

**IN THE INCOME TAX APPELLATE TRIBUNAL
'B' BENCH : BANGALORE**

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(TP)A No. 548/Bang/2016
Assessment Year : 2011-12

The Deputy Commissioner of Income Tax, Circle – 7(1)(1), Bangalore.	Vs.	M/s. Tata Power Solar Systems Ltd., 78, Electronic City, Hosur Road, Bangalore – 560 100. PAN: AA ACT4660J
APPELLANT		RESPONDENT

&

**IT(TP)A No. 699/Bang/2016
Assessment Year : 2011-12
(By Assessee)**

Assessee by	:	Shri Kanchun Kaushal, CA
Revenue by	:	Shri Manjunath Karkihalli, CIT-DR

Date of Hearing	:	14-02-2022
Date of Pronouncement	:	30-03-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present cross appeals by assessee and revenue arises out of final assessment order dated 28.01.2016 passed by the Ld.DCIT, Circle -7 (1)(1), Bangalore for Assessment Year 2011-12 on following grounds of appeal:

IT(TP)A No. 548/Bang/2016 (Revenue's appeal):

“1. The directions of the Dispute Resolution Panel are opposed to law and facts of the case.

2. *Whether the Ld. DRP has erred in directing to consider average of both the half year margins of the company, it will be a fair basis to neutralize the incidence of high RPT for AY:2010-11 arbitrarily without appreciating the facts of the case.*

3. *For these and other grounds that may be argued at the time of hearing, it is prayed that the directions of Dispute Resolution Panel in so far as it relates to the above grounds may be reversed.*

4. *The appellant craves leaves to add, alter, amend and /or delete any of the grounds mentioned above.”*

IT(TP)A No. 699/Bang/2016 (Assessee’s appeal):

Revised grounds of appeal:

“The grounds mentioned herein by the Appellant are without prejudice to one another.

1. *That on the facts and the circumstances of the case, the order the learned Deputy Commissioner of Income Tax, Circle 7(1)(1), Bangalore ("Assessing Officer" or "AO") pursuant to the direction of the learned Dispute Resolution Panel (learned Panel) under section 144C (5) of the Act to the extent prejudicial to the Appellant, is bad in law and liable to be quashed. [corresponding to Ground 1]*

2. *That the learned AO and the learned Panel erred in upholding the rejection of Transfer Pricing ("TP") documentation by the learned Additional Commissioner of Income tax, Transfer Pricing — Range 4(2) — Mumbai (learned TPO) and in upholding the adjustment to the transfer price of the Appellant in respect of manufacturing activity of the Appellant. [corresponding to Ground 2]*

3. *That on the facts and circumstances of the case, the learned AO/learned Panel erred in rejecting the internal Transactional Net Margin Method ("TNMM") analysis conducted by the Appellant and also proposing a different set of comparable companies for re-computing the arm's length price ("ALP") for the manufacturing activity. [corresponding to Ground 3(a)]*

4. *That the learned Panel erred in law and on facts by including Surana Ventures Limited as a comparable whereas this company has significant related party transaction; [corresponding to Ground 3 (b)]*

5. *That the learned Panel erred in law and on facts by including V-Guard ("others segment") as a comparable whereas this company should have been excluded on ground of functional dissimilarity; [corresponding to Ground 3 (b)]*

6. That the learned Panel erred in law and on facts by excluding Websol Energy as a comparable whereas this company should have been included on ground of functional similarity; [corresponding to Ground 3 (b)]

7. That the learned Panel has erred in upholding the learned TPO's approach using data as at the time of assessment proceedings, instead of that available as on the date of preparing the TP documentation for comparable companies while determining arm's length price, ignoring the fact that this data was not available to the Appellant at the time of complying with the TP documentation requirement. [corresponding to Ground 3 (c)]

8. That the learned Panel has erred in upholding the learned TPO's approach of rejecting the aggregation approach followed by the Appellant in the transfer pricing study; [corresponding to Ground 4 (a)]

9. That the learned Panel has erred in upholding the learned TPO's approach of upholding the arm's length value of the international transaction related to reimbursement of expenses as NIL; [corresponding to Ground 4 (b)]

10. That the learned AO/ learned Panel erred in bringing to tax the interest income of INR 32,496,741 as "Income from Other Sources" as against reducing the same from Capital Work in Progress ("CWIP"). [corresponding to Ground 5]

11. Without prejudice to the ground no. 10 above, the learned AO erred in not granting depreciation on the amount of the interest income not allowed to be setoff against CWIP, ignoring the fact that the net amount of CWIP was capitalised in the subsequent years when the relevant assets were put to use for the purpose of carrying the business. [corresponding to Ground 6 (a)]

12. Without prejudice to the ground no. 10 above, the learned AO erred in not granting deduction under section 57(iii) of the Act for the interest incurred and capitalised onto CWIP in respect of External Commercial Borrowing. [corresponding to Ground 6 (b)]

13. The learned AO erred in making an addition of INR 2,34,55,729 to the total income on account of unreconciled amount as per the income reflecting in Form 26AS and income considered in the books for the year under consideration. The learned AO also erred in not considering the additional evidence filed on September 10, 2015. [corresponding to Ground 7]

14. The learned AO erred in not granting credit to the Dividend Distribution Tax paid by the Company amounting to INR 2,76,16,230 and in charging interest under section

115P of the Act at INR 39,60,390. [corresponding to Ground 8]

15. The learned AO erred in charging interest under section 234B and 234C of the Act. [corresponding to Ground 9]

That the Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein below or produce further documents before or at the time of hearing of this Appeal.”

2. Brief facts of the case are as under:

2.1 The assessee is engaged in the business of manufacture and sale (including exports) of Solar cells, Photovoltaic modules and Systems. The Assessee caters to the its Associated Enterprises ('AEs') as well as third parties. The assessee filed its return of income for the Financial Year 2010-11 relevant to AY 2011-12 on 24.09.2011.

2.2 The Ld.TPO passed an order under section 92CA of the Income-tax Act, 1961 ('the Act') on 30.01.2015 proposing an adjustment to the international transactions entered by the assessee with its AEs. On receipt of order from Ld.TPO, the Ld.AO passed a draft assessment order under section 144C(1) r.w.s 143(3) on 27.03.2015 wherein the transfer pricing adjustment was made as also certain other additions on corporate tax issues.

Aggrieved by the draft assessment order, the assessee filed objections before the Dispute Resolution Panel ('DRP').

3. In response to the objections raised, the DRP issued directions under section 144C(5) of the Act on 30.12.2015 confirming the additions proposed in the draft assessment order.

On receipt of the DRP directions, the Ld.AO passed the final assessment order on 28.01.2016.

Aggrieved, the assessee and the revenue have filed appeals before the *Tribunal*.

4. The Ld.AR submitted that the assessee wants to raise an additional ground on jurisdictional issues, based on the legal positions and on inclusion of a comparable Photon Energy Systems Limited based on the functional comparability of the company on merits.

5. He submitted that assessee may be permitted to raise these additional grounds. He thus submitted that the admission of additional ground nos. 16 to 19 vide application dated 19.03.2021 be considered.

Admission of Additional Ground Nos. 16 to 19:

Additional grounds of appeal:

“Ground No. 16: On the facts and in the circumstances of the case and in law, the order dated 30 January 2015 passed by the Additional Commissioner of Income-tax (Transfer Pricing) — 4(2) (Transfer Pricing Officer) under section 92CA of the Act is beyond the time limit prescribed under section 92CA(3A) r.w.s 153 of the Act thus making the transfer pricing order illegal, bad in law, null and void and liable to be quashed.

Ground No. 17: On the facts and in the circumstances of the case and in law, the transfer pricing order being illegal and void on account of being barred by limitation in terms of section 92CA(3A) r.w.s 1,53 of the Act, the action of the Assessing Officer in passing the draft assessment order dated 27 March 2015 by invoking section 144C of the Act is without jurisdiction and hence, the final assessment order dated 28 January 2016 and all proceedings consequent to the draft assessment order are also illegal and bad in law and liable to be quashed.

Ground No. 18: On the facts and in the circumstances of the case and in law, the transfer pricing order being illegal and void on account of being barred by limitation in terms of section 92CA(3A) r.w.s 153 of the Act, consequently, the final assessment order dated 28 January 2016 is also barred by limitation as prescribed under section 153 of the Act, thus making the final assessment order illegal, bad in law, null and void and liable to be quashed.

Ground No. 19: On the facts and in the circumstances of the case and in law, the Appellant prays for inclusion of the comparable - Photon Energy Systems Limited as the said company is functionally comparable to the manufacturing activity of the Appellant and hence, the same ought to be included in the final set of comparable to determine the arm's length price ("ALP") for the manufacturing activity."

6. The Ld. AR submitted that ground no. 16 regarding the validity of proceedings as order u/s. 92CA(3) having passed after expiry of limitation period is a legal and jurisdictional issue that goes to the root cause of the case. It is submitted that no new facts needs to be investigated for adjudicating the issue raised in these grounds. He placed reliance on the decision of *Hon'ble Supreme Court* in the case of *NTPC Ltd. vs. CIT* reported in 229 ITR 383.

On the contrary, the Ld.CIT.DR objected for admission of additional grounds.

We have perused the submissions advanced by both sides in the light of records placed before us.

7. Since the additional ground no. 16 raised by assessee being a legal issue goes to the root of the matter, we are of the view that it is paramount to take up this issue for adjudication before addressing the other issues raised by assessee.

Accordingly, we admit the additional ground 16 raised by assessee vide application dated 19.03.2021.

8. Before us the Ld.Counsel contended that the order passed by the Ld.TPO is time barred under the provisions of section 153 rws 92CA(3) of the Act and hence it is liable to be quashed. He referred to the provisions of section 153(1) and submitted that reference u/s 92CA (3) of the Act was received by the Ld.TPO on 27.08.2013 and therefore date of limitation for passing of the

order by ld. TPO expired on 29.01.2015. Whereas the Ld.TPO passed order u/s 92CA(3) on 30.01.2015 therefore, the order passed by the Ld.TPO is barred by the limitation. Ld. Counsel thus submitted that since the order of the Ld.TPO is barred by limitation, subsequent proceedings made pursuant to order u/s.92CA(3) does not survive.

9. He submitted that on identical facts, this issue has been decided in following case:

- *Decision of Hon'ble Delhi Tribunal in case of Honda Trading Corporation vs. DCIT reported in (2015) 61 taxmann.com 223*
- *M/s. Asian Honda Motor Co. Ltd. vs. DCIT in ITA No. 6143/Del/2015, order dated 18.07.2016*
- *M/s. Pfizer Healthcare India Pvt. Ltd. vs. JCIT in W.P. No. 32699 of 2019, judgment dated 07.09.2020, High Court of Madras*

The Ld.CIT.DR submitted that the order passed by the TPO is not barred by the limitation and submitted that such illegality is capable of being cured and it is merely a case of irregularity in assessment proceedings by the Ld.TPO.

10. The Ld.CIT.DR thus submitted that assuming there is a delay in passing order u/s. 92CA(3), at best, it would be a curable defect.

We have perused submissions advanced by both sides in the light of records placed before us. Firstly we look at the various provisions which are cited before us.

11. Section 92CA (3A) of the act reads as under:

"[(3A) Where a reference was made under sub-section (1) before the 1st day of June, 2007 but the order under sub-section (3) has not been made by the Transfer Pricing Officer before the said date, or a reference under sub-section (1) is made on or after the 1st day of June, 2007, an order under sub-section (3) may be made at any time before sixty days prior to the date on which the period of

limitation referred to in section 153, or as the case may be, in section 153B for making the order of assessment or reassessment or recomputation or fresh assessment, as the case may be, expires"

12. Admittedly the reference to Ld.TPO was made after 27.08.2013. Therefore the provisions of this section are applicable to the facts of the case. Accordingly Ld.TPO may make order under this section at any time before 60 days prior to the date of expiry of limitation as per section 153 (1) of the act.

13. According to section 153 (1) of the act the time limit for passing an order u/s 143 (3) was as under :-

Time limit for completion of assessments and reassessments.

153. 39[(1) *No order of assessment shall be made under section 143 or section 144 at any time after the expiry of--*

(a) two years from the end of the assessment year in which the income was first assessable ; or

(b) one year from the end of the financial year in which a return or a revised return relating to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year, is filed under sub-section (4) or sub-section (5) of section 139, whichever is later :]

Provided *that in case the assessment year in which the income was first assessable is the assessment year commencing [on or after the 1st day of April, 2004 but before the 1st day of April, 2010], the provisions of clause (a) shall have effect as if for the words "two years", the words "twenty-one months" had been substituted :]*

Provided *further that in case the assessment year in which the income was first assessable is the assessment year commencing [on or after the 1st day of April, 2005 but before the 1st day of April, 2009] and during the course of the proceeding for the assessment of total income, a reference under sub-section (1) of section 92CA--*

(i) was made before the 1st day of June, 2007 but an order under sub-section (3) of that section has not been made before such date; or

(ii) is made on or after the 1st day of June, 2007,

the provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words "two years", the words "thirty-three months" had been substituted.;

*42b[**Provided also** that in case the assessment year in which the income was first assessable is the assessment year commencing on the 1st day of April, 2009 or any subsequent assessment year and during the course of the proceeding for the assessment of total income, a reference under sub-section (1) of section 92CA--*

(i) is made before the 1st day of July, 2012, but an order under sub-section (3) of that section has not been made before such date; or

(ii) is made on or after the 1st day of July, 2012, the provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words "two years", the words "three years" had been substituted.]

[Extracted from taxmann.com as amended by the Finance Act 2012]

Therefore accordingly the order u/s 143(3) for AY 2011-12 should have been passed by 31.03.2015.

14. Based on the facts narrated above we hereby tabulate the relevant dates pertaining to the proceedings before the various authorities for the impugned AY.

1. Date of filing of return of income - 24.09.2011
2. 143(2) issued on – 01.08.2012
3. 143(1) issued on - 17.10.2014
4. Reference by the Ld.AO made on - 27.08.2013
5. Time period within which 143(3) is to be passed as per sec. 153(1) – 31.03.2015
6. Date by which order u/s. 92CA(3) was to be passed – on or before 28.01.2014
7. Date of passing the order u/s. 92CA(3) – 30.01.2015

15. Before us the Ld. Counsel relied on decision of *Hon'ble Delhi Tribunal* in case of *Honda Trading Corporation Vs. DCIT (supra)*

wherein, it was held that the time limit specified u/s 92CA(3A) is mandatory and not directory and therefore the Ld.TPO is bound by the time limit for passing of the order u/s 92CA (3) of the Act. Accordingly, in that case time limit as per section 153(1) of the Act was up to 07.06.2014 and the Ld.TPO passed his order on 31.05.2014 instead of on or before 08.04.2014, hence order passed by the Ld.TPO therein was held to be time barred. *Hon'ble Delhi Tribunal* further held that in such circumstances the final assessment order would be same but the addition on account of transfer pricing adjustment arising from the determination of the ALP of the international transaction by the TPO emanating from his time barred order passed u/s. 92CA(3) is unsustainable. *Hon'ble Delhi Bench* thus directed for deletion of addition of on account of transfer pricing adjustment made in the final assessment order. *Hon'ble Delhi Tribunal* held as under:-

" B. Time limit for passing of order by the TPO

6.1. *The ld. AR also challenged the passing of the order by the TPO. It was submitted that the TPO passed order on 31.5.2014, which was time barred and, hence, the same should be annulled leading to the quashing of the final assessment order. In the opposition, the ld. DR supported the Revenues stand.*

6.2. *We have heard the rival submissions and perused the relevant material on record. It has been noticed above that the provisions of section 92CA requiring the passing of the order by the TPO determining the ALP of the international transactions, came into being by the Finance Act, 2002. As per sub-section (3) of section 92C, the TPO is required to pass the order determining the ALP of the international transactions. No time limit was initially given for the passing of order by the TPO. It is only by the Finance Act, 2007, that sub-section (3A) was inserted providing time limit for the passing an order by the TPO. No amendment has been carried out in this provision thereafter. Sub-section (3A) of section 92CA containing the relevant time*

limit for the passing of the order by the TPO, reads as under :-

'(3A) Where a reference was made under sub-section (1) before the 1st day of June, 2007 but the order under sub-section (3) has not been made by the Transfer Pricing Officer before the said date, or a reference under sub-section (1) is made on or after the 1st day of June, 2007, an order under sub-section (3) may be made at any time before sixty days prior to the date on which the period of limitation referred to in section 153, or as the case may be, in section 153B for making the order of assessment or reassessment or recomputation or fresh assessment, as the case may be, expires..

6.3. It transpires from a reading of the above provision that where a reference is made to the TPO after 1.6.2007, an order under sub-section (3) may be made at any time before 60 days prior to the date on which the period of limitation referred to in section 153, or, as the case may be, in section 153B, for making the order of assessment or re-assessment, etc., expires.

6.4. The ld. DR vehemently contended that the use of the word `may in this provision for the passing of the order by the TPO within a period of 60 days of the limitation set out in section 153 indicates that the adherence to this time limit is not mandatory. He contended that even if the order is passed after the period of 60 days from the period of limitation as given u/s 153, still it would be treated as having been passed within time. This argument was countered by the ld. AR.

6.5. There is no doubt that the legislature has used the word `may in sub-section (3A) of section 92CA. There is further no doubt that the ambit of the word `may is different from the word `shall. Whereas, ordinarily the use of the word `shall signifies mandatory compliance, the word may signifies directory compliance. But at times, the word `may can also be read as `shall and vice versa. In fact, all depends upon the context and the background of the provision in which such a word is used.

6.6. Section 127 deals with the power to transfer cases. Sub-section (1) of this provision provides that : `The Director General or Chief Commissioner or Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one or more Assessing Officers subordinate to him (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) also subordinate to

him. Dispute arose in Sahara Hospitality Ltd. vs. CIT (2013) 352 ITR 38 (Bom) as to whether or not giving the assessee a reasonable opportunity of being heard before the transfer of case by the Chief Commissioner, in the backdrop of the use of the word `may in the provision, be considered as mandatory. The Hon'ble Bombay High Court has held that the word `may in section 127 should be read as `shall and hence the granting opportunity to the assessee is mandatory.

6.7. Section 16 of the Wealth-tax Act, 1957 deals with the assessment of wealth. Section 16A having marginal note of `Reference to Valuation Officer provides through sub-section (1) that : `For the purpose of making an assessment (including an assessment in respect of any assessment year commencing before the date of coming into force of this section) under this Act, where under the provisions of section 7 read with the rules made under this Act or, as the case may be, the rules in Schedule III, the market value of any asset is to be taken into account in such assessment, the Assessing Officer may refer the valuation of any asset to a Valuation Officer- (a) in a case where the value of the asset as returned is in accordance with the estimate made by a registered valuer if the Assessing Officer is of opinion that the value so returned is less than its fair market value; (b) in any other case, if the Assessing Officer is of opinion- (i) that the fair market value or the asset exceeds the value of the asset as returned by more than such percentage of the value of the asset as returned or by more than such amount as may be prescribed in this behalf; or (ii) that having regard to the nature of the asset and other relevant circumstances, it is necessary so to do. In Raj Paul Oswal vs. CWT (1988) 171 ITR 489 (P&H), there arose a quarrel as to the meaning of the word `may used in section 16A in the context of making reference to the Valuation Officer. Settling the controversy, the Honble High Court held that the word `may' used in section 16A(1)(b), should be read as `shall'. It held that if the legislative intent had been to accord total discretion to the WTO to make a reference to the Valuation Officer or not in cases which were covered by cls. (a) & (b) of sub-s. (1) of s. 16A of the WT Act, then there was no necessity of providing the guidelines in cl. (a) or in sub-cls. (i) and (ii) of cl. (b) of sub-s. (1) of s. 16A. It was, therefore, held that the legislature by prescribing the contingencies, in which, by implication, it would not be necessary to make a reference, also again by necessary implication be taken to have intended that the reference to Valuation Officer was must if the given contingencies did not exist. In this regard, the Honble High Court observed

that : `There is no doubt about the fact that the use of expression "may" and "shall" to some extent serves an indicia to the intention of the legislature and helps in deciding as to whether the given requirement is directory or mandatory in character, but the use of expression "may" or "shall" is never considered decisive in that regard. It was thus held that the moment the estimated value exceeded the returned value of the asset by more than what is envisaged by r. 3B, then the WTO had no option, but to make a reference and he is not to wait for a request from the assessee to make a reference. Similar view has been expressed by the Honble Delhi High Court in Sharbati Devi Jhalani vs. CWT & Ors. (1986) 159 ITR 549 (Del). It is vivid from the above discussion that the use of word `may or `shall in a provision is not conclusive of its mandatory or directory nature. One needs to go through the text of the provision and the context in which such a word has been used.

6.8. Reverting to section 92CA, we find that the Finance Act, 2007 inserted sub-section (3A) carrying the time limit of sixty days for passing of the order by the TPO before the expiry of time limit for completion of assessment by the AO u/s 153. Despite the use of the word `may, the time limit for passing the order by the TPO is mandatory, as in the otherwise situation of the TPO having been allowed more time by implication, say of three months or more, could at that time have frustrated the provisions of section 153 for the passing of the assessment order by the AO. Thus we have no hesitation in holding that the use of the word `may in sub-section (3A) of section 92CA is to be construed as `shall, thereby making this time limit as mandatory and not directory. As such, it is held that the TPO is bound by the given time limit for passing of his order.

6.9. Having held that the word `may in section 92CA(3A) should be read as `shall, we once again note that prior to the insertion of section 144C by the Finance Act, 2009, the time limit for completion of assessment was contained in section 153 and accordingly the time limit for the passing of the order by the TPO was also set out accordingly in section 92CA w.r.t. the time limit for the completion of assessment as per section 153. However, with the insertion of section 144C, the time limit for the completion of assessment, or in other words, for passing of the final assessment order, stood shifted to sub-sections (4) or (13) of section 144C and got detached from section 153. Along with this, passing of draft order also became mandatory, for which we have held above that the same is required to be passed within a reasonable time and it has got no

relation with the time limit given in section 153. When the position is such that the draft order has to be passed independent of the time limit given in section 153, there appears some logic in not continuing with the time limit for the passing of the order by the TPO tagged with the time limit given in section 153. It has led to incoherence in the provisions. This position can be set right only with a suitable legislative amendment.

6.10. Having held that the time limit given in sub-section (3A) of section 92CA is mandatory for the passing of the order by the TPO, let us find out the time available with the TPO for the passing of his order. It has been noticed above that the time limit as per section 153(1) read with the third proviso and clause (viii) of the Explanation to the section, comes at 7th June, 2014. Period of 60 days prior to such time limit coming as per section 153, available with the TPO for passing his order, comes to an end on 8th April, 2014. As against this, the order was actually passed by the TPO on 31st May, 2014. Thus, the order passed by the TPO is patently time barred.

C. Consequences of valid draft order and TPO's time barred order

7. The ld. AR argued that since the draft order as well as the order of the TPO were time barred, the final assessment order passed by the AO was liable to be set aside. We have held above that the draft order was passed within time and only the order of the TPO is time-barred. When an order is passed without jurisdiction or beyond the permissible time, it is considered as null and void. The effect of passing a null and void order is that it is considered as non est, meaning thereby, that it entails all the consequences of not having been passed at all and is ignored for all practical purposes. The Honble Madras High Court in Vijay Television (P.) Ltd. vs. DRP (2014) 369 ITR 113 (Mad) considered a case in which the assessment order was directly passed without routing through draft order or DRP. The Honble Court held it to be a noncurable defect and resultantly the assessment was quashed. It was held that when there is an omission on the part of the AO to follow the mandatory procedure prescribed under the Act, such an omission cannot be termed as a mere procedural irregularity and it cannot be cured. Extantly, we are confronted with a situation in which the draft order has been passed in time but the lapse has come in the passing of the order by the TPO. The consequence of the above scenario is that the passing of a valid and properly timed draft order cannot lead to the setting aside of the final assessment order. However the passing of the time

barred order by the TPO, which is again a mandatory procedure prescribed under the Act, would be a non-curable defect, having the consequence as if it was not passed. In such circumstances, though the final assessment order would be saved but the addition on account of transfer pricing adjustment arising from the determination of the ALP of the international transactions by the TPO as emanating from his time barred order, would be unsustainable. We hold accordingly and direct the deletion of addition on account of transfer pricing adjustment made in the final assessment order.

8. In view of our decision on the above legal ground, there remains no need to deal with the contentions raised before us on the merits of the addition on account of transfer pricing adjustment."

16. In the present facts, the Ld.CIT.DR has submitted that the order of the Ld.TPO is passed on 28.01.2015 but dated 30.01.2015. Then, the order of the Ld.TPO is not only irregular, wrong or illegal but is also null and void. Such action cannot be considered to be of any irregularity in the procedure, so as to get any kind of protection u/s. 292BB of the Act.

17. The Ld.AR has also placed before us a recent decision by *Hon'ble Madras High Court* in *WP No. 32699/2019 dated 07.09.2020* in case of *M/s. Pfizer Health care India Pvt. Ltd. vs. JCIT* wherein the issues of computing 60 days period prior to the due date has been decided by the *Hon'ble Court* as under:

"29. The provisions of Section 144C prescribe mandatory time limits both pre and post the stage of passing of a transfer pricing order. Assessments involving transfer pricing issues are different and distinct from regular assessments and the intention of Legislature is to fast track such assessments. Bearing in mind the specialized nature of such assessments, a separate set of Officers attend to the framing of assessments and the DRP has been constituted for redressal of disputes involving TP issues, in a timely fashion. In this scheme of things, I am unable to accept the submission that the period of 60 days stipulated for passing of an order of transfer pricing, is only directory or a rough and ready guideline. This argument is rejected."

In view of above and following judicial precedent cited before us by the Ld.AR being decisions of *Hon'ble Madras High Court* and the *Coordinate Bench*, we hold that the order of the Ld.TPO passed on 30.01.2015 is barred by limitation and liable to be quashed. Therefore, consequently, the proposed addition on account of transfer pricing adjustment amounting to does not survive.

Accordingly, Additional ground no. 16 of the appeal of the assessee is allowed.

18. In view of our decision on the above ground we do not find it necessary to deal with the contention raised before us on the merits of the addition on account of transfer pricing adjustment as they become infructuous. In view of this ground raised by assessee and revenue on merits becomes academic at this stage.

In the result, the appeal filed by the assessee stands allowed on the legal issue.

19. The order passed u/s. 92CA has been held to be bad in law and the addition in respect of international transaction stands quashed. The appeal filed by the revenue becomes infructuous.

Accordingly, the assessee's appeal is allowed in terms of Additional ground no. 16 and revenue's appeal is dismissed.

In the result, the appeal filed by the assessee is allowed and the appeal of the revenue is dismissed.

Order pronounced in the open court on 30th March, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 30th March, 2022.
/MS /

Copy to:

1. Appellant
2. Respondent
3. CIT

4. CIT(A)
5. DR, ITAT, Bangalore
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore