

**IN THE INCOME TAX APPELLATE TRIBUNAL
“K” BENCH, MUMBAI
BEFORE SHRI PRASHANT MAHARISHI, AM &
SHRI KULDIP SINGH, JM**

आयकरअपीलसं./ I.T.A. No.7147/Mum/2017
(निर्धारणवर्ष / Assessment Year: 2013-14)

**Asus India Private
Limited.**
402, Supreme Chamber,
Veera Desai Road,
Andheri West,
Mumbai-400 053.

**ITO Ward- 9(1) (4),
Mumbai.**

**बनाम/
Vs.**

स्थायीलेखासं ./जीआइआरसं ./PAN No **AAJCA 6450C**
(अपीलार्थी/**Appellant**) : (प्रत्यर्थी / **Respondent**)

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| अपीलार्थी की ओरसे/ Appellant by | : | Dhanesh Bafna, Pratik Shah, Ms. Tejal Saraf, Ms. Riddhi M Maru |
| प्रत्यर्थी की ओरसे/ Respondent by | : | Shri Anoop Hiwase (Sr. DR) |
| सुनवाई की तारीख/ Date of Hearing | : | 21.03.2023 |
| घोषणा की तारीख/ Date of Pronouncement | : | 14.06.2023 |

आदेश / O R D E R

Per Prashant Maharishi, Accountant Member:

- 1) This appeal is filed by Asus India Private Limited [Assessee/ Appellant] against the assessment order passed u/s 144C (13) r.w.s 143(3) of the Act, 1961 on 26th October, 2017 for Assessment Year 2013-14.

- 2) Brief facts of the case shows that the assessee company filed its return of income for Assessment Year 2013-14 on 30/11/2013 declaring total income of Rs.13,10,200/- as per normal computation of income and book profit u/s 115JB computed at Rs.3,98,36,847/-. The return was picked up for scrutiny. Subsequently, the assessee revised return of income on 31/03/2015 for change in carry forwarding of MAT credit.
- 3) As the assessee engaged in the business of distribution of Asus Group products in India whereby it purchases Notebooks and Tablets from its associated enterprises and sales the product locally, it entered into several international transaction. Therefore, the reference u/s 92CA of the Act was made to the Addl. Commissioner of Income Tax, [Transfer Pricing Officer-1(1), Mumbai] [The ld TPO] .
- 4) The Ld. Transfer Pricing Officer (TPO) passed an order on 01/11/2016 u/s 92CA(3) of the Act by making and upward adjustment to the international transaction of Marketing Service Fees amounting to Rs.3,51,53,636/-. The Ld. Assessing Officer passed the draft assessment order on 27/12/2016 wherein the

total income of the assessee was determined at Rs.10,66,868/- against the return of income of Rs.13,10,200/- wherein several additions disallowances were made in the normal computation also.

- 5) Against this draft assessment order, the assessee preferred an objection before the Ld. Dispute Resolution Penal-1 (WZ), Mumbai, (DRP). The DRP passed direction on 22/09/2017.
- 6) Consequently, the final assessment order was passed on 26th October, 2017 determining the total income of assessee at Rs.9,53,12,786/-. The book profit was also computed at Rs.8,12,81,648/-.
- 7) The assessee is aggrieved with that and is in appeal before us.
- 8) During the course of hearing before us as per letter dated 8th April, 2021, the assessee filed an additional ground No. G wherein three contentions were raised stating that the order of the Ld. TPO is beyond the time limit prescribed and, therefore, the draft

assessment order and final assessment order dated 26th October, 2017 is time barred and, therefore, liable to be quashed.

- 9) The Ld. AR vehemently submitted that this ground is available to the assessee after filing of the appeal in view of judicial precedents. All the relevant facts such as the various dates of passing of the various orders are available on record. Therefore, there is no need to investigate further facts. It was further stated that the grounds of appeal are jurisdictional, goes to root of the matter and hence, same may be admitted.
- 10) The Ld. Departmental Representative (Ld. DR) strongly opposed the ground raised by the assessee submitted that these grounds were not raised before the Lower Authorities.
- 11) We have carefully considered the rival contentions and find that the application for admission of additional ground deserves to be admitted. These grounds are jurisdictional, goes to the root of the matter and do not require any further investigation of facts and, therefore, admitted.

- 12) As the additional ground is jurisdictional so it is required to be adjudicated first. We find that the Ld. AR submitted that for Asst. Year 2013-14 the time limit of completion of assessment was available of 33 months from the end of the assessment year. Therefore, the assessment should be completed on or before 31st December, 2016. This is so because the issue involved in the present case is 'reference to Transfer Pricing Officer' and, therefore, additional 12 months are available for completion of assessment over and above 21 months limitation period expires on 31st December, 2016. The TPO should have passed the order prior to 60 days from this date, therefore, the period of 60 days expires on 01/11/2016 and, therefore, the Ld. TPO should have passed an order on or before 31/10/2016. In this case, the order of the Ld. TPO is passed on 01/11/2016 and, therefore, the order of the Ld. TPO is passed beyond the prescribed time. As the foundation of the Ld. Assessing Officer's draft assessment order incorporating the order of the TPO considering the assessee as 'eligible assessee' u/s 144C(15), it also fails. The moment the assessee is ceases to be a 'eligible assessee', the extended time

limit of 12 months is also not available to the AO. In view of this, the draft assessment order and consequent final assessment order passed by the AO are barred by limitation. Therefore, same deserves to be quashed. The ld. AR relied upon the decision of the Hon'ble Madras High Court in case of *M/s. Pfizer Healthcare India Pvt. Ltd. vs. ACIT*, in Writ Appeal No.1139/2021 along with the decisions of the Co-ordinate Bench of Mumbai in case of *Altos India Pvt. Ltd. vs. DCIT* in ITA No.1795/Mum/2017 as well as *M/s. Mondelez India Foods Pvt. Ltd. vs. ACIT* in ITA No.1492/Mum/2015. Therefore, the Ld. AR vehemently stated that this issue is covered in favour of the assessee and as the final assessment order is barred by limitation, it deserves to be quashed.

- 13) The Ld. Departmental Representative (DR) vehemently supported the order of the Ld. AO and TPO and submitted that same has not barred by limitation but has passed within prescribed limit u/s 153 of the Act.

14) We have carefully considered the rival contention and also considered the argument of both the parties. We have also looked that the relevant provisions of law u/s 92(CA), Sec.153 and Sec.144(C) of the Act and the judicial precedents cited before us. The brief fact emerges is that for Asst. Year 2013-14 the time limit for completing the assessment u/s 153 of the Act is 21 months. If the assessee has TP issues and AO makes reference to the Ld. TPO for determination of Arm's Length Price of international transaction, a further time of 12 months is available for passing of the order. Therefore, the extended time limit available to the Assessing Officer for passing the final order in the present case is 33 months ending on 31st December, 2016. According to the provisions of Sec.92CA(3) such order should be passed at any time before 60 days prior to the date on which the period of limitation be prescribed u/s 153 expires. In this case, the period of limitation expires on 30th December, 2016, therefore, the Ld. TPO should have passed an order u/s 92CA(3) of the Act on or before 31/10/2016, however, such TP order is passed on 01/11/2016, therefore, naturally the order passed by the Ld. TPO

is barred by limitation. In such a situation, the Hon'ble Madras High Court in the case of M/s Pfizer India Healthcare Pvt. Ltd. as the order dated 07/09/2020 has quashed the TPO order. Accordingly, we respectfully following the decision of Hon'ble Madras High Court which has been further affirmed by the Division Bench of the Hon'ble Madras High Court in 444 ITR 636 in DCIT Vs. Saint Gobain India Pvt. Ltd quash the T P order .

- 15) As the order of the Ld. TPO is barred by limitation, there is no variation to the income of the assessee pursuance to the reference made the Ld. TPO. Accordingly, assessee does not qualify to be an eligible assessee u/s 144C(15)(b). Thus, the moment the order of the TPO is quashed the assessee ceases to be an 'eligible assessee'. Therefore, in that circumstances the time limit for completion of the assessment reverts back to 21months. However, in this case the final assessment order is passed on 26th October, 2017, same is also time barred. Accordingly, the final assessment order is also quashed. We draw support from the decision of the Hon'ble Delhi High Court in case of *Honda Cars India Limited vs. DCIT, 67 taxmann.com 29* and also of the Co-ordinate Benches in

the case of *Altos India Pvt. Ltd. (supra)* and *M/s. Mondelez India Foods Pvt. Ltd. (supra)*. Accordingly, the final assessment order passed by the Ld. Assessing Officer on 26th October, 2017 is barred by limitation and, therefore, quashed. Accordingly, additional ground No. G filed by the assessee is allowed.

- 16) In view of our decision on additional ground, we do not find any reason to adjudicate on the normal grounds raised in memorandum of appeal.
- 17) In the result, the appeal of the assessee is allowed.

Orders pronounced in the open court on 14th June, 2023.

Sd/-

(Kuldip Singh)
Judicial Member

Sd/-

(Prashant Maharishi)
Accountant Member

मुंबई Mumbai; दिनांक Dated : 14.06.2023

PK/sps

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai

6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ ITAT, Mumbai