

**IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH “K”, MUMBAI**

**BEFORE SHRI BASKARAN BR, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.796/M/2022
Assessment Year: 2017-18**

M/s. DSV Air & Sea Pvt. Ltd. [Successor to Panalpina World Transport (India) Pvt. Ltd.] B-201, B-204, The Qube, MV Road, Off International Airport Approach Road, Marol, Andheri (East), Mumbai – 400 059 PAN: AAACP7676A	Vs.	Addl/JT/ACIT/ITO/ NFAC Delhi – 110002
(Appellant)		(Respondent)

Present for:

Assessee by : Shri Nikhil Tiwari, A.R.
Revenue by : Ms. Samruddhi Dhananjay Hande, Sr. A.R.

Date of Hearing : 07 . 11 . 2022
Date of Pronouncement : 06 . 02 . 2023

O R D E R

Per : Kuldip Singh, Judicial Member:

Appellant, M/s. DSV Air & Sea Pvt. Ltd. (hereinafter referred to as ‘the taxpayer’) by filing the present appeal sought to set aside the impugned order dated 26.02.2022 passed by the Assessing Officer (AO) in consonance with the order passed by the Ld. Dispute Resolution Panel (DRP)/Transfer Pricing Officer (TPO) under section 143(3) read with section 144C(13) of the

Income Tax Act, 1961 (for short 'the Act') qua the assessment year 2017-18 on the grounds inter-alia that:

“General Ground

1. *erred in assessing the total income of the Appellant at INR 4,21,99,209 against a total (loss) of Rs (11,70,61,334) as offered by the Appellant in its return of income;*

2. *erred in making additions to the total taxable income without issuing a show cause notice (i.e. draft order of proposed additions) as per the provision of Section 144B(1)(xvi)(b) of the Act and thereby vitiating the process of law. Hence, the draft order (and consequent orders) are invalid and bad in law.*

3. *erred in issuing two assessment orders (in the name of non-existing entity Le Panalpina India) under Section 143(3) of the Act for the same AY on the same day on conclusion of single assessment proceedings.*

4. *erred in issuing the transfer pricing order (dated 31 January 2021), the draft assessment order (dated 30 April 2021), the directions of the Hon'ble DRP (dated 28 January 2022), the subsequent first final assessment order (dated 30 April 2021), and the second final assessment order (dated 26 February 2022) in the name of non-existing entity is Panalpina India disregarding the fact that the merger had been already been intimated to the learned AO/Hon'ble DRP/ learned TPO, Thereby, the entire proceedings is invalid and bad in law.*

5. *erred in appreciating the fact that the first draft assessment order was issued on 30 April 2021 21:30 and a subsequent first final assessment order was issued on the same day (ie. 30 April 2021) at 23:20 and therefore, the entire DRP proceedings and final assessment issued on 30 April 2021 stand as invalid and bad in law.*

6. *erred in appreciating the fact that the first draft assessment order (dated 30 April 2021) was passed vitiating the provisions of Section 144B of the Act which are compulsory in the process of law, Hence, the entire proceedings are invalid and bad in law.*

7. *In view of the above grounds the entire proceedings are bad in law as the same are not in line with the provisions of the Act, hence the orders passed as bad in law, void and should be quashed.*

Without prejudice to the above grounds of objection on maintainability of order, we wish to raise the below grounds of objection:

Transfer Pricing grounds

Reference to the TPO

8. *erred in making a reference of the Appellant's case to the TPO, without complying to provisions of Section 92CA, thereby making a transfer pricing (TP") adjustment of Rs.7,36.21,080 in respect of the international transaction of provision of freight forwarding services, which is bad in law;*

Rejection of economic analysis undertaken by the Appellant

9. *erred in rejecting the transfer pricing analysis undertaken by the Appellant for the international transaction of provision of freight forwarding services in accordance with the provisions of the Act read with the Rules and imputing a transfer pricing adjustment by modifying the economic analysis for determination of arm's length price:*

Rejection of comparables selected by the Appellant in its TP documentation

10. *erred in rejecting functionally comparable company i.e. Atlas Logistics Private Limited on the basis that it is incurring losses in two out of three years without appreciating that only persistent loss-making companies (i.e. losses in continuous three years) should be rejected:*

Suo-motto rejection of comparables selected by the Appellant in its TP documentation

11. *erred in disregarding the Appellant's plea for rejecting one of its own comparables (i.e. Patel Integrated Logistics Ltd) without appreciating that the Appellant cannot be estopped from pointing out its own mistake as the company is functionally different and owns significant assets as compared to the Appellant which is a Non-vehicle owning common carrier (NVOCC)';*

Introduction of additional comparables by the learned TPO

12. *erred in considering Anil Mantra Logistix Pvt Ltd. Prudential Global Logistics (India) Pvt Ltd. Continental Carriers Pvt Ltd and CTA Logistics Ltd as comparables for benchmarking the international transaction of provision of freight forwarding services, disregarding the Fact that it is functionally different from the Appellant.*

Margin computation of tested party

13. *erred in considering liabilities no longer required written back, gain on foreign exchange fluctuation", "provision for bad debts written back and miscellaneous income as non- operating in nature for the purpose of computing the operating margin of the Appellant, without*

appreciating that the same are operating in nature and related to the day to day business operations of the Appellant;

14 without prejudice to the above ground, the learned AO/TPO erred in not applying a consistent approach for treatment of 'liabilities no longer required written back', 'foreign exchange fluctuations', 'provisions for bad debts written back' and 'miscellaneous income as non-operating in nature, while computing the operating profitability of the comparable companies;

15. without prejudice to the above ground, the learned AO/ TPO erred in not treating certain items of expenses i.e. 'bad debts' and 'miscellaneous expenses as non-operating items while computing the operating profitability of the Appellant, whereas the corresponding items of income pertaining to the said expenses i.e. 'provision for bad debts written back' and miscellaneous income have been considered as non-operating;

16. without prejudice to the above, the learned AO/ TPO erred in passing rectification order under Section 154 of the Act for considering the issue of margin computation and treatment of items of income, without appreciating that the said issue is debatable in nature and cannot be rectified by passing order under section 154 of the Act,

17. erred in incorporating the rectification order dated 24 January 2022 passed by the learned TPO in the final assessment order dated 26 February 2022 passed pursuant to the DRP directions issued on 28 January 2022, whereas separate draft order was required to be passed, which makes enhancement made pursuant to rectification order as bad in law:

Grant of economic adjustment

18. erred in not allowing Appellant the benefit of working capital adjustment which is required to be undertaken to account for the difference in working capital levels between the comparable companies and the Appellant;

Incorrect consideration of losses to compute the revised assessed income.

19. has erred in considering an amount of Rs.3,14,21,871 (being book loss reported under Section 115JB of the Act as against Rs.11,70,61,334 (being net loss reported under the normal provisions of the Act) as the starting point to arrive at the revised assessed income. The same is evidenced side the final assessment order dated 26 February 2022.

The Appellant prays that the learned AO be directed to consider an amount of Rs.11,70,61,334 (being net loss reported under the normal

provisions of the Act) as against Rs.3,14,21,871 (being book loss reported under Section 115JB of the Act) as the starting point for purpose of computing the revised assessed income.

Penalty Proceedings

20. *erred in initiating penalty proceedings under Section 270A of the Act;*

21. *erred in initiating penalty proceedings under Section 271AA of the Act.”*

2. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : Panalpina India, the taxpayer now merged with DSV Air and Sea Private Ltd. (is an Indian Pvt. Ltd. Company) incorporated on 22.12.1986 under the Companies Act, 1986. The taxpayer is an asset freight company primarily engaged in the business of freight forwarding and logistic services specialising in international air and sea freight consignments and associated supply chain management services. During the year under consideration the taxpayer entered into international transactions with its Associate Enterprise (AE) as under:

Sl. No.	Nature of Transactions	Method Applied	Value (INR)
1.	Trademark fees	CUP	9,02,65,149
2.	Freight Forwarding expenses		3,21,08,08,063
3.	Freight Forwarding income		2,53,19,87,051
4.	Internal Communication		23,10,293
5.	IT Expenses		65,131
6.	Personnel Income		1,24,90,009
7.	Assignment Service fee		13,27,959

8.	Business Support Cost allocation	38,39,33\351
9.	Interest paid on loan	53,07,534
10.	Claims (payable)	-7,28,820
11.	Recovery of travel expenses	6,36,361
12.	Training/Conference and personnel expenses	39,45,414
13.	Claims (receivable)	29,410
14.	Recovery of Travel Expenses	23,937
Total		624,38,58,482

3. Taxpayer in order to benchmark its international transactions applied CUP with OP/OC as the profit level indicator (PLI) and computed its margin as per TP study at (-) 0.15% OP/OC. Transfer Pricing Officer (TPO) after applying various filters finally selected 6 comparables having margin of (-)1.50% as against taxpayer's margin of (-)0.15% and thereby proposed the proportionate adjustment at Rs.4,19,53,631/-.

4. The taxpayer carried the matter before the Ld. DRP by way of filing objections which have been disposed of partly in favour of the taxpayer. Feeling aggrieved with the impugned order passed by the Ld. DRP the taxpayer has come up before the Tribunal by way of filing present appeal.

5. We have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

6. The taxpayer has come up by moving an application for raising additional ground of appeal as under :-

“Validity of TP order

18. Without prejudice to Ground Nos 1 to 17, the TP order passed under Section 92CA(3) is invalid and unsustainable in law since the same is passed on 31 January 2021 which is beyond the time limit available for completion of proceedings under Section 92CA(3A) of the Act.

Validity of Assessment order

19. The learned AO has erred in law, in incorporating the TP adjustment proposed in the TP order which is invalid and bad in law into the Final Assessment order passed under Section 143(3) read with Section 144C(13) of the Act.”

on the grounds inter alia that the draft assessment order passed by the ld. AO is without jurisdiction having been passed beyond the prescribed time limit and as such, consequent assessment order is liable to be annulled; that additional ground can be raised at any stage of proceedings and relied upon the judgments passed by **Hon’ble Apex Court in case of Jute Corporation of India Ltd. vs. CIT 187 ITR 688 and National Thermal Power Corporation Ltd. 229 ITR 383.**

7. However, on the other hand, ld. DR for the Revenue opposed the application for additional ground on the grounds inter alia that application is not maintainable having been filed after undue delay;

that no such plea has been taken by the taxpayer before the lower Revenue authorities; and that no prejudice has been caused to the taxpayer as he has been duly represented before the Id. Revenue authorities in passing the TP order/assessment order.

8. Keeping in view the settled principle of law that jurisdictional issue is a legal issue which can be taken by the aggrieved party at any stage of the proceedings before the judicial/quasi judicial bodies, particularly when assessee has come up with the pleading that TP order and consequent assessment order has been passed beyond the period of limitation. So, application raising additional ground by the taxpayer is allowed without prejudice to the merits of this case.

9. Since taxpayer has raised jurisdictional issue which goes to the roots of the case, we would decide the additional ground nos.18 & 19 first before going into the grounds raised on merits.

10. The Ld. A.R. for the taxpayer challenging the impugned order passed by the AO/DRP/TPO contended inter-alia that the order passed by the TPO dated 31.01.2021 was barred by limitation and as such consequent assessment order is also not sustainable being passed on the basis of time barred TP order; that the due date for passing the TP order under section 92CA(3) i.e. 60 days prior to the date prescribed under section 153 of the Act i.e. due date for passing TP order under section 92CA(3A) was 29.01.2021 whereas the impugned order has been passed on 31.01.2021 and relied upon Hon'ble Madras High Court in case of M/s. Pfizer Healthcare India Pvt. Ltd. vs. JCIT WP No.32699/2019 judgment dated 07.09.2020.

11. However on the other hand the Ld. D.R. for the Revenue to repel the argument addressed by the Ld. A.R. for the taxpayer contended that the Ld. TPO has passed TP order in this case well within time on 31.01.2021 i.e. within 2 months as prescribed under section 153 of the Act and the decisions relied upon by the Ld. A.R. for the taxpayer are not applicable to the facts and circumstances of the case.

12. In order to determine if the order dated 31.01.2021 passed by Ld. TPO is barred by limitation as contended by Ld. A.R. for the taxpayer we would advert to the provisions contained under section 92CA(3) read with section 153 of the Act.

13. Undisputedly, sub-section (3A) to section 92CA has been inserted w.e.f. 01.06.2007 providing time limit for the Transfer Pricing Officer to pass the order i.e. within a period of 60 days prior to the date of completion of assessment as per section 153. So, u/s 92CA (3A) read with section 153, TPO was required to pass the order within the period of 60 days prior to the date on which the period of limitation referred to in section 153 expires i.e. 21 months.

14. In the instant case undisputedly assessment order in this case was passed on 26.02.2022 and the Ld. TPO was required to pass the order within 60 days prior to the date on which period of limitation as prescribed under section 153 of the Act expires.

15. Now, the question arises as to how the period of 60 days prior to the date of TP order i.e. 31.03.2013 is to be computed.

16. Hon'ble Madras High Court in case of M/s. Pfizer Healthcare India Pvt. Ltd. (supra) while dealing with the issue held that for computing the period of 60 days, the last date as per section 153 should be excluded. Operative part of the judgment is extracted for ready perusal as under :-

“30. Now, coming to the question of how the 60 day period is to be computed, the critical question would be whether the period of 60 days would be computed including the 31st of December or excluding it. Section 153 states that no order of assessment shall be made at any time after the expiry of 21 months from the end of the assessment year in which the income was first assessable. The submission of the revenue is to the effect that limitation expires only on 12 a m of 01.01.2020. However, this would mean that an order of assessment can be passed at 12 a m on 01.01.2020, whereas, in my view, such an order would be held to be barred by limitation as proceedings for assessment should be completed before 11.59.59 of 31.12.2019. The period of 21 months therefore, expires on 31.12.2019 that must stand excluded since Section 92CA(3A) states 'before 60 days prior to the date on which the period of limitation referred to Section 153 expires'. Excluding 31.12.2019, the period of 60 days would expire on 01.11.2019 and the transfer pricing orders thus ought to have been passed on 31.10.2019 or any date prior thereto. Incidentally, the Board, in the Central Action Plan also indicates the date by which the Transfer Pricing orders are to be passed as 31.10.2019. The impugned orders are thus, held to be barred by limitation.”

17. In the case at hand Ld. A.R. for the taxpayer computed the limitation period under section 92CA(3A) for the year under consideration in tabulated form as under:

Financial Year	2016-17
Assessment Year	2017-18
End of Assessment Year	31-03-2018
Due date for completion of assessment under Section 153(1) i.e. 21 months from the end of A.Y.	31-12-2019
Extension of 12 months in case of transfer pricing as per Section 153(4) of the Act	31-12-2020
Extension of 3 months to pass the order as per the CBDT notification dated 24 June 2020 (copy enclosed as Annexure 1)	31-03-2021

Time Limit for passing the order under section 92CA(3A) i.e. 60 days prior to the date prescribed under Section 153	
Date on which limitation expires under section 153 i.e. 31-03-2021	1 day
Less: Remaining days of March	30 days
Less: Remaining days of February	28 days
Less: Remaining days of January	2 days
Due date for passing the TPO order under Section 92CA(3) i.e. 61 from 31 March 2021	29-01-2021
Date of passing the TP order under Section 92CA(3)	31-01-2021

18. Identical issue has also been dealt with by the coordinate Bench of the Tribunal in case of Honda Trading Corporation vs. DCIT in ITA No.1132/Del/2015 order dated 15.09.2015 by returning following findings :-

“5.27. It is, therefore, summed up that the time limit for completion of assessment, or in other words, passing of the final assessment order pursuant to the order of the TPO, is contained in section 144C(4) and (13); the time limit given u/s 153 has no relation whatsoever with the passing of the draft order, which should be passed within a reasonable time; and the time limit given in section 153 is relevant for determining the time available with the TPO for passing order u/s 92CA(3).

5.28. Turning to the facts of the instant case, we find that the AO passed the final assessment order on 29.1.2015, which is well within a period of one month from the end of the month in which direction was received from the DRP on 24.12.2014. As such, we hold that the final assessment order passed by the AO is within the time prescribed u/s 144C(13). Further since the draft order has also been passed within a reasonable time, the same is also not barred by limitation. The contention of the ld. AR that the draft order passed in this case was barred by limitation, is therefore, found to be without any substance and hence repelled.

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 Revenue's 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 Hon'ble 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-cl. (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 Hon'ble 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 Hon'ble 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 Hon'ble 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 Hon'ble Court held it to be a non- curable 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.”

19. Computation period of 60 days given by the taxpayer extracted in the preceding para 14 cannot be faulted with on any ground because from 26.02.2022, the date of passing order of the AO, 60 days was to be computed by excluding the date of order i.e. 31.01.2021. so while excluding the date of passing assessment order i.e. 26.02.2022, the order was required to be passed by the Ld. TPO by 29.01.2021 whereas the impugned order has been passed on 31.01.2021 which is barred by limitation.

20. In view of what has been discussed above and following the decision rendered by Hon'ble Madras High Court and the order passed by the coordinate Bench of the Tribunal in cases of M/s. Pfizer Healthcare India Pvt. Ltd. and Honda Trading Corporation (supra) respectively and mandate of section 92CA (3) read with section 153 of the Act, impugned order passed by the Id. TPO is barred by limitation which was required to be passed by 29.01.2021 and as such is hereby quashed.

21. Consequently addition made on account of transfer pricing adjustment by way of determining the ALP of international transactions by the Ld. TPO are not sustainable in the eyes of law, the order of TPO (Supra) being barred by limitation. So the consequent assessment framed qua the determination of ALP of

international transactions is also barred by limitation and the assessment order to that extent is not sustainable, hence ordered to be set aside.

22. However the taxpayer has raised corporate grounds challenging the incorrect consideration of losses to compute the revised assessed income by virtue of ground number 19. However the Ld. A.R. for the taxpayer brought on record the fact that the taxpayer's application for rectification dated 07.04.2022 is already pending adjudication with the AO to rectify the incorrect consideration of losses to compute the revised assessed income. Since prima-facie the ground number 19 raised by the taxpayer is a mistake apparent on record which can be rectified under section 154 of the Act the AO is directed to dispose of the application within a period of 2 months from the date of receipt of the order.

23. In view of what has been discussed above, the appeal filed by the taxpayer is partly allowed.

Order pronounced in the open court on 06.02.2023.

Sd/-
(BASKARAN BR)
ACCOUNTANT MEMBER

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Mumbai, Dated: 06.02.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai

The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.