

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'I-2' : NEW DELHI)**

**BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCE)

**ITA No.6913/Del./2018
(ASSESSMENT YEAR : 2011-12)**

ACIT, Circle 21 (2),
New Delhi.

vs. M/s. Rolls Royce India Pvt. Ltd.,
2nd Floor, Birla Tower West,
25, Barakhamba Road,
New Delhi – 110 001.

(PAN : AABCR5277Q)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri R.K. Kapoor, CA
REVENUE BY : Shri S.B. Shukla, CIT DR

Date of Hearing : 01.04.2021

Date of Order : 27.05.2021

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, ACIT, Circle 21 (2), New Delhi (hereinafter referred to as 'the Revenue') by filing the present appeal sought to set aside the impugned order dated 20.1.2016 passed by the Assessing Officer (AO) in consonance with the orders passed by the ld. TPO/CIT (A) under section 254/143 (3) of the Income-tax

Act, 1961 (for short 'the Act') qua the assessment year 2011-12 on the grounds inter alia that :-

“1. Whether in facts and circumstances of the case, the Ld. CIT(A) is justified in treating the appeal effect order as the final assessment order without appreciating the fact that neither any reference was made from this office for fresh computation of Ann's Length Price to the TPO nor did the Ld. TPO pass the final order which is to be passed u/s 92CA(3)?

2. Whether in facts and circumstances of the case, the Ld. CIT(A) is justified in treating the appeal effect order as the final assessment order without appreciating the fact that this case for the same A.Y. is sub-judice before the Hon'ble High Court. By the time, appeal is pending before the Hon'ble High Court, how can the appeal effect be treated as the final assessment order?

3. Whether in facts and circumstances of the case, the Ld. CIT(A) is justified in treating the appeal effect order as the final assessment order without appreciating the fact that the order of the Ld. TPO dated 20.09.2016 specifically stated in the subject that it is "Order Giving PARTIAL EFFECT to the directions of Hon'ble ITA T in the case of M/s Rolls Royce India Pvt. Ltd. A.Y. 2011-12". Therefore, it was not an order u/s 92CA(3), rather an order giving only partial effect to the directions of the Hon'ble ITAT which was necessary for filing of further appeal before the Hon'ble High Court. Moreover, it gave effect keeping into consideration only those grounds/ comparables that have been deleted/ excluded by the Hon'ble ITA T and nothing on the set-aside issues were commented upon in the order of the Ld. TPO"?

4. Whether in facts and circumstances of the case, the Ld. CIT(A) is justified in treating the appeal effect order as the final assessment order without appreciating the fact that the appeal effect order was just a mechanical application of IT A T directions before filing further appeal and by no stretch of imagination can be held to be the Final Assessment order?

5. Whether III facts and circumstances of the case, the Ld. CIT(A) is justified in invalidating the order u/s 254/143(3) on the grounds that no Draft Assessment Order was presented to the assessee before passing this order without appreciating the fact that Draft Assessment order u/s 144C is to be presented to the assessee company only before passing the final assessment order and not before giving of the appeal effect?

6. Whether in facts and circumstances of the case, the Ld. CIT(A) is justified in invalidating the order u/s 254/143(3) on the grounds that no Draft Assessment Order was presented to the assessee before passing this order without appreciating the fact that section 144C states that the draft assessment order is to be forwarded to the 'eligible assessee' and the explanation of the 'eligible assessee' given in this section itself states "any person in

whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA". It is to be noted here that in this case, the Ld. TPO did not pass any order under section 92CA(3) for giving effect to the directions of the Hon'ble ITAT. The final assessment in this case is still pending.

7. Whether in facts and circumstances of the case, the Ld. CIT(A) is justified in invalidating the order u/s 254/143(3) on the grounds that no Draft Assessment Order was presented to the assessee before passing this order without appreciating the fact that section 144C states that the Draft Assessment Order is to be presented to the eligible assessee when the AO has proposed any variation in income or loss returned which is 'prejudicial' to the interest of such assessee. In this case, vide the appeal effect order, the assessed income of the assessee company has been revised downwards to give partial effect to the directions of the Hon'ble ITAT and this order cannot be held to be prejudicial to the interest of the assessee.

8. Whether in facts and circumstances of the case, the Ld. CIT(A) is justified in invalidating the order u/s 254/143(3) by relying on the judgments of Control Risk India Pvt. Ltd., JCB India Ltd and Turner International Ltd. without appreciating the fact that in all these cases the final assessment order was quashed on the grounds that no Draft Assessment Order was presented to the assessee company before passing the Final Assessment Order. None of these cases have talked about following the same procedure even before passing the appeal effect order."

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : The taxpayer is wholly owned subsidiary of Rolls Royce International Limited. The taxpayer operates through an office in India in order to provide commercial information services and market support services to Rolls Royce International Ltd. relating to Indian territory and neighbouring countries. The taxpayer filed its revised return of income for AY 2011-12 at an income of Rs.38,22,94,149/-. The assessment was framed u/s 143 (3) read with section 144C of the Act by the AO by making Transfer Pricing (TP) additions of Rs.5,12,62,317/-

proposed by the TPO and passed the draft order. Thereafter, ld. DRP partly accepted the objections raised by the taxpayer and reduced the TP addition to Rs.3,62,82,532/-. Thereafter, final order was passed u/s 143 (3)/144C/92CA (3) of the Act.

3. Then the taxpayer carried the matter before the ld. CIT (A) who has directed the AO/DRP to reexamine some of the comparables challenged by the taxpayer and to verify and allow the risk adjustment.

4. In other words, this is second round of litigation before the Tribunal challenging the impugned order dated 20.10.2016 passed by the AO in pursuance of the TP order dated 20.09.2016 giving partial effect to the directions of the Tribunal in case of the taxpayer for AY 2011-12.

5. The taxpayer carried the matter before the ld. CIT(A) by way of filing the appeal who has accepted the appeal by quashing the assessment order passed u/s 254/143(3) of the Act being invalid. Feeling aggrieved by the order passed by the ld. CIT (A), the Revenue has come up before the Tribunal by way of filing the present appeal.

6. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and

orders passed by the Revenue authorities below in the light of the facts and circumstances of the case.

7. Undisputedly, in the first round of litigation before the Tribunal decided vide order dated 22.04.2016, the appeal of the taxpayer was allowed directing the AO/TPO to reexamine some of the comparables challenged by the taxpayer and verify and allow the risk adjustment sought for by the taxpayer. It is also not in dispute that till now, no order has been passed by the TPO in consonance with the order (supra) passed by the Tribunal rather an order dated 20.09.2016 is passed by the Id. TPO under the subject, ***“Order giving partial effect to the directions of Hon’ble ITAT in case of M/s. Rolls Royce India P. Ltd. AY 20111-12”***.

8. AO, thereafter while giving effect to the order dated 20.09.2016 passed by the TPO, framed the assessment at Rs.40,97,57,996/-.

9. Ld. DR for the Revenue challenging the impugned order passed by the Id. CIT (A) contended that Id. CIT (A) has erred in treating the appeal effect order as the final assessment order passed by the AO as the TPO has never passed a final order after remand of the case by the Tribunal u/s 92CA(3) of the Act.

10. However, on the other hand, Ld. AR for the taxpayer relied upon the order passed by the Id. CIT (A) and contended that any

assessment order containing proposed TP adjustment without passing draft assessment order is not sustainable in the eyes of law and as such, Id. CIT (A) has rightly quashed the assessment order passed by the AO and relied upon the judgments of **Hon'ble Delhi High Court in the cases of Turner International India (P) Ltd. vs. DCIT 82 taxmann.com 125 (Delhi), DCIT vs. Control Risks India (P) Ltd. (2017) TII-56-High Court-Delhi-TP and JCB India Ltd. vs. DCIT in Writ Petition No.3399/2016, 3429/2016 & 3431/2016.**

11. In the backdrop of the aforesaid facts and circumstances of the case and contentions raised by the Id. Authorised Representatives of the parties to the appeal, the sole question arises for determination in this case is :-

“as to whether impugned assessment order dated 20.10.2016 passed by the AO pursuant to the order dated 20.09.2016 passed by the TPO giving partial effect to the order passed by the Tribunal in case of the taxpayer for AY 2011-12, without passing draft assessment order is sustainable in the eyes of law?”

12. The Tribunal in the first round of litigation vide order dated 22.04.2016 categorically directed the TPO to reexamine some of the comparables challenged by the taxpayer and allow after verification the risk adjustment sought for by the taxpayer by partly allowing the appeal. In such eventualities, the only course

available to the TPO was to reexamine the comparables by providing an opportunity of being heard to the taxpayer for benchmarking the international transactions viz. IBI Chematur Engineering & Consultancy Ltd., Mitcon Consultants & Engg. Services Ltd., Ashok Leyland Project Services Ltd. & HSCC (India) Ltd.. However, ld. TPO for the reasons best known to him evolved his own procedure by passing order dated 20.09.2016 under the subject :

“Order giving partial effect to the directions of Hon’ble ITAT in case of M/s. Rolls Royce India P. Ltd. AY 2011-12”

on the basis of which assessment order has been framed by the AO.

13. When assessment order has been framed u/s 154/143(3) of the Act pursuant to the order dated 20.09.2016 passed by the TPO, the taxpayer had the only remedy to approach the ld. CIT (A) by way of filing appeal. Ld. CIT (A) has accepted the appeal and held the assessment order dated 20.10.2016 as invalid. In the entire exercise, ld. TPO/AO have deprived the taxpayer to avail of their remedy to challenge the draft assessment order to be passed by the AO pursuant to the TP order passed by the ld. TPO.

14. When undisputedly the order passed by the Tribunal in the first round of litigation is to be treated under the provisions contained u/s 92CA(3) and section 144C of the Act and in these

circumstances, the TP order (supra) is also to be treated u/s 92CA(3) of the Act on the basis of which draft assessment order was required to be passed so as to enable the taxpayer to approach the Id. DRP, if so require. So, assessment order passed by the AO without passing draft assessment order to enable the taxpayer to approach Id. DRP is not sustainable in the eyes of law.

15. Identical issue has been decided by the Hon'ble Delhi High Court in the cases of **Turner International India (P) Ltd. vs. DCIT, DCIT vs. Control Risks India (P) Ltd. and JCB India Ltd. vs. DCIT** (supra) whereby final assessment order has been quashed on the ground that no draft assessment order was passed before passing final assessment order.

16. Procedure adopted in this case by the Id. TPO/AO is unheard of. In these circumstances, we are of the considered view that Id. CIT (A) has rightly quashed the final assessment order. So, finding no perversity or illegality in the impugned order, present appeal filed by the Revenue is hereby dismissed.

Order pronounced in open court on this 27th day of May, 2021.

**Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

**Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 27 day of May, 2021
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.DRP
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.
