

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI**

**[Coram: Pramod Kumar (Vice President),
and Saktijit Dey (Judicial Member)]**

ITA No. 6649/Mum/2019
Assessment year: 2015-16

Sabre Asia Pacific Pte. Ltd. **Appellant**
(Earlier known as M/s Abacus International Pte. Ltd.)
C/o Deloitte Haskins & Sells LLP Indiabulls Finance Centre,
Tower 3, 28th Floor, Senapati Bapat Marg, Elphinstone (W)
Mumbai 400013 [PAN: AABCA6590M]

Vs.

Assistant Commissioner of Income Tax
International Taxation Circle 4(2)(1), Mumbai **Respondent**

Appearances by:

Ms. Jeenal Dedhia *for the appellant*
S S Iyengar *for the respondent*

Date of concluding the hearing : 22/07/2021
Date of pronouncing the order : 21/10/2021

O R D E R

Per Pramod Kumar, VP:

1. By way of this appeal, the assessee-appellant has challenged correctness of the order dated 29th June 2019 passed by the Dispute Resolution Panel-2, Mumbai, under section 144C (5) of the Income Tax Act, 1961, for the assessment year 2015-16.

2. One of the grievances raised by the assessee-appellant is that the learned DRP erred in dismissing the appeal in limine, without dealing with grievances raised in the objections filed before the learned DRP. This grievance is reflected in the following grounds of appeal:-

DRP directions not in accordance with section 144C of the Act

2. *The directions issued by the Hon'ble DRP are contrary to the provisions of law and facts of the case and without appreciation of the facts and circumstances of the case in their right perspective.*
 3. *The directions issued by the Hon'ble DRP are not in accordance with the provisions of section 144C of the Act.*
 4. *The Hon'ble DRP has erred in holding that the objections are not maintainable and thereby dismissing the same and simultaneously directing the learned ACIT to pass the final assessment order as per the draft proposed in terms of section 144C(13) of the Act.*
 5. *The Hon'ble DRP having accepted and registered the objections in its record, erred in dismissing the objections as not maintainable and thereby foreclosing the right of the appellant to prefer an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)] as per section 246A of the Act.*
 6. *The Hon'ble DRP erred in holding that the objections filed by the appellant on 18 January 2019 are not in accordance with section 144C read with the Income-tax (Dispute Resolution Panel) Rules, 2009.*
 7. *The Hon'ble DRP erred in not appreciating that even if objections were defective, it was incumbent on the Hon'ble DRP to give an opportunity to the appellant to rectify/ remove the alleged defect in the Form 35A.*
 8. *The Hon'ble DRP erred in not appreciating that the alleged defect is a curable defect under section 292B of the Act. Further, it was bonafide and there was sufficient cause to rectify the defect.*
 9. *The Hon'ble DRP has erred in holding that the appellant has filed the objections before it beyond the time limit prescribed and thereby refusing to condone the alleged delay without appreciating that the appellant the objections within time limit as prescribed in the Act.*
 10. *The Hon'ble DRP erred in not appreciating that the object of reference to the DRP is to 'resolve a dispute' by directing the learned ACIT on specific issues raised by the appellant, which if not allowed may cause irreparable damage t the appellant.*
 11. *The Hon'ble DRP erred in not following the decision of the jurisdictional Tribunal in the case of MSM Satellite (Singapore) Pte. Ltd. v/s JDIT [2016] 161 ITD 602, on the basis that the facts are different.*
 12. *The Hon'ble DRP erred in not appreciating that even if the objections are filed beyond time limit, the Hon'ble DRP ought to have condoned the delay.*
 13. *The Hon 'ble DRP at para no. 5.19 of the directions erred in observing the appellant claimed that the hard copy of the signed Form 35A was sent by couriers from Singapore on 17 January 2019 but was not received till the due date of filing the objections.*
3. Learned representatives fairly agree that the issue in appeal is squarely covered by a decision of the co-ordinate bench in the case of *MSM Satellite Singapore Pte Ltd vs JDIT [(2016) 161 ITD 602 (Mum)]* even though learned Departmental Representative justified the distinction made out by the learned DRP. The relevant observations in the above co-ordinate bench decision are as follows:-

4. Assessee filed its objections to the DRP in Form No. 35A on 23.4.2013. However, the Form No. 35A filed by the assessee is only a scanned copy containing the signature of the concerned person. Before the DRP, the maintainability of the scanned copy of the Form No. 35 (said application) came up for discussion in the very first hearing on 13.11.2013. For the first time, the DRP gave a show cause notice to the assessee proposing to treat the said scanned copy of the application in Form No. 35A as 'non-est' and proposed to dismiss the same in limine. Assessee was given time till 2.12.2013 to respond to the said show cause notice. In response, vide letter dated 28.11.2013, the Assessee's Representative submitted that original Form No. 35A could not be furnished to replace the scanned copy which is already with DRP, within the prescribed time of 30 days for the reasons viz (i) the assessee geographically located in Singapore; (ii) the signed original application could not be received in India in time; (iii) to meet the dead lines, assessee filed the application with colour scanned copy of Form No. 35 with the intention to replace the same with the original one at the time of hearing before the DRP; (iv) there was a change in the tax consultant/AR of the assessee and the responsibility of replacing the scanned copy with the original application has missed inadvertently. Assessee also argued strongly on the curability of the said lapse/irregularity/defect. In this regard, assessee relied on various decisions and argued that the said defect is rectifiable u/s. 292B of the Act. Assessee was ready to furnish the application in original Form No. 35A which was not accepted by the DRP. On hearing the above, DRP decided the preliminary issue about the maintainability of such application being a scanned copy of the original Form No. 35A. The DRP discussed the assessee failure to replace the scanned copies with the original signed documents and debated on the negligence of the assessee. They also discussed the responsibility of the citizen to abide by the rules and procedures prescribed in the law. The DRP equated this defect/mistake to the fact of the return of income filed without signature. He also mentioned that the proceedings before the DRP constitute a 'pre-assessment proceedings'. Further, stating that when the assessee failed to remove the defect in the return of income, the said return of income will be treated as non-est and the similar fact is attributed to the failing to file Form No. 35A in original. Further, responding to the assessee's corrected application in Form No. 35A, the DRP is of the opinion that the same is not proper as the proceedings before the DRP are different from thus before the appellate authority under the Statute and they are only 'pre-assessment proceedings'. Therefore, the decisions cited by the assessee which primarily relates to the proceedings before the CIT (A) are distinguishable on facts. Further, responding to the AR's argument to treat the assessment proceedings as 'time barred' as copy of Form No. 35A filed before the AO was also a scanned copy and the AO should have considered the same as 'non-est' and therefore, completed the assessment by holding that the assessee had not opted for filing the objections before the DRP. In reply, the DRP took notice of the assessee's intimation to the AO about its intention to file the objections before the DRP and concluded that the assessment order is not time barred. Eventually, DRP held that the scanned copy application of Form No. 35A is invalid and non-est. Accordingly, DRP dismissed the application in limine. Relevant lines from the DRP's direction dated 4.12.2013 (at page 10 and 11) are extracted as under:—

" It is trite law that an application made before any authority under prescription of law has to be dealt with by that authority itself. In the instant matter it means that the application filed before the DRP in number 35A, in all respects and aspects of the application, was to be dealt with by the DRP itself. The assessing officer, therefore, could not

have taken a view on the maintainability of the application or on the merits of each of the objections raised before the DRP. This was within the sole purview of this DRP. This decision is now being taken and the AO will complete the assessment in compliance of these directions being issued. Based on the discussion in paras supra, and in the facts and circumstances of the case and in law, we hold the assessee's application in form number 35A as invalid and non-est. It is accordingly dismissed in limine."

5. However, DRP did not adjudicate the other grounds raised by the assessee on merits. Subsequently, assessment order dated 10.1.2014 u/s. 143 (3) read with section 144C(13) of the Act was passed assessing the total income of the assessee at Rs. 282,48,09,813/-, after making various additions on accounts of royalty income, interest income, advertisement income, treating the distribution income as royalty income etc. Aggrieved with the above order of the AO and the DRP, assessee is in appeal before the Tribunal.

6. During the proceedings before us, Shri P.J. Pardiwalla, Ld Counsel for the assessee narrated the above cited facts, submissions and legal propositions etc. Ld Counsel for the assessee's arguments revolve around the following: (i) filing application before the DRP by way of scanned copy of Form no. 35A is a curable defect/irregularity. The provisions of section 292B of the Act support the same; (ii) assessee could not furnish the application in original due to the limitation of 30 days and it took time for sending the original application from Singapore to India. After receipt in India, the same could not be filed before the DRP due to the fact of change of the Authorized Representative in India to represent before the DRP; (iii) no defect notice/show cause notice was received by the assessee with intimation to remove the defects, if any, till the first hearing of the application by the DRP. Otherwise, Ld Counsel for the assessee brought our attention to various decisions and suggested institution of DRP was incorporated in the Statute to do away with the well existed proceedings before the first appellate authority ie CIT (A). The DRP proceedings constitute 'appellate proceedings' in substance and therefore, the events relatable to the removal of defects are equally applicable to the DRP. Referring to the assessee's efforts in sending scanned copies of the application to the DRP, Ld Counsel for the assessee submitted that assessee's intention is undisputedly clear and they want to exploit the right of filing application before the DRP seeking directions to the AO. Taking clue from the DRP's order, Ld Counsel for the assessee argued by stating that the assessment order made by the AO on 10.1.2014 should be treated time barred if the impugned application to the DRP is treated as 'non-est. Elaborating the same, Ld Counsel for the assessee submitted that the DRP cannot dismiss the application as non-est and treated the assessment order as valid one. He also mentioned that this issue has come up for judicial scrutiny for the first time and they are not binding/persuasive precedents on this issue. Finally, he submitted that the application filed on 13.4.2013 is otherwise complete in all respects as it is validly signed by the Authorized Signatory and filed in time ie before the expiry of 30 days limited prescribed in the Act. He also summed up by saying that it is a curable defect and assessee's attempt to file original Form No. 35A was not accepted by the DRP for the reasons not known to the assessee.

7. Per contra, Ld DR for the Revenue relied heavily on the order of the AO, DRP and the conclusions drawn by these authorities in their respective orders. Ld DR submitted that the DRP followed the same analogy and the likely effect of the validly filed return of income. He prayed for confirming the order of the AO and the directions of the DRP.

8. We have heard the parties and also perused the orders of the revenue, relevant pages of the assessee's paper book, judgments cited before us. The main issue for adjudication before us revolves around the correctness of the decision of the DRP in dismissing the application of the Assessee in limine by treating the scanned copy of the application in Form No. 35A as non-est. The core reason for such dismissal relates to the furnishing of the scanned copy of the

Form No. 35A as non-est before the DRP and not in original. Otherwise, there is no dispute on facts relating to this issue. Assessee filed the scanned copy of the duly signed application in Form No. 35A before the expiry of 30 days time given in the statute, before the DRP and same was accepted by the DRP. No defect notice was issued by the Revenue for period of at least 6 months (23.4.2013 to 13.11.2013). For the first time, a show cause notice was issued only during the hearing proceedings ie after hearing notice was issued in response to the said Form No. 35A, a scanned copy. Assessee replied to the same and he wanted to file the application in original and replace the existing 'scanned copy' of the same. But, the same was rejected by the DRP. With above said factual matrix, now, we need to decide if the DRP is justified in treating the said scanned copy of application as non-est and also dismissing the application in limine.

9. On hearing the parties, we find, the following are some of the list of inadequacies from assessee's side: They are: 1. Failure to file the Form 35A (a kind of appeal memo) in original instead of the scanned copy before the DRP, 2. Failure to replace the scanned copy by filing the same in original immediately thereafter; 3. Notwithstanding, assessee fails to pray for the condonation of delay, if any, in filing the said Form No. 35A, and 4. Failure of maintaining the continued flow of information to the newly appointed AR of the assessee. Assessee changed the AR for dealing with the DRP related matters after the scanned copy was filed.

10. Further, some of the list of inadequacies from Revenue side include: 1. Failure to reject the Form No. 35A in scanned copy at the threshold stage itself, and why the officers have not taken any action on the said defect Form No. 35A and also against the erring officials/officers; 2. Failure to issue an appropriate defect notice at appropriate time calling for removal of the defect, if any, without waiting for more than 7 long months ie till the date of hearing of the application before the DRP. DRP issued a show cause notice for the first time only during the hearing proceedings, 3. Failure in appreciating the same when the scanned copy of Form No. 35A is otherwise in order in all respects bearing correct signature of the person, who is duly authorised in this regard, etc.

11. In the light of the above stated factual position, we proceed to analyse the provisions of section 292B of the Act, intent in of the assessee etc before deciding the first four grounds of appeal.

A. Legal Provisions:

11.1 Section 292B of the Income Tax Act relates to "Return of income, etc., not to be invalid on certain grounds." and the same read as under,—

"Sec. 292B. No return of income, assessment, notice, summons or other proceeding, furnished or made or issued or taken or purported to have been furnished or made or issued or taken in pursuance of any of the provisions of this Act shall be invalid or shall be deemed to be invalid merely by reason of any mistake, defect or omission in such return of income, assessment, notice, summons or other proceeding if such return of income, assessment, notice, summons or other proceeding is in substance and effect in conformity with or according to the intent and purpose of this Act."

12. We have examined the above provisions and the highlighted in bold the relevant expressions that may be of some use to the issue under consideration. The expressions 'other proceedings' that appear at three times in the section distinctly imply proceedings other than return, assessment, notice, summons etc. How about the furnishing of the application to the DRP? We have examined if this proceeding falls within the scope/meaning of this expression. As such, there is no precedent in this regard for or against it. Considering the same, we are of the considered opinion that the expression ie 'other proceedings', is residual and generic in nature and it is wide enough to include the present issue under consideration viz the

proceeding of furnishing of application. Having held it so and in favour of the assessee, we need to decide if the furnishing of such scanned copy of the duly signed application in Form No. 35A, constitutes a invalid one and not curable under this section. In this regard, we have examined if the such scanned copy is in sync, in substance, with the intent and purpose of the Act. We find there is no dispute on that part of the analysis and argument. Revenue's only objection is regarding furnishing of the application in scanned copy. Otherwise, the said scanned copy is meant for the assessee and for the purposes of the Act in all respects. Further, we find it is undisputed fact that, in response to the show cause notice, the assessee attempts to file the Form No. 35A in original and however, the same was not successfully allowed by the DRP. Rather, the DRP preferred to act on the said scanned copy of Form No. 35A unfairly and considered the said the scanned application as non-est. Further, it is relevant to mention that the DRP failed to provide the written reasons for rejecting the Original Application attempted to be filed by the assessee in response to the show cause notice.

13. Thus, in our opinion, the expression 'other proceedings' is wider enough to cover the present defect or omission of replacing the scanned copy with the original in time. We order AO accordingly.

B. Intension of the Assessee:

14. We have analysed the conduct and mind of the assessee and find the activities suggest inescapably that assessee wants to make use of the benefits of the office of DRP. They are: preparedness of the relevant papers in Form no. 35A, signed the same in time, scanned them, sent the office in India for filing before the DRP and ensured filing them before the expiry of the due date ie within 30 days from the date of the draft order of the AO. In that case, why the same was not replaced by the assessee by filing Original Form No. 35A. As discussed above, we find, the same is not without reason and the same being the change in the Representative. As such, the furnishing of the scanned papers and replacing them with hard copies or soft copies, if any, is now not new to the Department. Further, now, the Revenue started accepting the e-filing of application/appeals these days. Why not this also should not be deemed as such but for the procedural defects, if any.

Considering the same, we are of the view that the both decisions of the first appellate authority in treating the application non-est and dismissing the same as in limine are unsustainable in law. We order accordingly. Thus, grounds no. 1 to 4 raised by the assessee are allowed. Considering our decision on the preliminary issues raised in grounds no. 1 to 4, we are of the view that the rest of the grounds raised in the appeal are required to be remanded to the file of the DRP/AO for want of speaking order on each of the issues raised in Grounds no. 5 to 20 of the grounds of appeal. Revenue shall grant a reasonable opportunity of being heard to the assessee as per the set principles of natural justice. Accordingly, Grounds no. 5 to 20 raised by the assessee are allowed for statistical purposes.

4. This is a case in which the assessee had filed scanned copies of form 35A within the limitation period on 1st January 2019, but filed the physically signed copies subsequently on 16th May 2019. There is thus no dispute that scanned copies were furnished well in time, and the physically signed copies were filed thereafter. Learned DRP has rejected the reliance on MSM decision (supra) on the ground that it was a case of error which was condoned but in the present case it was a conscious act of the assessee to have filed scanned copy. Such a hyper technical approach does not meet our approval. Once it is clear, as in this case, that the assessee has chosen to take steps for approaching the DRP, such a course cannot be declined to the assessee

on account of some procedural shortcomings and/or defects in the approach-particularly when defects can be, and have been, removed before disposal of the reference to the Dispute Resolution Panel. The distinction being made out by the DRP so far as the above legal position in MSM case (supra) is devoid of legally sustainable merits, and we reject the same.

5. In view of the above discussions, bearing in mind entirety of the case and following the co-ordinate bench decision in MSM's case (supra), we uphold the plea of the assessee and remit the matter to file of the DRP for adjudication as merits.

6. As the matter has been remitted to the DRP for fresh adjudication, all other grievances, which are on merits, need no adjudication by us at this stage. These grounds of appeal are thus held to be academic and infructuous.

7. In the result, the appeal is allowed for statistical purposes in the terms indicated above. Pronounced in the open court today on the 21st day of October, 2021

Sd/-
Saktijit Dey
(Judicial Member)
Mumbai, dated the 21st day of October, 2021

Sd/-
Pramod Kumar
(Vice President)

Copies to:

(1)	<i>The appellant</i>	(2)	<i>The respondent</i>
(3)	<i>CIT</i>	(4)	<i>CIT(A)</i>
(5)	<i>DR</i>	(6)	<i>Guard File</i>

By order etc

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai