by : Shri Y.V.S.T. Sai, CIT, D.R.

Date of hearing: 10/05/2019
Date of pronouncement: 31/07/2019

O R D E R

PER S. RIFAUR RAHMAN, A.M.:

This appeal filed by assessee is directed against the order of Dy.CIT, Circle 16(1), Hyderabad dated 27/06/2018 for AY 2013-14.

2. Brief facts of the case are that assessee is engaged in manufacturing of solar modules and setting up a plant for manufacture of polysilicon and water plant. The assessee filed its original e-return of income for the AY 2013-14 on 29.11.2013, declaring loss of Rs.32,93,66,045/- under normal provisions and Rs.48,06,372/- u/s 115JB. Subsequently TPO passed order u/s 92CA(3) of the I.T. Act, 1961 (the Act) on 2710.2016 proposing to make an adjustment of Rs.9,51,92,000/- on account of purchase of goods valuing at Rs.12,79,59,809/-. Subsequently Assessing Officer completed the assessment u/s 143(3) of the Act r.w.s. 92CA(3) and 144C(13) of the Act on 30.10.2017 after considering the DRP's order and assessing the total income of the assessee at Rs.7,22,59,980/- determining a refund of Rs.58,50,860/-.

3. Subsequently TPO passed order dated 1.5.2018 u/s 92CA(5) r.w.s.154 of the Act proposing adjustment u/s 92CA of the Act at Rs.2506.79 lakhs. In the 154 order of the TPO, the TPO observed that there was a mistake in computation of Arm's length Price (ALP) with regard to international transaction while computing the ALP, the operating revenue was taken as Rs.3789.67 lakhs instead of Rs.4337.99 lakhs and also operating cost was taken as Rs.4337.99 lakhs instead of Rs.6429.20 lakhs. Accordingly TPO recomputed ALP adjustment and proposed adjustment of Rs.2506.79 lakhs. With reference to the above TPO's direction, Assessing Officer passed the rectification order u/s 154 on 19th June, 2018 enhancing the ALP adjustment to the extent of Rs.15,54,87,00/-.

4. Aggrieved with the above order the assessee filed letter seeking rectification u/s 154 of the Act on 7.8.2017 since there was no response from the TPO and AO, assessee filed further rectification petition u/s 154 on 27.03.2019 and 30.04.2019.

5. Aggrieved with the above 154 order dated 19.6.2018 assessee filed appeal before us raising following grounds of appeal.

The AO erred both on facts and in law by passing the order u/s 154 of the IT Act as the final assessment order.

"1. *The AO ought to have appreciated the fact the rectification order passed u/s 154 of the Act dated 19.06.2018 is void ab initio as the same is not in line with the provisions of section 144C(1) of the Act.*

2. The AO ought to have appreciated the fact that as per the provisions of section 144C(1) of the Act, the AO should have passed "Draft Assessment Order" while proposing to make variation in the income of the assessee which is prejudicial to the interest of the assessee.

3. The AO erred in passing the final order u/ s 154 of the Act and raising a demand of Rs.8,07,70,929/- by issuing notice of demand u/s 156 of the Act dated 19.06.2018 which is against the provisions of law.

4. The AO erred in not passing the "Draft Assessment Order" while passing the order u/s 154 making adjustment to the income u/s 92CA of the Act and thus violated the provisions of section 144C(1) of the Act.

5. The AO ought to have passed the "Draft Assessment Order" while giving effect to the order of TPO and provided opportunity to assessee to file objections before DRP as per the provisions of section 144C(2) of the Act.

6. The TPO erred in passing the rectification petition u/s 154 of the Act without appreciating the fact that original TP order is already adjudicated by DRP and matter is pending before ITAT.

7. The AO ought to have appreciated the fact that the original assessment order passed u/s 143(3) rws 144C(13) rws 92CA(3) of the Act can only be modified pursuant to directions of Hon'ble DRP.

8. The TPO erred in passing the rectification petition u/s 154 of the Act without appreciating the fact that original TP order is already adjudicated by DRP and matter is pending before ITAT.

9. The TPO erred in passing rectification petition u/s 154 of the Act without appreciating the fact that there is no mistake apparent on record.

10. Without prejudice to the above, the AO erred in passing the order u/s 154 of the Act on the issue which is already adjudicated by Hon'ble DRP and pending before Hon'ble ITAT, Hyderabad for adjudication.

11. The AO erred in passing the order u/s 154 of the Act without providing reasonable opportunity to the assessee.

12. The appellant may add or alter or amend or modify or substitute or delete and or rescind all or any of the grounds of appeal at any time before or at the time of hearing of the appeal."

6. At the time of hearing we asked the DR for the status of the rectification application filed before the AO and TPO by the assessee, and it is brought to our notice that TPO and AO has passed rectification order dated 01.05.2018, a copy of which was filed before us.

7. It is noticed that assessee has filed this appeal with a delay of 179 days and filed a petition for condonation of delay with affidavit, as per which assessee has received the order on 27.6.2018 and the appeal could not be filed within time as the papers have been misplaced by one of office staff and the same could be traced out and could be filed on 21/02/2019 with the delay of 179 days.

8. Ld.AR of the assessee submitted that Ld.TPO and AO has passed the rectification order without giving proper opportunity to the assessee, particularly when the assessment is enhanced. Further, he submitted that the adjustment made in the 154 order relating to T.P. adjustment, proper procedure would be that AO must have passed draft assessment order, so that assessee will get an opportunity to file appeal before the DRP. Therefore the due procedure was not followed by the AO and submitted the final assessment order passed by the AO is void and in this regard he relied upon the following cases: (i) ACIT vs. Nokia India P Ltd. (2018) reported in 98 taxmann.com 374 (SC);

(ii) Piramal Enterprises Ltd. Vs. ADCIT reported in 97 taxmann.com 352; and
(iii) Srini Pharmaceuticals P Ltd. Vs. DCIT in ITA no.971/Hyd./2017.

Further he submitted that the assessee has a good case on merits and by relying on the cases of :

(i) RPK Estates (India) Pvt.Ltd. in ITA 1025/Hyd./2015;

(ii) KSP Shanmugavel Nadar reported in 30 Taxmann 133;

(iii) Midas Polymer Compounds P Ltd. In ITA 288/Coch./2017;

(iv) Divya Jyothi Steel Ltd. In ITA nos. 1176 & 29/Hyd./2016

v) N Balakrishnan vs M Krishna Murthy and

vi) Concord Drugs Ltd. In ITS no.1901/Hyd./2017.

He submitted that when the assessee has a merit, the delay may be condoned.

9. On the other hand, ld.DR objected to the contentions made by assessee on delay and submitted that the affidavit filed by assessee is generic and submitted that delay should not be condoned and in that process he relied on Esha Bhattacharjee vs. Mg.Committee of Raghunathpur Nafar (SC) in civil appeal nos.8183 and 8184 of 2013 judgement dt. 13.09.2013. He brought to

our notice paras 25 and 26 of the judgement, which is reproduced for the sake of convenience.

"25. We may state that even if the term sufficient cause has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of reasonableness as it is understood in its general connotation.

26. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise. These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly."

10. We have considered the rival submissions and material placed on record. We notice that the assessee has filed this appeal against rectification order passed u/s 154 with a delay of 179 days. Assessee has submitted that the order passed by the tax authorities was received by them on 27.11.2018, however, due to mistake of one of their staff, the appeal could not be filed in time.

10.1. We notice from the Ld.DR submissions and case law relied by him. We noticed that in Esha Bhattacharjee vs. Mgt. Committee (supra), the school management Committee did not respond to the directions of Lower Courts and subsequently filed appeal along with Condonation Petition. The lower Courts had condoned the delay. However, Hon'ble Supreme Court held that the delay should not cause injustice and it is directly result negligence, default

or inaction of other parties. Therefore, the condonation of delay was rejected. But in the given case, there cannot be any injustice caused to revenue department or conduct of the assessee can be questioned. Therefore, it is distinguishable on facts.

10.2. Further, we notice from the facts submitted before us tat , there is merit in the submissions of the assessee and, in order to deliver justice, we rely on the order of Tribunal in the case of Concord Drugs Ltd. In ITA no.1901/Hyd/17 and others to which we (both Members) are signatories, the relevant portion is extracted hereunder.

"3.1 While adjudicating the delay in filing the appeal, the Hon'ble Supreme Court in the case of Collector, Land Acquisition Vs. MST. Katiju and others, [1987]167 ITR 471, has held as below:

"3. The legislature has conferred the power to condone delay by enacting s. 5 of the Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice—that being the life-purpose of the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy.

4. And such a liberal approach is adopted on principle as it is realized that:

1. *Ordinarily, a litigant does not stand to benefit by lodging an appeal late. I.T.A. No. 1901Hyd/17 and others Concord Drugs Ltd.*
2. *Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this, when delay is condoned, the highest that can happen is that a cause would be decided on merits after hearing the parties.*
3. *"Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every*

second's delay ? The doctrine must be applied in a rational common sense and pragmatic manner.

4. *When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*
5. *There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.*
6. *It must be grasped that the judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."*

3.2 Considering the above decision and reasons for delay in filing the appeal submitted before us, only for the rendering of justice, we condone the delay in filing the appeal before us on the ground that the assessee was prevented by reasonable cause in filing the appeal belatedly. Accordingly, we admit the appeals for hearing and adjudication."

10.3. Accordingly, we condone the delay and proceed to dispose of the appeal on merit.

11. Coming to the merits of the case we notice that 154 order was passed by the AO on 19.6.2018 as per the advise of TPO order dated 1.5.2018, no doubt the order passed by TPO is based on rectification of error noticed by the TPO on the ALP adjustment, however, it involves enhancement of the demand and the AO should have given an opportunity to assessee before making the above adjustment. Further we notice that the AO has passed rectification order under section 154 enhancing the ALP adjustment as final assessment order without giving proper opportunity to assessee to represent the case, even otherwise he should have issued draft assessment order instead of final assessment order giving opportunity to assessee to appeal before appellate authorities. It is pertinent to note that assessee has come

up in appeal before us instead of First Appellate Authority or DRP to seek proper justice.

12. Now before us Ld.AR brought to our notice that assessee has entered into international transaction with it's A.E. to the extent of Rs.12.79 crores for the value of purchase of goods whereas now TPO has proposed an ALP adjustment of Rs.25.07 crores, he submitted that there is an apparent mistake on the calculation adopted by the TPO and he submitted that if the AO and the TPO has given an opportunity to assessee or if they have passed a draft assessment order, assessee would have got justice by going to the appellate authorities.

12.1. After considering the submissions of the assessee, in our considered view, we noticed that the AO and the TPO has not followed the due process of law. We are in agreement with Ld.AR and we notice that in the case of Nokia India Ltd. (supra), the Hon'ble Supreme Court has held as under:

"7. The principal ground of challenge by the Petitioner is that the impugned final order of the AO has been passed in violation of Section 144C of the Act inasmuch as it was not preceded by a draft assessment order as was mandatory in terms of Section 144C (1) of the Act. The second ground is that the impugned order was passed beyond the period of limitation.

8. The principal ground of challenge should succeed as it is squarely covered in favour of the Assessee and against the Revenue by the decision dated 17th May, 2017 passed by this Court in Turner International India (P) Ltd. v. Dy. CIT [2017] 82 taxmann.com 125 (Delhi). There, the Court categorically held that the mandatory requirements under Section 144C (I) of the Act had to be met even where the TPO had passed the order in the second round on remand by the ITAT.

9. This is also the view of the Gujarat High Court in CIT v. C-Sam (India) (P) Ltd. [2017] 84 taxmann.com 261.

10. By a separate order passed in JCB India Ltd. v. Dy. CIT [20 I 7] 85 taxmann.com 155/251 Taxman 143 (Delhi) the Court followed its decision in

Turner International India (P) Ltd. (supra) and quashed the final assessment order which was challenged in those cases.

11. Once there is a clear order of setting aside of an assessment order with the requirement of the AO/TPO to undertake a fresh exercise of determining the arm's length price, the failure to pass a draft assessment order, would violate Section 144C (1) of the Act result. This is not a curable defect in terms of Section 292B of the Act as held by this Court in its decision dated 17th July, 20 I 5 in ITA No. 275/2015 Pr. CIT v. Citi Financial Consumer Finance India Pvt. Ltd.

12. In view of the fact that the Court is accepting the first ground of challenge raised by the assessee as regards violation of section 144C, the Court is not examining the ground of limitation."

13. By respectfully following the above decision, we are inclined to accept the contentions of the assessee, and we quash the order passed under Section 154 by AO as not tenable and is against s.144C(1) of the Act.

14. Accordingly appeal filed by assessee is allowed.

15. Since the appeal of assessee is allowed, the Stay Application filed by assessee has become infructuous and is dismissed as such.

16. In the result appeal of assessee is allowed and Stay Application filed by assessee is dismissed.

Pronounced in the Open Court on 31st July, 2019.

Sd/-	Sd/-
(P MADHAVI DEVI)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 31st July, 2019.

*GMV

Copy forwarded to:

1. M/s Lanco Solar Pvt.Ltd. C/o P Murali & Co. C.As, 6-3-655/2/3, Somajiguda, Hyderabad 500 082.
2. Dy.CIT, Circle 16(1), Hyderabad.
3. CIT(A), Hyderabad.
4. D.R. ITAT Hyderabad.
5. Guard File

// C o p y //

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