

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA**

[Before Shri J. Sudhakar Reddy, Accountant Member and Shri S.S. Godara, Judicial Member]

**I.T.A. No. 1548/Kol/2019
Assessment Year: 2014-15**

***Nomura Research Institute Financial Technologies India Private Limited...Appellant
[PAN: AADCA 8967 A]***

Vs.

DCIT, Circle-2(2), Kolkata.....Respondent

Appearances by:

Sh. J.P. Khaitan, Sr. Adv. &

Sh. Pratyush Jhunjunwala, Adv., appeared on behalf of the Assessee.

Sh. Vijay Shankar, CIT(DR) appeared on behalf of the Revenue.

Date of concluding the hearing : January 20th, 2020

Date of pronouncing the order : March 13th, 2020

ORDER

Per J. Sudhakar Reddy, AM:

This is an appeal filed by the assessee directed against the final order passed by the AO u/s 143(3) r.w.s. 144C of the Income Tax Act, 1961 (hereinafter 'the Act') on 16.05.2019.

2. The assessee has raised the following jurisdictional grounds:

"1. For that the order dated May 16, 2019 passed by the Assessing Officer is a nullity.

2. For that the reference made to the TPO on September 8, 2015 was incompetent and his order dated October 27, 2017 was a nullity.

3. For that the AO acted without jurisdiction in initiating proceedings under section 147 on the basis of the purported order dated October 27, 2017 and the order under section 143(3) /147 dated May 16, 2019 is a nullity.

4. For that further and in any event and without prejudice to the aforesaid, the AO could not have made any transfer pricing adjustments in the absence of a reference under section 92CA after assumption of jurisdiction under section 147.

5. For that the Assessing Officer erred in assessing the total income of the Appellant at INR 9,40,36,160/- as against total income of INR 4,31,54,335/- computed as per the final assessment order passed on August 31, 2016 under section 143(3) of the Act."

3. **Facts in brief.** Nomura Research Institute Financial Technologies India Pvt. Ltd. is an Indian company incorporated in the year 2001 and is engaged in providing software services to its Associated Enterprises ('AEs').

For the subject AY, the company had filed its return of income ('RoI') on 28 November 2014 disclosing a total income of INR 4,31,43,710 under the normal provisions of Income Tax Act, 1961 ('the Act') and book profit of INR 4,22,29,700 under section 115JB of the Act. Since the tax liability under the normal provisions was higher, the company had paid taxes under the normal provisions of the Act.

The ROI filed by the company was selected for scrutiny through CASS on the basis of various reasons except Transfer Pricing risk parameter.

Subsequently, the Assessee has filed submissions responding to the specific questions raised by the Ld. AO. Later, the Ld. AO passed the final assessment order under section 143(3) of the Act dated 31 August 2016 ('final assessment order") making a disallowance of INR 10,626 under the normal provisions of the Act.

Subsequent to the final assessment order, the assessee received a notice dated 6th January 2017 from the Transfer Pricing Officer (herein after referred as 'or 'Ld. TPO') under section 92CA(2) read with section 92D of the Act initiating transfer pricing proceedings. In response to the said notice, the Assessee vide letter dated 14 February 2017 submitted that the final assessment order was already passed by the Ld. AO and hence TP proceeding was invalid and should be dropped.

However, the Ld. TPO disregarded the submission and continued with the TP proceedings. The Ld. TPO also issued show cause notice (SCN) dated 23 October 2017 where the Ld. TPO has proposed adjustment to the international transaction. The Assessee responded to the SCN vide submission dated 26 October 2017. Later, the Ld. TPO passed the transfer pricing order (referred to as 'T.P. order) dated 27 October 2017 under section 92CA(3) of the Act making an upward adjustment of INR 5,08,27,823.

Subsequently, a notice dated 26 February 2018 under section 148 of the Act was issued by the Ld. AO initiating the re-assessment proceedings for the captioned AY. The Ld. AO, upon request, also issued the reasons for initiating re-assessment proceedings

which mentioned that transfer pricing order was not considered in the assessment order dated 31.08.2016 and hence income has escaped assessment.

The Assessee has filed its objections against the 148 proceedings, however the same was disregarded by the Ld. AO. Later, the Ld. AO has passed draft assessment order dated 02 August 2018 determining the total income of the Assessee at INR 9,40,36,160 incorporating the transfer pricing adjustment proposed in the TP Order.

Aggrieved by the draft order and the order passed by the learned TPO, the Assessee has preferred to submit this application before the Hon'ble Dispute Resolution Panel ("Hon'ble Panel" or the "Panel").

4. The DRP in his direction u/s 144C(5) of the Act dated 22.04.2019 held as follows:

"DRP Directions:

i. The Panel has considered the facts and circumstances of the cases. The sequence of events leading to objections raised before the Panel is as under:

<i>Date</i>	<i>Particulars</i>
28.11.2014	Return of Income filed for AY 2014-15 disclosing a total income of INR 4,31,43,710 under normal provisions and book profit of INR 4,22,29,700 under MAT.
28.08.2015	Notice u/s 143(2) of the Act issued for limited scrutiny through CASS on non-TP Risk parameters fixing the date of hearing as 14.09.2015.
8.09.2015	Reference made to the TPO after taking prior approval as per sec 92CA(1)
21.06.2016	Notice under section 142(1) of the Act issued.
31.08.2016	Final Assessment Order passed with an adjustment of INR 10,626
23.10.2017	Show-cause notice issued by the TPO proposing TP adjustments
24.10.2017, 26.10.2017	Response to show-cause notice filed by the Assessee without prejudice to the fact that TP proceeding was invalid
27.10.2017	TP order passed with an upward adjustment of INR 5,08,27,823
26.02.2018	Reassessment proceedings initiated by the AO by issuing notice u/s 148
2.08.2018	Draft assessment order passed by the AO against which objections raised

ii. The above sequence of events has also been mentioned in the draft assessment order dated 2.08.2018 passed u/s 143(3)/147 r.w.s. 144C. The crux of the issue is that the case was initially selected for limited scrutiny under CASS. Reference was made to the TPO with due approval on 8.09.2015. However, the final order was passed on 31.08.2016, without waiting for the TPO order. This assessment order did not have even a hint of the TP reference made on 8.09.2015. The TPO apparently was not aware about the final order already passed and continued with his process and passed the TPO order on 27.10.2017. Even the first notice from the TPO was issued to the assessee on 6.01.2017, when the final order was already passed by the AO on 31.08.2016 and as such, no TP proceedings could legally be proceeded with after 31.08.2016.

iii. After the TP order dated 27.10.2017 was received by the AO, he reopened the case u/s 147/148 on 26.02.2018 (4 months after the TP order) after approval of PCIT. This was because

there were no proceedings pending before the AO to incorporate the TPO order. No further TP reference was made after the issue of the notice for reopening the case. In such a situation, the TPO order dated 27.10.2017 could not have been incorporated in the original assessment order since the final order was already passed by the AO. Even if the TP order dated 27.10.2017 is considered as information available with the AO for reopening, there is no fresh reference to the TPO for the purpose of reassessment. The reference was already made on 8.09.2015 after which the final order was passed on 31.08.2016, without waiting for and incorporating the adjustment prepared in the TPO order.

iv. *It is also observed that it is mentioned in the draft assessment order dated 2.08.2018 as under:*

"In the meantime, CBDT issued an instruction no.3/2016 dated 10.03.2016 [F. No. 500/9/2015-APA-II] in respect of Transfer Pricing. Accordingly, considering the CBDT's instruction no. 3/2016 dated 10.03.2016, the then AO passed an assessment order u/s. 143[3] of the I.T. Act, 1961 at an assessed income of Rs. 4,31,54,335/- on 31.08.2016."

This amply clarifies that the final assessment order passed on 31.08.2016 was in compliance of instruction No. 3/2016 dated 10.03.2016 after careful consideration and having full knowledge of the reference being made to the TPO. Thus the reference to the TPO made on 8.09.2015 became null and void once the final assessment order passed on 31.08.2016. The TPO order dated 27.10.2017 passed in consequence to the reference on 08.09.2015 can obviously not be used for making reassessment u/s. 148 without making a fresh reference with approval of the PCIT, and without a fresh TPO order following such reference after notice u/s. 148 was issued.

v. The panel therefore cannot give directions on the draft assessment order dated 2.08.2018 as the conditions u/s.144C(15) (b) of eligible assessee is not satisfied. The assessee is neither a foreign company nor is there a variation in income as a consequence of the order of the TPO passed under section 92CA(3), as the TPO order dated 27.10.2017 became invalid due to the final order already passed on 31.08.2016. Further, there is no valid TPO order under section 92CA(3), after initiation of proceeding u/s. 148. As the assessee is not an eligible assessee, the DRP does not have jurisdiction to issue Directions.

vi. *In view of the above discussion, the other objections of the assessee become infructuous.*

Direction u/s 144C of the Income Tax Act 1961

The objections of the Taxpayer are decided as above. The Assessing Officer is directed to complete the assessment as per the above directions. The AO shall incorporate the reason given by the DRP in respect of various objections at the appropriate places in the body of the final order. AO shall also place a copy of the DRP Directions as Annexure to the Final Order."

(Emphasis our)

5. The AO thereafter passed the final order determining the total income of the assessee at ₹9,40,36,160/- inter alia making Transfer Pricing Adjustment of ₹5,08,27,823/- of an international transaction after determining the ALP based on the order of the TPO.

6. The Id. Sr. Advocate arguing for the assessee submits that the assessment is bad in law for the following reasons:

- a) The case was taken up for scrutiny through CASS on “non-TP” risk parameters. Thus reference to TPO to determine ALP of an international transaction by the AO is beyond jurisdiction and hence invalid. Reliance is placed on instruction no. 7 of 2014 (F.No.225/229/2014-ITA.II). He referred to para 4 of this instruction and submitted that the procedure prescribed therein for approval was not obtained.
7. Original reference was made to the TPO on 08.09.2015 and that the final assessment order was passed on 31.08.2016, prior to the receipt of any order from the TPO. After completion of the final assessment order u/s 143(3) of the Act on 31.08.2016, the TPO issued notice to the assessee on 06.01.2017. The assessee responded on 14.02.2017 stating that transfer pricing proceedings were invalid and should be dropped. The T.P. proceedings were without jurisdiction and hence null and void. The ld. Sr. advocate submitted that consequently the reasons recorded for re-opening of assessment on 03.05.2018 were bad in law as they were based on a TPO report which was non-est in law, and was an illegal T.P. order. Hence, the re-assessment is bad in law.
8. He relied on the judgment of the Hon’ble Supreme Court in the case of *State of Punjab and Others vs. Gurudev Singh Civil Appeal No. 1852 of 1989 along with the Civil Appeal No. 4772 of 1989 (1991) 4 SCC 1* and submitted that the order of the AO passed u/s 143(3) of the Act have force and is operational, unless it is declared to be void or null by the competent body or authority.
9. The order of the TPO is without jurisdiction as there was no reference by the AO to the TPO during the course of re-assessment proceedings and hence no addition can be made in the re-assessment proceedings based on an illegal T.P. Order.
10. Thus he argued that the final assessment order is bad in law has to be quashed.
11. The ld. DR, Sh. Vijay Shankar on the other hand submitted that the re-opening is valid as the AO had information, in the form of a report by the TPO, determining that the Arm’s Length Price of the international transactions, of the assessee had with its associate enterprise calls for adjustment. He relied on the decision of the Hon’ble Supreme Court in the case of *Pooran Mal Etc vs Director Of Inspection 1974 AIR 348, 1974 SCR (2) 704 dated 14 December, 1973* for the proposition that, material found

during an illegal search can also be used for the purpose of adjudication of tax liability and submitted that similarly even if the reference to the TPO and consequent proceedings before the TPO are declared invalid, the material gathered, in the form of TPO report can be a basis for the re-opening of assessment. He submitted that the assessee is relying on the Board's circular wherein, whenever the scope of enquiry in cases selected for scrutiny is proposed to be enlarged by the AO and where the case is required to be taken for comprehensive scrutiny then the AO has to take certain approvals from higher authorities and pointed out that the Board has issued another instruction no. 3/2003 dated 20.05.2003 mandating the AO to refer to the TPO, for determination of ALP, in all cases where the assessee has international transaction with AE valued above ₹5 crores and submitted that this instruction No. 3/2003 dated 20.05.2003 supersedes all other instructions and when the assessee has entered into an international transaction with an AE, the value of which is above ₹5 crores, the AO has to necessarily refer the transaction to the TPO for determination of ALP and hence it is wrong to argue that the AO has acted beyond jurisdiction.

12. The ld. DR referred to the dates and events and submitted that the instruction dated 26.09.2014 relied upon by the assessee does not apply to the facts of the case as reference to the TPO was made on 08.09.2015 based on Instruction No. 3/2003 dated 20.05.2003.

13. The ld. DR also argued that the assessment order passed was a valid order. In reply the ld. Sr. Advocate relied on the certain case laws, which will be considered by us as and if required, for the proposition that a final assessment order passed without a valid reference to TPO as required under Act, renders the assessment order bad in law.

14. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows.

15. The dates and events are extracted for ready reference:

<i>Date</i>	<i>Particulars</i>
28 November 2014	<i>Return of Income filed disclosing a total income of INR 4,31,43,710 under normal provisions and book profit of INR 4,22,29,700 under MAT. @ Pg 24 of Paper Book ("PB")</i>

28 August 2015	Notice u/s 143(2) of the Income Tax Act, 1961 ("the Act") was issued for limited scrutiny through CASS on non-TP Risk parameters fixing the date of hearing as 14.09.2015. @ Pg 215 of PB
28 August 2015	AO wrote to Principal CIT for approval, to refer case to TPO so that ALP may be determined. @ Pg 219 of PB
31 August 2015	JCIT agreed with AO's proposal. @ Pg 218 of PB
7 September 2015	DCIT Headquarters communicated Principal CIT's approval. @ Pg 217 of PB
8 September 2015	The case was referred to the TPO u/s 92CA(1) of the Act @ Pg 216 of PB
21 June 2016	Notice under section 142(1) of the Act was issued by the AO. @ Pg 220 of PB
31 August 2016	Final Assessment Order passed u/s 143(3) of the Act with an addition of INR 10,626/- @Pg 222 of PB
6 January 2017	Transfer Pricing notice issued by the TPO initiating proceedings
14 February 2017	Response filed by the Assessee stating that TP proceeding was invalid and should be dropped. @ Pg 229 of PB
18 October 2017	Notice from TPO under section 92CA(2) read with section 92D of the Act was received by the assessee @ Pg 230 of PB
23 October 2017	Show-cause notice issued by the TPO proposing TP adjustments. @ Pg 231 of PB
26 October 2017	Response to show-cause notice filed by the Assessee without prejudice to the fact that TP proceeding was invalid. @ Pg 233 of PB
27 October 2017	TP order passed with an upward adjustment of INR 5,08,27,823/- @ Pg 297 of PB
26 February 2018	Reassessment proceedings initiated by the AO by issuing notice u/s 148 @ Pg 326 of PB
3 May 2018	Reasons for initiating reassessment proceedings provided by the AO @Pg 327 of PB
2 August 2018	Draft assessment order passed by the AO with an adjustment of INR 5,08,27,823/- @ Pg 346 of PB
30 August 2018	Objections filed by the Assessee against such draft order with the Hon'ble DRP @ Pg 353 of PB
31 August 2018	Copy of DRP objections filed with the AO
22 April 2019	DRP direction issued @ Pg 467 of PB
16 May 2019	Final Assessment order u/s 143(3)/147 r.w.s 144C @ Pg 475 of PB

16. The DRP on page 7 held as follows:

"iv. It is also observed that it is mentioned in the draft assessment order dated 2.08.2018 as under:

"In the meantime, CBDT issued an instruction no.3/2016 dated 10.03.2016 [F. No. 500/9/2015-APA-II] in respect of Transfer Pricing. Accordingly, considering the CBDT's instruction no.3/2016 dated 10.03.2016, the then AO passed an assessment order u/s. 143[3] of the I.T. Act, 1961 at an assessed income of Rs. 4,31,54,335/- on 31.08.2016."

This amply clarifies that the final assessment order passed on 31.08.2016 was in compliance of instruction No. 3/2016 dated 10.03.2016 after careful consideration and having full knowledge of the reference being made to the TPO. Thus the reference to the TPO made on 8.09.2015 became null and void once the final assessment order passed on 31.08.2016. The TPO order dated 27.10.2017 passed in consequence to the reference on 08.09.2015 can obviously not be used for making reassessment u/s. 148 without making a fresh reference with approval of the PCIT, and without a fresh TPO order following such reference after notice u/s. 148 was issued."

(Emphasis our)

17. According to the findings of the DRP the final assessment order could not be done without making a valid reference to the TPO. The DRP also held that TPO could not have initiated any proceedings against the assessee, after the AO passed the order on 31.08.2016, as the reference made on 08.09.2015 by the AO to the TPO becomes

infructuous after passing of the final assessment order on 31.08.2016. Thus, the TPO order dated 27.10.2017 is non-est in law. The DRP also held that after re-opening the assessment u/s 147 of the Act on 26.02.2018, a fresh reference has not been made to the TPO. Hence the adjustment made without a valid reference to the TPO for determination of ALP of the international transaction cannot be sustained. We agree with these findings. The TPO has acted without jurisdiction as there was no valid and continuing reference. The reference made on 08.09.2015 gets terminated or infructuous after passing of the final assessment order u/s 143(3) of the Act on 31.08.2016. A T.P. report is not a material found as in the case of *Pooran Mal Etc* (supra). It is a report which has no legal validity. An adjustment made based on this report is also bad in law.

18. The directions of the DRP are binding of the AO u/s 144(13) of the Act. The final assessment order dated 16.05.2019 should have incorporated the finding of the DRP as directed in the order of the DRP. When the DRP has held that the re-opening of the assessment is bad in law, the AO, in our view, has no other alternative but to drop the assessment proceedings on the ground that re-opening of assessment has been held as bad in law. As the AO has not followed the binding directions of the DRP, we have to quash the final assessment order dated 16.05.2019 as bad in law.

19. This Bench of the Tribunal in the case of *M/s. Labvantage Solution Pvt. Ltd. Vs. DCIT* (supra) under identical circumstances held as follows:

"5. We find that the Learned AO having realized his mistake of not selecting the case for scrutiny sought to remain silent after receiving the Learned TPO's order dated 28.1.2014. We find that notice u/s 143(2) was also issued and served on the assessee in the reassessment proceedings. We find that in the reassessment proceedings, no fresh reference was made to the Learned TPO u/s 92CA(1) of the Act by the Learned AO. We hold that the action of using the old TPO order passed u/s 92CA(3) as an information for forming his opinion of reason to believe that income has escaped assessment within the meaning of section 147 of the Act also cannot be appreciated for reopening the assessment. In this regard, we find that the case law relied on by the Learned AR in the case of CWT vs Sona Properties reported in 327 ITR 592 (Bom) rendered by Bombay High Court is well placed. In the said case, the Assessing Officer had made a reference to the Departmental Valuation officer after the end of the assessment proceedings. Their Lordships held that such a reference could not have been made under the scheme of the Act because the assessment proceedings had come to an end before the point of time when such a reference was made, and as such the reference itself was legally invalid. The stand of the revenue was that even if reference to the DVO is to be held to be invalid, the DVO's report constituted information and as such it could be a good basis for coming to the conclusion that wealth has escaped assessment. Rejecting this plea, their Lordships observed that, "a report called by an authority having no jurisdiction would be a nullity at law and consequently proceedings based solely on such report considering the requirement of section 17 would be illegal and will have to be quashed." In effect thus, it is held that when reference itself

is invalid, the report received as a result of the said reference cannot constitute material for forming the belief that an income or wealth tax has escaped assessment.

The order passed by the Learned TPO passed pursuant to an illegal reference cannot be used in the reassessment proceedings by the Learned AO as both the proceedings are separate and independent of one another.

In view of the above, we hold that the reassessment proceedings initiated based on the TPO's order dated 28.1.2014 suggesting an adjustment of Rs. 7,51,20,484/- to ALP (which was based on an illegal reference) by the Learned AO is void ab initio and bad in law."

In view of the aforesaid facts and circumstances and respectfully following the aforesaid decision, we hold that the reassessment proceedings initiated based on the ld TPO's order dated 29.1.2013 suggesting an adjustment of Rs. 2,43,53,752/- to ALP was based on illegal reference by the ld AO and is accordingly void ab initio and bad in law. Hence the entire reassessment proceedings initiated based on such illegal reference and illegal order of ld TPO cannot be construed as information which would have live link to the formation of belief to have reason to believe on the part of the ld AO that income had escaped assessment within the meaning of section 147 of the Act. Hence we hold that no addition in the sum of Rs. 2,43,53,752/- towards adjustment to ALP could be made in the reassessment. Once this addition goes, then the very root of the reassessment proceedings also vanishes and no other addition could be made thereon. Accordingly, the entire reassessment proceedings deserve to be quashed in the facts and circumstances of the case.

2.5. In view of our above conclusion, we allow the ground no. 1 raised by the assessee by declaring that the reassessment order of the ld AO is bad in law and void ab initio. In view of this decision, the adjudication of other grounds becomes infructuous and hence no decision is given on the merits of the additions and on other grounds raised by the assessee."

20. Consistent with the view taken therein, we uphold the view of the DRP that the re-opening of assessment based on a TPO report which is a nullity is bad in law. Hence, we quash the final assessment order passed by the AO u/s 143(3) r.w.s. 144C of the Act on 16.05.2019 as bad in law.

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

Kolkata, the 13th March, 2020.

Sd/-
 [S.S. Godara]
 Judicial Member

Sd/-
 [J. Sudhakar Reddy]
 Accountant Member

Dated: 13.03.2020
Bidhan

Copy of the order forwarded to:

- 1. Nomura Research Institute Financial Technologies India Private Limited, PS Srijan Corporate Park, Tower-1, 22nd Floor, Block-EP & GP, Sector-V, Salt Lake, Kolkata-700 091.**
- 2. DCIT, Circle-2(2), Kolkata.**
3. CIT(A)
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata. (sent through e-mail)

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches