

**IN THE INCOME TAX APPELLATE TRIBUNAL
"K" BENCH, MUMBAI**

**SHRI B.R. BASKARAN, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 940/MUM/2021
(Assessment Year: 2016-17)**

Colgate-Palmolive (India) Limited,

Colgate Research Centre, Main Street,
Hiramandani Street, Powai,
Mumbai - 400076

[PAN: AAACC4309B]

..... **Appellant**

**The Assistant Commissioner of
Income-tax- 15(1)(2),**

Aaykar Bhawan, New Marine Lines,
Mumbai - 400020

Vs

..... **Respondent**

Appearance

For the Appellant/Assessee : Shri Madhur Agrawal/
Shri Vasishth Dave

For the Respondent/Department : Dr. Yogesh Kamat

Date : 12.04.2023

Conclusion of hearing : 27.04.2023

Pronouncement of order

ORDER

Per Rahul Chaudhary, Judicial Member:

1. The present appeal is directed against the Assessment Order dated, 31/03/2021, passed under Section 143(3) read with Section 144C(13) read with Sections 143(3A) & 143(3B) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'], as per directions, dated 23/03/2021, issued by the CIT (Dispute Resolution Panel-1), Mumbai-3 (hereinafter referred to as 'the DRP') under Section 144C(5) of the Act pertaining to the Assessment Year 2016-17.
2. When the appeal was taken up for hearing, the Learned Authorised Representative for the Appellant invited our attention to the Ground

No. 1 raised in the appeal which reads as under:

"Ground No. 1

- 1.1 *On the facts and in the circumstances of the case and in law, the order dated 1 November 2019 passed by the Additional Commissioner of Income-tax (Transfer Pricing)-1(3) ('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.*
- 1.2 *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, the action of the Assessing Officer in passing the draft assessment order dated 24 December 2019 is without jurisdiction and hence, the final assessment order dated 31 March 2021 and all proceedings consequent to the draft assessment order are also illegal and bad in law and liable to be quashed."*

- 2 Since the Ground No.1 raised by the Appellant goes to the root of the matter, we proceed to first adjudicate the same.
- 3 The relevant facts in brief are that the Appellant filed return of income for the Assessment Year 2016-17 on 29/11/2016, which was selected for complete scrutiny assessment under the E-Assessment Scheme, 2019. During the assessment proceedings, reference was made to the Transfer Pricing Officer (TPO) who passed order under Section 92CA(3) of the Act on 01/11/2019, proposing transfer pricing adjustment of INR 365,53,43,882/-. The Assessing Officer passed the Draft Assessment Order on 24/12/2019, proposing additions/disallowances including the aforesaid transfer pricing adjustment. The Appellant filed objections before DRP which were disposed off vide Directions issued by the DRP on 23/03/2021. Sequent thereto, Assessing Officer passed the Final Assessment

Order on 31/03/2021 which has been challenged by the Appellant by way of the present appeal filed before the Tribunal.

4 The Ld. Authorised Representative for the Appellant appearing before us submitted that Ground No. 1 raised by the Appellant stands decided in favour of the Appellant in the appeal preferred by the Appellant for the Assessment Years 2011-12 [ITA No. 3488 & 2799/Mum/2016], Assessment Year 2012-13 [1977/Mum/2017], and Assessment Year 2013-14 [ITA No. 75/Mum/2018]. The Ld. Authorised Representative for the Appellant also placed reliance on the following the judgments/decisions:

- Pfizer Healthcare India Private Ltd Vs. Joint Commissioner of Income Tax: (2021) 433 ITR 28 (Madras)
- DCIT vs. Saint Gobain India Pvt. Ltd.: 444 ITR 636 (Madras)
- Atos India Private Limited Vs. DCIT [ITA No. 1795/Mum/2017, dated 23/02/2023, Assessment Year 2012-13],
- Mondelez India Foods Pvt. Ltd. vs. Addl. CIT [ITA No. 1492/Mum/2015, dated 14/11/2022].
- M/s Teleperformance Global Services Private Limited vs. Additional/Joint/Deputy/ Assistant/Income Tax Officer, Delhi and Deputy Commissioner of Income Tax, Mumbai [ITA No. 1180/Mum/2021, dated 24/03/2023]

On the strength of the aforesaid judgments/decisions, the Ld. Authorised Representative for the Appellant submitted that the order, dated 01/11/2019 passed by the TPO as well as the Final Assessment Order, dated 31/03/2021, passed by the Assessing Officer should be quashed as being null & void, and barred by limitation.

3. Per Contra Learned Departmental Representative submitted that the Revenue has not accepted the judgment of the Hon'ble Madras High

Court in the case of Pfizer Healthcare India Private Limited (supra) and has preferred Special Leave Petition before the Hon'ble Supreme Court which is pending. He vehemently contended that even if for the sake of arguments it is presumed that there was a delay of 1 day in passing the order by the Transfer Pricing Officer, the same does not, in any manner, causes any prejudice to the Appellant. In this regard, the Learned Departmental Representative relied upon the judgment of the Hon'ble High Court of Jharkhand in the case of M/s Prakash Lal Kahndelwal vs. CIT, Ranchi (Jharkhand) and ITO Ward-2, Ranchi (Jharkahnd) [W.P.(T) No. 1901 of 2022, dated 21/02/2023]. He further submitted that for the purpose of determining whether an assessee is an 'Eligible Assessee' for the purpose of section 144C(15)(b) of the Act, all that is required to be seen is whether the Transfer Pricing Officer has proposed any variation in the order passed under Section 92CA(3) of the Act. The fact that the variation proposed by the Transfer Pricing Officer is subsequently set-aside/deleted or that the order passed by the Transfer Pricing Officer is subsequently held to be invalid, would not result in change of status of an assessee from Eligible Assessee to an assessee who is not an Eligible Assessee. He further contended that in case, the contention raised by the Assessee is accepted then, by the same logic or reasoning, even the appellate proceedings before Tribunal would stand vitiated as appeal before Tribunal against the final assessment order passed pursuant to directions having been issued by the DRP can be also be filed only by an Eligible Assessee. He submitted that the Tribunal has in some cases declined to quash the final assessment order even when the order passed by the TPO has been held to be invalid. In this regard, the Learned Departmental Representative placed on record, copy of decision of the Tribunal in the case of M/s Indian Hotels Ltd. vs. DCIT Circle 2(2)(1), Mumbai

[ITA No. 2308 & 3022/Mum/2016, dated, 29/11/2022].

4. We have considered the rival submissions and perused the material on record. We find that the Hon'ble Madras High Court has, in the case of Pfizer Healthcare India Private Limited (supra), held 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 am of 1-1-2020. However, this would mean that an order of assessment can be passed at 12 am on 1-1-2020, 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 1-11-2019 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". (Emphasis Supplied)

5. The above judgment of Hon'ble Madras High Court been confirmed by the judgment of the Division of the Hon'ble Madras High Court in the case of DCIT vs. Saint Gobain India Pvt. Ltd. : 444 ITR 636 (Madras) wherein it has been held as under:

"29. The language employed is simple. 31-12-2019 is the last date for the assessing officer to pass his order under section 153. The TPO has to pass order before 60 days prior to the last date. The 60 days is to be calculated excluding the last date because of the use of the words "prior to" and the TPO has to pass order before the 60th day. In the

present case, the word "before" used before "60 days" would indicate that an order has to be passed before 1-11-2019 i.e on or before 31-10-2019 as rightly held by the Learned Judge.

30. Even considering for the purpose of alternate interpretation, the scope of section 9 of the General Clauses Act, it is to be noted that an inverted calculation of the period of limitation takes place here. If the last date is taken to be the first date from which the period of 60 days is to be calculated, reading down the provision with the use of the word "from", which denotes the starting point or period of direction in general parlance, would mean that 60 days "from the last date". Even going by section 9 of the General Clauses Act, when the word "from" is used, then, that date is to be excluded, implying here that 31-12-2019 must be excluded. After excluding 31-12-2019, if the period of 60 days is calculated, the 60th day would fall on 1-11-2019 and the TPO must have passed the order on or before 31-10-2019 as orders are to be passed before the 60th day. Therefore, either way the contention of the Revenue is a fallacy and has no legs to stand.
Mandatory or Directory

31. The next contention that has been raised by the learned senior standing counsel for the appellants is that the usage of the word "may" in section 92CA (3A) indicates that the time fixed is only directory, a guideline, not mandatory and is for the sake of internal proceedings.

32. Let us now examine the relevant procedures relating to Transfer Pricing. After an international transaction is noticed subject to satisfaction of section 92B, a reference is made to the TPO under sub-section (1) of section 92CA of the Act. The TPO after considering the documents submitted by the assessee is to pass an order under section 92CA (3) of the Act. As per section 92CA(3A), the order has to be passed before the expiry of 60 days prior to the date on which the period of limitation under section 153 expires. As per 92CA(4), the assessing officer has to pass an order in conformity with the order of the TPO. After receipt of the order from the TPO determining ALP, the assessing officer is to forward a draft assessment order to the assessee, who has an option either to file his acceptance of the variation of the assessment or file his objection to any such variation with the Dispute Resolution Panel and also the Assessing Officer. Sub-section (5) of section 144C of the Act provides that if any objections are raised by the assessee before the Dispute Resolution Panel, the Panel is empowered to issue such direction as it thinks fit for the

guidance of the Assessing Officer after considering various details provided in Clauses (A) to (G) thereof. Sub-section (13) of section 144C of the Act provides that upon receipt of directions issued under sub-section (5) of section 144C of the Act, the Assessing Officer shall in conformity with the directions complete the assessment proceedings. It goes without saying that if no objections are filed by the Assessee either before the DRP or the assessing officer to the determination by the TPO, section 92CA(4) would come into operation. Therefore, it is very clear that once a reference is made, it would have an impact on the assessment unless a decision on merits is taken by DRP rejecting or varying the determination by the TPO.

33. It would only be apropos to note that as per proviso to section 92CA (3A), if the time limit for the TPO to pass an order is less than 60 days, then the remaining period shall be extended to 60 days. This implies that not only is the time frame mandatory, but also that the TPO has to pass an order within 60 days.

34. Further, the extension in the proviso referred above, also automatically extends the period of assessment to 60 days as per the second proviso to section 153.

35. Also, but for the reference to the TPO, the time limit for completing the assessment would only be 21 months from the end of the assessment year. It is only if a reference is pending, the department gets another 12 months. Once reference is made and after availing the benefit of the extended period to pass orders, the department cannot claim that the time limits are not mandatory. Hence, the contention raised in this regard is rejected.

36. xx xx

37. xx xx

38. In case of assessments involving transfer pricing, fixing of time limits at various stages sets forth that the object of the provisions is to facilitate faster assessment involving such determination. In the present case, as rightly held by the learned Judge in paragraphs 22 to 29 of the order dated 7-9-2020, the order of the TPO or the failure to pass an order before 60 days will have an impact in the order to be passed by the Assessing Officer, for which an outer time limit has been prescribed under sections 144C and 153 and is hence mandatory. What is also not to be forgotten, considering the scheme of the Act, the inter-relatability and inter-dependency of the

provisions to conclude the assessment, is the consequence or the effect that follows, if an order is not passed in time. When an order is passed in time, the procedures under 144C and 92CA(4) are to be followed. When the determination is not in time, it cannot be relied upon by the assessing officer while concluding the assessment proceedings.

39. Upon consideration of the judgments and the scheme of the Act, we are of the opinion that the word "may" used therein has to be construed as "shall" and the time period fixed therein has to be scrupulously followed. The word "may" is used there to imply that an order can be passed any day before 60 days and it is not that the order must be made on the day before the 60th day. The impact of the proviso to the subsection clarifies the mandatory nature of the time schedule. The word "may" cannot be interpreted to say that the legislature never wanted the authority to pass an order within 60 days and it gave a discretion. Therefore, the learned Judge rightly held the orders impugned in the writ petitions as barred by limitation, as the Board, in the Central Action Plan, has specified 31-10-2019 as the date on which orders are to be passed by the TPO, reiterating the time limit to be mandatory." (Emphasis Supplied)

6. Keeping in view the facts of the present case, the time limit for passing order under Section computed 92CA(3) of the Act per the above judgments of the Hon'ble Madras High Court can be computed as under:

S.No.	Particulars	Relevant date/period
	Assessment Year involved	2016-17
1.	Period of limitation for making an order of assessment as per section 153 of the Income-tax Act, 1961 ["the Act"] - 21 months from the end of the Assessment Year	31.12.2018
2.	Extension of period of limitation in case reference is made u/s 92CA	12 months
3.	Therefore, Assessment proceedings should be completed on/or before	31.12.2019
4.	Date prior to the date on which period of limitation expired (stated in Sr. No. 3 above)	30.12.2019
5.	Sixty day period expired on December = 30 days (excluding 31.12.2019) November = 30 days	01.11.2019

6.	Transfer Pricing Order u/s 92CA(3) of the Act should have been passed on/or before	31.10.2019
7.	Transfer Pricing Order u/s 92CA(3) actually passed on	01.11.2019

7. On perusal of the above it can be seen that the time limit for passing the order under Section 92CA(3) of the Act, computed as per the above judgements of the Hon'ble Madras High Court expired on 31/10/2019. Since the order under section 92CA(3) of the Act has been passed 01/11/2019, i.e., after the expiry of the period of limitation, the same is set aside as being barred by limitation.
8. The next issue that arises for consideration is whether the Final Assessment Order passed on 31/03/2021 is barred by limitation and bad in law.
9. In this regard, we note that the Mumbai Bench of the Tribunal has, in the case of Mondelez India Foods Pvt. Ltd. (Supra), held as under:

"16. The Id. Counsel for the assessee has further pointed that reference to DRP can only be made by "eligible assessee". The expression "eligible assessee" has been defined in sub-section (15) to section 144C of the Act. The definition of eligible assessee is reproduced herein below:

'(b) "eligible assessee" means -

(i) 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; and

(ii) any non-resident not being a company, or any foreign company'

A perusal of the above definition would show that eligible assessee mean any person in whose case variation arises as a consequence of the order of the TPO passed u/s. 92CA(3) of the Act. The order has to be a valid order. In the instant case since, the order of TPO was beyond the period of limitation it is not a valid order. Therefore, there is no "eligible assessee" in terms of

the definition provided in sub-section (15) to section 144C of the Act. If there is no eligible assessee, no reference to DRP could have been made. Once the substratum for making the assessment under transfer pricing mechanism erodes the subsequent proceedings emanating from flawed foundation is without jurisdiction."

10. Further in the case of Atos India Pvt. Ltd. (supra) it has been held by the Tribunal as under:

42. Thus, despite the fact that the reference made to the Ld. TPO is valid, in absence of a legally valid transfer pricing order and a valid draft assessment order, the Ld. AO cannot assume jurisdiction to proceed with the assessment under Section 144C of the Act and pass the consequential final assessment order. The decisions of the Hon'ble jurisdictional High Court in case of International Air Transport Association (supra) and Dimension Data Asia Pacific PTE Ltd. (supra) forties appellant's contentions and the irresistible conclusion that the draft assessment order imbibes a jurisdictional power in terms of Sec. 144C(1) of the Act and creates/ envisages special rights upon the 'eligible assessee'. If such an order is passed on an assessee who is not an 'eligible assessee' as defined in section 144C(15)(b)(i) of the Act, then it would render the entire proceedings pursuant to such order null and void.
43. We find that section 153(1) of the Act, as it stood applicable for the AY 2012-13, provided a time limit of 3 years from the end of AY 2012-13 for completion of assessment under section 143(3) of the Act, i.e., on or before 31 March 2016.
44. *In such a case if the Ld. AO invokes the provisions of section 144C of the Act and passes the final assessment order after 31 January 2016 i.e. beyond the period of limitation as stated above, such final assessment order u/s 143(3) r.w.s 144C of the Act is liable to be quashed as being barred by limitation.*
45. *In a recent decision of the Hon'ble Madras High Court in case of Virtusa Consulting Services Put. Ltd [TS-474-HC-2022(MAD)] dated 9 June 2022, it has been held in context of period of limitation under section 153 of the Act as under:*

"17. Further, it is to be noted that the different timelines to be adhered by the TPO, Assessing Officer to pass a draft order, assessee to file their objections, DRP to issue directions and the assessing officer to pass final order, would commence only on a reference to the TPO and not otherwise. At this juncture, it is not to be forgotten that the period of 33 months is to pass the final order of assessment after the directions from the DRP. In this case, we find from the undisputed dates and events that not only was the reference to the TPO made after the period of expiry of the period of limitation to pass assessment orders, but also that the assessing officer has failed to pass final assessment orders in time. The time to pass the original assessment would end on 31.12.2008 being 21 months from the end of the assessment year 2006-07 i.e., 31.03.2007. Then the last date for the assessing officer to pass the final assessment order would end on 31.12.2009, even considering the extension by twelve months. In the present case, the order of the DRP itself is only 24.09.2010 much beyond the permissible period."

46. Thus taking into the provisions of law and the judgment referred to above, we hold that the final assessment order passed on 31 January 2017 is beyond the prescribed period of limitation under section 153 of the Act expiring on 31 March 2016, thus, barred by limitation and is hereby quashed." (Emphasis Supplied)

11. In the present case we have already held in paragraph 7 above that the order, dated 01/11/2019 passed by TPO under Section 92CA(3) of the Act is barred by limitation. The Appellant, therefore, does not qualify as an 'Eligible Assessee' under Section 144C(15)(b)(i) of the Act. The Assessing Officer did not have jurisdiction to pass the Draft Assessment Order, dated 24/12/2019 under Section 144C(1) of the Act. As a result, the time limit available to the Assessing Officer under Section 153 of the Act for passing the assessment order expired on 31/12/2019 even if the benefit of extended period of 12 months is granted on account of a valid reference having been made under Section 92CA of the Act. The Final Assessment Order has been

passed in present case on 31/03/2021 and therefore, the same is barred by limitation. In identical facts and circumstances the Tribunal has quashed the transfer pricing order and the final assessment order for the Assessment Year 2011-12 to 2013-14 by way of common order dated 11/04/2023 passed in appals preferred by the Appellant [ITA No. 3488/Mum/2016, ITA No. 1977/Mum/2017, ITA No. 75/Mum/2018].

12. In view of the above judicial precedents and keeping in view the facts and circumstances of the present case the Transfer Pricing Order, dated 01/11/2019, and Final Assessment Order, dated 31/03/2021, are quashed as being bad in law. Ground No. 1 raised by the Appellant is allowed. All the other grounds raised by the Appellant are disposed off as being infructuous.
13. In result, the present appeal is allowed.

Order pronounced on 27.04.2023.

Sd/-
(B.R. Baskaran)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 27.04.2023
Alindra, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT,
Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai