

आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH, CHENNAI

श्री महावीर सिंह, उपाध्यक्ष एवं श्री मंजुनाथ. जी, लेखा सदस्य के समक्ष
BEFORE SHRI MAHAVIR SINGH, HON'BLE VICE PRESIDENT AND
SHRI MANJUNATHA. G, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ITA No.: **1010/Chny/2017**

निर्धारण वर्ष / Assessment Year: 2012-13

Eaton Power Quality Private
Limited,
No.2, EVR Street Sedarapet,
Puducherry 605 111,
Puducherry (UT).

The Deputy Commissioner of
v. Income Tax,
Pondicherry Circle,
Pondicherry.

[PAN: AACC-6943-R]

आयकर अपील सं./IT(TP)A No.: **35/Chny/2021**

निर्धारण वर्ष / Assessment Year: 2016-17

Eaton Power Quality Private
Limited,
No.2, EVR Street Sedarapet,
Puducherry 605 111,
Puducherry (UT).

The Assessing Officer,
v. National e-Assessment Centre,
Delhi.

[PAN: AACC-6943-R]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by

: Shri. Vishal Kalra, Advocate

प्रत्यर्थी की ओर से/Respondent by

: Shri. S. Maruthu Pandian, CIT

सुनवाई की तारीख/Date of Hearing

: 01.05.2023

घोषणा की तारीख/Date of Pronouncement

: 03.05.2023

आदेश / O R D E R

PER MANJUNATHA. G, ACCOUNTANT MEMBER:

These two appeals filed by the assessee is directed
against separate orders of the Assessing Officer passed u/s.
143(3) r.w.s. 144C(13) of the Income-tax Act, 1961

(hereinafter referred to as "the Act") dated 15.02.2017 & 22.04.2021 in pursuant to DRP directions issued u/s. 144C(5) of the Act, dated 28.12.2016 & 23.03.2021 and pertains to assessment year 2012-13 & 2016-17, respectively. Since, facts are identical and issues are common, for the sake of convenience these two appeals were heard together and are being disposed off, by this consolidated order.

IT(TP)A No: 35/Chny/2021 for AY 2016-17:

2. The assessee has raised the following grounds of appeal:

1. That on the facts and circumstances of the case and in law, the AO erred in assessing the total income of the Appellant at INR 62,93,34,720, in pursuance to the directions issued by the DRP, as against the returned income of INR 26,14,64,870.

2. That on the facts and circumstances of the case and in law, the order dated April 22, 2021 passed by the AO under section 143(3) read with sections 144C(13) and 1448 of the Act is contrary to law, facts and circumstances of the case and thus, liable to be quashed.

3. That on the facts and circumstances of the case and in law, the order dated November 1, 2019 passed by the TPO under section 92CA(3) of the Act is barred by limitation, bad in law, void ab initio and thus, liable to be quashed .

Transfer Pricing ("TP") adjustment amounting to INR 16,73,97,818 pertaining to the international transaction of receipt of corporate support services:

4.1 That on the facts and circumstances of the case and in law, the AO/ DRP/ TPO have erred in making an upward TP

adjustment of INR 16,73,97,818 in respect of the international transactions relating to receipt of corporate support services ("CSS"), alleging that the same were not at arm's length and determining the ALP as 'Nil'.

4.2 That on the facts and circumstances of the case and in law, the AO/ DRP/ TPO have erred in rejecting the benchmarking analysis and methodology adopted by the Appellant, wherein Transactional Net Margin Method ("TNMM") has been adopted as the most appropriate method for benchmarking the international transaction of receipt of CSS.

4.3. That on the facts and circumstances of the case and in law, the AO/ DRP/ TPO have erred in erroneously determining the arm's length price ("ALP") of the international transactions pertaining to receipt of CSS as 'Nil' by applying "Other Method", which is not in accordance with the provisions of the Act read with Income-tax Rules, 1962.

4.4. That on the facts and circumstances of the case and in law, the AO/ DRP/ TPO have erred in classifying the intra-group services received as shareholder/ duplicative services without appreciating that the services are critical to Appellant's operations and commercial expediency has to be looked from the point of businessman .

4.5. That on the facts and circumstances of the case and in law, the AO/ DRP/ TPO have erred in alleging, inter alia, that the Appellant had failed to maintain records to establish receipt of services, need for services, benefit received therefrom and cost incurred by the AE, without appreciating the submissions and evidences furnished by the Appellant in this regard.

5. Disallowance amounting to INR 5,45,37,056 of management fees (corporate cost allocation) under section 37(1) of the Act:

5.1 That on the facts and circumstances of the case and in law, the AO/ DRP have erred in disallowing expenditure of INR 5,45,37,056 towards management fees paid to its associated

enterprises ("AEs"), under section 37(1) of the Act, alleging that the Appellant had failed to establish receipt of services.

5.2 That on the facts and circumstances of the case and in law, the AO/ DRP have erred in holding that the Appellant has failed to submit supporting evidences in support of its claim or deductibility of the expenditure under section 37(1) of the Act, without appreciating the evidences/ submissions furnished by the Appellant in this regard.

5.3 That on the facts and circumstances of the case and in law, the AO/ DRP have erred in allowing the expenditure incurred by the Appellant towards management fees to its AE's - ::: appreciating that the same were incurred wholly and exclusively for the purposes of business.

6. Other grounds:

6.1 That on the facts and in the circumstances of the case and in law, the AO erred in not allowing set-off of brought forward business loss from earlier assessment years.

6.2 That on the facts and in the circumstances of the case and in law, the AO erred in granting short credit of taxes to the Appellant while computing the tax demand for the subject assessment year.

6.3 That on the facts and in the circumstances of the case and in law, the AO erred in levying interest under sections 234A and 234C of the Act.

6.4 That on the facts and in the circumstances of the case and in law, the AO erred in incorrectly computing interest under section 234B of the Act.

Each of the above grounds is independent and without prejudice to the other grounds of appeal preferred by the Appellant.

The Appellant prays for leave to add, alter, vary, omit, substitute or amend the above grounds of appeal, at any time before, or at, the time of hearing of the appeal."

3. The brief facts of the case are that, the assessee company is engaged in the business of manufacturing, assembling and trading of electrical equipment like High Rupturing Capacity industrial fuses, UPS, DC Power Systems, Switchgears, Miniature Circuit Breakers etc. The appellant had filed its return of income for the assessment year 2016-17 on 30.11.2016, declaring total income of Rs. 11,91,18,170/-. Subsequently, the company filed a revised return of income on 07.08.2017, admitting a total income of Rs. 26,14,64,870/-, after set off of brought forward business loss. The case was selected for scrutiny and during the course of assessment proceedings, a reference was made to TPO to determine Arm's Length Price (ALP) of international transactions of the assessee with its Associate Enterprises (AEs). The TPO, vide their order u/s. 92CA(3) of the Act, dated 01.11.2019 has made TP adjustment of Rs. 16,73,97,818/-. Thereafter, the AO has passed draft assessment order u/s. 144C(1) of the Act, on 20.12.2019 and proposed TP adjustment as suggested by the TPO. The assessee has filed objection before the DRP-1, Bangalore and the DRP vide their directions issued u/s. 144C(5) of the Act, dated 23.03.2021, upheld TP adjustment as suggested by the TPO. The AO, thereafter passed final

assessment order u/s. 143(3) r.w.s. 144C(13) and 144B of the Act, dated 22.04.2021 and determined total income of Rs. 62,93,34,720/-. Aggrieved by the final assessment order, assessee is in appeal before us.

4. The Id. Counsel for the assessee submitted that, the final assessment order passed by the AO dated 01.11.2019 is beyond limitation prescribed under provisions of section 153(1) & 153(4) of the Act and liable to be quashed. In this regard, he relied upon the decision of ITAT Chennai Benches in the case of M/s. Verizon Data Services India Pvt Ltd vs ITO in ITA 37/Chny/2021 dated 18.11.2022.

5. The Id. DR, on the other hand submitted that as per provisions of section 153(1) & 153(4) of the Act, time limit available for completion of assessment is 33 months from the end of the relevant assessment years and further in the case of reference in terms of provisions of section 92CA of the Act, an order has to be passed by the TPO before 60 days prior to the last date on which the period of limitation referred to in section 153(4) of the Act for making final assessment expires. If you count number of 60 days from the limitation provided

under the provisions of section 153(4) of the Act, it expires on 01st November, 2019 and thus, the final assessment order passed by the AO is well within limitation prescribed under the law. Therefore, there is no merit in grounds of appeal filed by the assessee and same needs to be dismissed.

6. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. An undisputed fact that emerges from the records is that for the assessment year 2016-17, the TPO has passed order u/s. 92CA of the Act, on 01.11.2019. As per provisions of section 153(1) & 153(4) of the Act, the period of 60 days prior thereto would run till 01st November, 2019 and any order passed prior to that date would mean 31st October, 2019 or before. Since, the order was passed on 01.11.2019, the same would be barred by limitation, as held by the Hon'ble Madras High Court in the case of M/s. Pfizer Healthcare India Pvt Ltd & ors. (WP Nos. 32688 of 2019 & ors.) order dated 07.09.2020. A similar view has been taken by the coordinate bench of ITAT in the case of M/s. Verizon Data Services India Pvt Ltd (Supra), where the Tribunal by following the decision of Hon'ble Madras High Court in the case of M/s. Pfizer

Healthcare India Pvt Ltd & ors. (Supra), held that final assessment order passed after 31st October is beyond limitation as prescribed u/s. 153(4) of the Act. The relevant findings of the Tribunal are as under:

5. *The undisputed fact that emerges is that for AY 2016-17, the order has been passed by Ld. TPO u/s 92CA (3) on 01.11.2019. As per the decision of Hon'ble Single Judge in cited decision of **M/s Pfizer Healthcare India Pvt. Ltd. & ors. (supra)**, this order would be barred by limitation. In this decision, bunch of assessee invoked writ jurisdiction of Hon'ble Court on the ground that the order passed u/s 92CA(3) was barred by limitation by one day. It was noted that in terms of Sec.92CA(3A), an order has to be passed by TPO before 60 days prior to the last day on which the period of limitation referred to in Sec.153 for making assessment expires. The assessment is to be completed within 21 months from end of assessment year in which the income was first assessable. Therefore. Counting from 31.03.2017, the assessment was to be framed on or before 31.12.2019. The period of 60 days prior thereto would run till 01.11.2019 and any date prior thereto would mean 31st of October or before. Since the order was passed on 01.11.2019, the same would be barred by limitation. The relevant observations were as under: -*

"19. The revenue relies on the amendment to Section 92CA(4) which requires the Assessing Officer to compute total income of an assessee after receipt of the transfer pricing order. Prior to 01.06.2007, it was mandatory for the Assessing Authority to accept the ALP determined by the TPO and the phrase used in the provision was 'having regard to'. Post amendment, the provision made it compulsory for the Assessing Authority to adopt the ALP as determined by the TPO and the phrase 'having regard to' was replaced by the phrase 'in conformity with'. Thus, according to the revenue, the AO hardly need apply his mind with respect to the ALP determined and the prescription of 60 days is merely for internal convenience of the different officers to facilitate step by step completion of assessment.

20. Much has been stated about the use of the words in the computation itself, such as 'may', 'shall', the absence of reference to 'month' as it may have led to an ambiguity of whether the period should be reckoned as 30 or 31 days and the absence of the phrase 'no order shall be made' as used in Section 153. This, according to the revenue, leads to the conclusion that there is nothing sacrosanct about the period of 60 days which must be construed as flexible.

21. On the question of alternate remedy, I see no reason to relegate the petitioners to the Assessing Authority for completion of draft assessment that may be challenged before the DRP. Limitation, which is the issue raised in these writ petitions, is a mixed question of law and facts, but there are no disputes on factual aspects in the present case. The writ petitions are thus, held to be maintainable.

22. Limitation has been prescribed for each stage/process in an assessment, commencing with the filing of a return, transfer pricing proceedings under Section 92, filing of objections to draft assessment order in terms of Section 144C(2), passing of final order of assessment after expiry of the period for filing of objections in terms of Section 144C(4), issuance of directions by the DRP in terms of Section 144C(12) and passing of final assessment order after receipt of directions from the DRP in terms of Section 144C(13). An assessment involving issues of transfer pricing is thus measured by limitation at every step.

23. On the question of interpretation of the language employed in the provisions, the following judgements of the Supreme Court settle the position that one should not proceed blindly on the basis of the words/phrases employed in Statute, whether 'may', 'shall', 'no order shall be passed' or 'within' and the scheme of assessment in entirety as well as the intention of Legislature qua that scheme of assessment must be taken into account.

Drawing support from various judicial precedents, it was finally held by 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.*

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.*

It has been pointed out that the present assessee was also a party to this litigation. Since at that stage, the draft assessment order was under challenge by assessee before Ld.

DRP, it was directed by Hon'ble Court that the petitioner would pursue the remedy opted by them.

6. *The revenue's writ appeals against this decision came up for hearing before Division Bench of Hon'ble Court which was disposed-off on 31.03.2022 wherein the writ appeals were dismissed and the adjudication of Ld. Judge was confirmed. With respect to assessee, the revenue preferred similar WA No.2051 of 2021 which was disposed-off on 16.09.2021 wherein it was held that since the assessee chose to avail alternative provided under the Act by approaching DRP, it would be open for the assessee to canvass all legal and factual issues before Tribunal before which the appeal was pending at that stage.*

7. *The assessee raised similar legal plea before Ld. DRP who held that the intention was never to make this time limit of 60 days mandatory since the expression used in Sec. 92CA(3A) is "may" in contrast to "shall" as used in Sec. 92CA(4). The word "may" could not be read as "shall" and therefore, the time period was not mandatory. It was further observed by Ld. DRP that the department has not accepted the ruling and preferred Writ Appeals with the division bench and therefore, to keep the matter alive, the objection raised by the assessee were dismissed. Aggrieved, the assessee is in further appeal before us.*

8. *The undisputed position that emerges is that now the division bench has dismissed the Writ appeals of the revenue and confirmed the adjudication of Hon'ble Single Judge. Accordingly, the legal plea as raised by Ld. Sr. Counsel squarely favors the case of the assessee. Therefore, we would hold that considering the statutory time limit, the order passed by Ld. TPO u/s 92CA(3) on 01.11.2019 would be barred by limitation and consequence as mentioned in para-4 would follow. In other words, this order would be time barred as a result of which the assessee would cease to be an eligible assessee and therefore, the machinery of Sec.144C would not be triggered. The Ld. AO is not required to pass the draft assessment order; DRP would not have any jurisdiction to adjudicate the matter. Consequently, the final assessment order passed on 30.04.2021 would be barred by limitation since in terms of Sec. 153(1) r.w.s. 153(4), the same should have been passed on or before 31.12.2019. The same is accordingly, liable to be quashed. Accepting first two legal*

propositions of Ld. Sr. Counsel, we would hold that the assessment would be nullity since it is barred by limitation. Delving into other legal ground as well as entering into the merits of the assessment has been rendered merely academic in nature.”

7. In this view of the matter and by following the decision of coordinate bench of ITAT, Chennai in the case of M/s. Verizon Data Services India Pvt Ltd (Supra), we are of the considered view that the final assessment order passed by the AO u/s. 143(3) r.w.s. 143C(13) of the Act on 01.11.2019 is clearly bad by limitation and liable to be quashed and thus, we quashed final assessment order passed by the AO.

8. In the result, appeal filed by the assessee for the assessment year 2016-17 is allowed.

ITA No:1010/Chny/2017 for AY 2012-13:

9. The brief facts of the case are that, the appellant was a wholly owned subsidiary of Eaton Holdings 2 Limited and was engaged in the trading and manufacturing of power quality equipment such as UPS, direct current power systems, power component/distribution equipment and to provide maintenance service for those items. The appellant filed its return of

income for the assessment year 2012-13 on 30.11.2012, declaring total income of Rs. 6,83,62,540/-. During the financial year 2012-13, the appellant had entered into international transactions with its Associate Enterprises (AEs). During the course of assessment proceedings, a reference was made to the Transfer Pricing Officer (TPO) for determination of ALP of international transactions of the assessee with its AE. The transfer pricing officer vide their order dated 29.01.2016, made transfer pricing adjustment amounting to Rs. 16,12,54,966/-. Thereafter, the AO passed draft assessment order on 29.03.2016 incorporating the transfer pricing adjustments proposed by the TPO and has also made corporate tax addition of Rs. 33,00,34,120/-. The assessee has filed an objection before the DRP and the Id. DRP-1, Bangalore vide order dated 28.12.2016, issued directions u/s. 144C(5) of the Act. Thereafter, the AO passed a final assessment order on 15.02.2017 u/s. 143(3) r.w.s. 144C(5) of the Act and determined total income of Rs. 11,90,62,500/-. Aggrieved by the final assessment order, assessee preferred an appeal before the Tribunal.

10. At the time of hearing, Id. Counsel for the assessee referring to petition filed by the assessee for admission of additional grounds of appeal filed under Rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963, submitted that the assessee has taken a legal ground challenging the final assessment order passed by the Assessing Officer u/s. 143(3) r.w.s. 144C(13) & 144B of the Act, in light of limitation prescribed u/s. 153(1) r.w.s. 153(4) of the Act. The Id. Counsel further submitted that additional grounds of appeal filed by the assessee is purely a legal ground which can be taken at any time of proceedings, including pending proceedings before the Tribunal. Therefore, in light of decision of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd vs CIT [1998] 229 ITR 383 SC, additional grounds of appeal filed by the assessee should be admitted and decide the issue in accordance with law.

11. The Id. DR, appearing for the revenue opposing petition filed by the assessee under Rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963 submitted that the assessee could not adduce reasons as to why it could not take said grounds before the DRP and further, the assessee could not

establish with regard to facts already available on record on the issue before the Assessing Officer at the time of assessment proceedings. Therefore, petition filed by the assessee should be dismissed.

12. We have heard both the parties and considered relevant contents of petition filed by the assessee under Rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963 and we find that the legal ground taken by the assessee challenging the validity of final assessment order passed by the AO u/s. 144(3) r.w.s. 144C(13), in light of provisions of section 153(1) & 153(4) of the Act, is purely a legal ground which can be taken at any time of proceedings including proceedings before the appellate authorities. Therefore, by following the decision of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd vs CIT (Supra), we admit additional grounds of appeal filed by the assessee for adjudication. The relevant additional grounds filed by the assessee is reproduced as under:

"1. That on the facts and circumstances of the case and in law, the final assessment order passed by the Assessing Officer (AO) under section 143(3) r.w.s. 144C & 144B is barred by limitation and is bad in law, as the same has been passed beyond the time limit prescribed under section 153(1) read with section 153(4) of the Income-tax Act, 1961 ("Act")."

13. The Id. Counsel for the assessee referring to additional ground filed by the assessee submitted that the final assessment order passed by the Assessing Office dated 17.02.2017 is beyond the time limit prescribed u/s. 153(1)(a) and proviso provided thereto and liable to be quashed. In this regard, he relied upon the decision of Hon'ble Madras High Court in the case of CIT vs Roca Bathroom Products (P) Ltd [2022] 445 ITR 537 (Mad).

14. The Id. DR, on the other hand submitted that the assessee has taken legal ground for the first time before the Tribunal and the Id. DRP did not had an occasion to examine the case of the assessee in light of provisions of section 153(1)(a) and proviso provided thereto. Therefore, the matter may be decided in accordance with law.

15. We have heard both the parties, perused materials available on record and gone through orders of the authorities below. We have also carefully considered relevant provisions of section 153(1)(a) and proviso provided thereto in light of decision of Hon'ble Madras High Court in the case of CIT vs Roca Bathroom Products (P) Ltd (Supra) and we find that the

Hon'ble Madras High Court has dealt the issue of limitation prescribed u/s. 153(1) of the Act and held that the limitation prescribed under the statute is for the Assessing Officer and therefore, it is the duty of the AO to pass order in time irrespective of whether the directions are received from DRP or not. We, further noted that if you go by the dates and events in the present case, prima facie, it appears that the order passed by the Assessing Officer u/s. 143(3) r.w.s. 144C(13) is beyond time limit prescribed u/s. 153(1)(a) and proviso provided thereto. However, in the instance case the subject matter of assessment year is 2012-13 and as per section 153(1) of the Act, the final assessment order should have been passed on or before expiry of 36 months from the end of the relevant assessment year which is 13.03.2016. However, the AO has passed final assessment order on 17.02.2017, therefore, it appears that the final assessment order passed by the AO is beyond the time limit prescribed under the statute. But, fact remains that the assessee has taken its legal ground for the first time before the Tribunal and the DRP did not had an occasion to examine the case of the assessee in light of decision of Hon'ble Madras High Court in the case of CIT vs Roca Bathroom Products (P) Ltd (Supra) and also keeping in

view the various limitation prescribed under the statute for the Assessing Officer and the DRP. Therefore, we are of the considered view that the issue needs to be set aside to the file of the AO to decide the preliminary objections of the assessee on the issue of limitations in light of decision of Hon'ble High Court of Madras in the case of CIT vs Roca Bathroom Products (P) Ltd (Supra). The AO is directed to obtain necessary directions from the DRP on the issue, if necessary and adjudicate the additional grounds taken by the assessee.

16. In the result, appeal filed by the assessee is treated as allowed for statistical purposes.

Order pronounced in the court on 03rd May, 2023 at Chennai.

Sd/-
(महावीर सिंह)
(MAHAVIR SINGH)
उपाध्यक्ष /Vice President

Sd/-
(मंजुनाथ. जी)
(MANJUNATHA. G)
लेखासदस्य/Accountant Member

चेन्नई/Chennai,

दिनांक/Dated, the 03rd May, 2023

JPV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF