

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

**BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &  
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.1249/Mum/2021  
(A.Y. 2016-17)**

|  |     |   |
|--|-----|---|
| DHL Logistics Private Limited, 201A, Silver Utopia, Cardinal Gracias Road, Chakala, Andheri (East) Mumbai - 400099 | Vs. | National e-Assessment Centre<br>Additional/Joint/Deputy/Assistant Commissioner of Income Tax/Income Tax Officer, National e-Assessment Centre Delhi |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACM6824H  |     |   |
| Appellant  | ..  | Respondent  |

|                 |  |
|-----------------|--|
| Appellant by :  | Madhur Agrawal/Fenil Bhatt/<br>Darshan Dalal |
| Respondent by : | Jayant B Jhaveri                             |

|                       |            |
|-----------------------|------------|
| Date of Hearing       | 19.06.2023 |
| Date of Pronouncement | 22.06.2023 |

**आदेश / O R D E R**

**Per Amarjit Singh (AM):**

This appeal filed by the assessee is directed against the order passed by the CIT(DRP-1), Mumbai, dated 15.03.2021 for A.Y. 2016-17. The assessee has raised the following grounds before us:

- “1. On the facts and in the circumstances of the case and in law the order dated 1 November 2019 passed by the Learned Asst. Commissioner of Income-tax (Transfer Pricing)-1(2)(2), Mumbai (Ld. TPO) under section 92CA of the Act is beyond the time limit prescribed under section 92CA(3A) r.w.s 153 of the Income-tax Act, 1961 (Act), thus making the transfer pricing order and resultant final assessment order dated 30 April 2021 is illegal, bad in law, null and void and liable to be quashed.

*The following grounds are without prejudice to Ground 1 above.*

2. *On the facts and circumstances of the case and in law, the Lat. Dispute Resolution Panel (DRP) erred in upholding the action of the Ld. Assessing Officer (CAO)/ 1d TPO in confirming the addition of INR 65,03,77,598/- to the income of the Appellant by holding that its international transactions pertaining to its freight forwarding segment do not satisfy the arm's length principle envisaged under the Act.*
3. *In doing so, the Ld. AO erred in not reducing the TP adjustment from INR 65,03,77,598/- to INR 172.536.318 pursuant to order dated April 30, 2021 issued by the 1d TPO giving effect to the directions of the Ld. DRP dated March 15, 2021.*
4. *Further, in doing so, The Ld. DRP/Ld. TPO/LA. AO grossly erred in.*
  - 4.1 *disregarding the arm's length price (ALP) and the scientific benchmarking process carried out by the Appellant in the Transfer Pricing (TP) documentation maintained by the Appellant in terms of section 92D of the Act read with Rule 10D of the Income-tax Rules, 1962 (Rules);*
  - 4.2 *failing to appreciate the economic rationale of using "Operating Profit/ Value Added Expenses" as the Profit Level Indicator (PLI), and instead using "Operating Profit/ Total Cost (OP/TC) as the PLI.*
  - 4.3 *not allowing the exclusion of pass through costs of the appellant for AY 2016-17 and thereby enhancing the cost base for the purpose of computing the operating margin (OP/TC) of the assessee.*
  - 4.4 *disregarding all comparable companies selected by the Appellant in its TP documentation.*
  - 4.5 *including Om Logistics Limited which is a functionally incomparable company in the final set of comparable companies.*

*The Appellant prays that the book value of the international transactions pertaining to the freight forwarding segment of the Appellant should be held to be the arm's length price of the said transactions as per the Appellant's TP documentation, and the addition made on account of the above grounds should be deleted.*

5. *Charge of interest under section 234A and 2348 of the Act.*
  - 5.1 *On the facts and circumstances of the case and in law, the learned AO has erred in charging interest under section 234A and 2348 of the Act.*

*It is prayed that the learned AO be directed to delete the interest under section 234A of the Act.*

6. *Penalty Proceeding under section 274 read with section 271(1)(c) of Income-tax Act 1961 should be dropped.*

6.1 *On the facts and in the circumstances of the case and in law, the learned AO erred in initiating penalty proceedings under section 271(1)(c) of the Act without appreciating that the Appellant has neither concealed any particulars of its income nor furnished any inaccurate particulars of the income.*

*The Appellant craves leave to alter, amend or withdraw all or any of the grounds herein or add any further grounds as may be considered necessary either before or during the hearing.”*

2. Fact in brief is that return of income declaring total income of Rs.77,60,27,700/- was filed on 29.11.2016. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued to the assessee company on 17.07.2017. The assessee company DHL Logistics Pvt. Ltd. (DLPL) is a logistics services provider offering a comprehensive portfolio of international, domestic and specialised freight handling services. It is an indirect subsidiary of Deutsche Post AG (DPAG), the ultimate payment company of DLPL. The DLPL and its associated enterprises (AE's) in the DHL network of companies may be characterised as freight handling companies with normal risk operating in the international logistics business.

3. During the course of assessment the assessing officer stated that in the case of the assessee of TP adjustment of Rs.10 crores or more was made in the earlier years and during this year the assessee had also entered into large international transactions with the associated enterprises. Therefore, the Transfer Pricing Officer i.e Assistant Commissioner of Income Tax (Transfer Pricing)-1 (2)(2), Mumbai vide order u/s 92CA(3) dated 01.11.2019 has made an upward adjustment to the arm's length price by Rs.65,03,77,598/- in relation to the international transactions entered into by the assessee company with its associated enterprise during the financial year 2015-16 relevant to assessment year 2016-17. In view of the order passed u/s 92CA(3) dated 01.11.2019 by the Transfer Pricing Officer an addition of

Rs.65,03,77,598/- was proposed by the assessing officer in the draft assessment order on 07.12.2019.

4. The assessee has filed objections from the Id. Dispute Resolution Panel (DRP) against the additions proposed by the assessing officer in the draft assessment order. The Id. DRP issued directions vide order u/s 144C(5) of the Act on 15.03.2021. Thereafter in the final assessment order the AO stated that the DRP has issued directions that the “the AQ/TPO should make necessary independent verification and the ALP may be applied wherein transactions entered into with the AEs and should not be extended to the total sales of the Assessee.”

5. Accordingly, the AO has passed final assessment order on 30.04.2021 and total income was assessed at Rs.142,64,05,302/-.

6. During the course of appellate proceedings before us the Id. Counsel filed additional ground of appeal as follows:

**Submission on Additional Ground No. 1 (corresponding Ground no.1 of the Form 36)**

- *Additional Ground No. 1 (corresponding Ground no.1 of the Form 36)- Challenging the period of limitation for passing the transfer pricing order by the TPO:*
- *Attention is invited to section 92CAL3A) of the Act which provides for the time limit for passing the transfer pricing order. The same is extracted below*

*“(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;”*

*(emphasis supplied)*

- *As can be seen from the above, the TPO can pass an order under section 92CA of the Act at any time before 60 days prior to the due date prescribed under section 153 of the Act for passing the assessment order.*
- *Section 153 of the Act (as applicable to AY 2016-17) prescribes a time limit of 21 months from the end of the assessment year for completion of assessment. Further, where a reference is made to the TPO for determination of ALP, the time limit is further extended by 12 months. Accordingly, the due date for passing the assessment under in the case of the Appellant for AY 2016-17 was 31 December 2019.*
- *Consequently, in terms of section 92CA(3A) of the Act, the 60 day prior to 31 December 2019 (i.e 60 day from 31 December 2019) falls on 1 November 2019. Accordingly, the due date for the TPO to pass the transfer pricing, order for AY 2016-17 should be at any time before 1 November 2019 i.e, on or before 31 October 2019.*
- *In the present case, the TPO has passed the transfer pricing order on 1 November 2019 i.e, beyond the time limit prescribed under the Act. Hence, the same is barred by limitation in terms of section 92CA(3A) r.us. 153 of the Act.*
- *In view of the above, the Appellant wishes to raise an additional ground to contest that the transfer pricing order dated 1 November 2019 passed by the TPO for AY 2016-17 is barred by limitation as prescribed under section 92CA(3A) r.us. 153 of the Act and accordingly, the transfer pricing order ought to be treated as illegal, bad in law, null and void and therefore be quashed.*
- *Thus, based on the above submission the Appellant most humbly submits vide the additional grounds of appeal (corresponding Ground 1 of the Form 36), that the transfer pricing order, draft assessment order and the final assessment order are bad in law, null and void and liable to be quashed.*

*We crave leave of your Honor's to rely upon the following decisions in support of our plea for admission and adjudication of the enclosed additional ground of appeal.”*

7. The Id. Counsel has also placed reliance on the following judicial pronouncements i.e (i) Strides Shasum Limited Vs. DCIT, Circle 15(3)(2) vide ITA No. 2877/Mum/2014 dated 28.02.2023 (ii) M/s Mondelez India Foods Private Limited Vs. Ad. CIT, Range 5(1) vide ITA Nos. 1492, 1576 & 2340/Mum/2015 dated 14.11.2022 and (iii) M/s Tubacex Prakash India Pvt. Ltd. Vs. The ACIT/JCIT/DCIT/ACIT-national E-assessment Centre, Delhi and DCIT, circle 14(1)(2), dated 24.03.2023.

After referring the aforesaid decision of ITAT Mumbai the Id. Counsel contended that order passed by the Transfer Pricing Officer dated 01.11.2019 and the assessment order dated 30.04.2021 are time barred. The Id. Counsel submitted that additional ground is the legal grounds challenging the validity of the assessment order and the order of TPO on the ground of limitation and no further documentary evidence is required to adjudicate these ground. After considering the decision of Hon'ble Supreme Court of India in the case of National Thermal Power Company Vs. CIT (229 ITR 383) these ground of appeal are admitted and are taken up for adjudication. As per additional ground the order of the TPO is barred by limitation, therefore, the assessee does not become eligible assessee u/s 144C of the Act, therefore, the draft assessment order dated 07.12.2019 and the final assessment order passed by the A.O on 30.04.2021 were barred by limitation.

8. The Id. Counsel submitted that the order passed by the transfer pricing officer on 01.11.2019 is time barred by 1 day since the impugned order would have been passed on or before 31.10.2019 The Id. Counsel further submitted that as per provisions of Sec. 92CA(3A) of the Act in a case where the reference is made to the TPO, the TPO is required to pass order u/s 92CA(3A) of the Act at any time before 60 days prior to the date on which period of limitation referred to in Sec. 153 for making the assessment order expires. The Id. Counsel also submitted that the period of limitation for making of order of assessment as per Sec. 153 of the Act is two years and where a case is referred u/s 92CA of the Act to the TPO the period of limitation shall be 3 years from the end of the assessment year in which the income was first assessable. He further submitted that in the case of the assessee in accordance with provisions of Sec. 153 of the Act the period of limitation for completion of the assessment as per provisions of Sec. 153 of the Act is 31.12.2019, therefore, the time limit for passing the order

u/s 92CA(3A) of the Act is before 60 days prior to the date on which limitation for passing the assessment order is expired. As per the computation shown by the ld. Counsel the order u/s 92CA(3) of the Act ought to be passed on or before 31.10.2019. However, the TPO has passed the same order on 01.11.2019. Therefore, the ld. Counsel vehemently contended that impugned order passed u/s 92CA(3) is time barred by 1 day. The ld. Counsel has placed reliance on the following judicial pronouncements of Hon'ble Madras High Court i.e Pfizer Healthcare India Pvt. Ltd. Vs. JCOIT, 433 ITR 028 (Mad); DCIT Vs. Saint Gobain India P. Ltd. 137 taxmann.com 215 (Mad) and also placed reliance the decision of ITAT Mumbai in the cases i.e (i) Strides Shasum Limited Vs. DCIT, Circle 15(3)(2) vide ITA No. 2877/Mum/2014 dated 28.02.2023 (ii) M/s Mondelez India Foods Private Limited Vs. Ad. CIT, Range 5(1) vide ITA Nos. 1492, 1576 & 2340/Mum/2015 dated 14.11.2022 and (iii) M/s Tubacex Prakash India Pvt. Ltd. Vs. The ACIT/JCIT/DCIT/ACIT-national E-assessment Centre, Delhi and DCIT, circle 14(1)(2), dated 24.03.2023.

On the other hand, the ld. D.R. submitted that the period of limitation computed by the assessee in the additional ground is not as per the letter and spirit contained in the act. The ld. D.R also submitted that Sec. 92CA(3A) uses word may only and same cannot be construed as shall and equated to limitation especially when further proceedings are contemplated under the Act such as passing the draft assessment order and for the remedy before the dispute resolution panel and final assessment order.

9. Heard both the side and perused the material on record with regard to the limited issue of validity of order passed by the TPO u/s 92CA(3) of the Act and the subsequent proceedings arises therefrom. During the course of appellate proceedings the ld. Counsel has filed computation of period of limitation as under:

| DHL Logistics Private Limited - AY 2016-17 ("DHL") |  |   |
|--|--|---|
| Sr. No.  | Particulars  | Relevant date/ Period                         |
|  | Assessment Year Involved   | 2016-17                                       |
| 1  | Period of Limitation for making an order of Assessment as per sec. 153 of the Income Tax Act., 1961 ("The Act")  | 21 months from the end of the Assessment Year |
| 2  | Extension of period of Limitation in case reference is made u/s 92CA of the Act  | 12 Months                                     |
| 3  | Assessment proceedings should be completed on / or before  | 31.12.2019                                    |
| 4  | Date prior to the date on which period of limitation expires (Stated in Sr. No. 3 above)   | 30.12. 2019                                   |
| 5  | Sixty days period expires on<br>December = 30 days (excluding 31.12.2019)<br>November = 30 days  | 01.11.2019                                    |
| 6  | Transfer Pricing order u/s 92CA(3) of the Act to be passed on/or before  | 31.10.2019                                    |
| 7  | Date on which Transfer Pricing order u/s 92CA(3) is passed   | 01.11.2019                                    |
| 8  | Hence, the Assessee is not an eligible assessee in accordance with sec. 144C(15) of the Act since TP order is time barred by limitation. As there is no TP order in existence, the Assessee ceases to be an eligible assessee. Accordingly, the final order should have been passed on 31.12.2019. |   |
| 9  | Date of Draft Assessment order   | 07.12.2019                                    |
| 10   | Final Assessment order is passed beyond the timeline   | 30.04.2021                                    |
| 11   | Based on above, even the final Assessment is barred by limitation.   |   |

The relevant provisions of Sec. 92CA(3A) is reproduced as under:

**Section 92CA (3A)**

*“(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:”*

**Section 153(1)**

*“Time limit for completion of assessment and reassessments- (1) No order of assessment shall be made under section 143 or section 144 at any time after the expiry of –*

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

*Provided xxxxxxxxxxxx*

*Provided further xxxxxxxxxxxx*

*Provided also that in case the assessment year in which the income was first assessable is the assessment year commencing on the 1st day of April, 2009 or any subsequent assessment year and during the course of the proceeding for the assessment of total income, a reference under sub-section(1) of section 92CA is made, the provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words "two years" the words "three years" had been substituted."*

As per provision of Sec. 92CA(3A) the TPO is required to pass an order u/s 92CA(3) of the Act at any time before 60 days prior to the date on which the period of limitation referred to in Sec. 153 for making the assessment order on assessment or reassessment or re-computation or fresh assessment as the case may be expires. The decision of single bench of Hon'ble High Court of Madras in the case of Pfizer Healthcare Ltd Vs. JCIT as supra is reproduced 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".*

10. Further the decision of division bench of the Hon'ble Madras High Court in the case of DCIT Vs. Saint Gobain India P. Ltd. as referred supra by the ld. Counsel is reproduced as under:

*"28. The word "date" in section 92CA(3A) would indicate 31-12-2019. But the preceding words "prior to" would indicate that for the purpose of calculating the 60 days, 31-12-2019 must be excluded. The usage of the word "prior" is not without significance. It is not open to this court to just consider the word "to" by ignoring "prior". The word "prior" in the present context, not only denotes the flow of direction, but also actual date from which the period of 60 days is to be calculated. It is settled law that while interpreting a statute, it is not for the courts to treat any word(s) as redundant or superfluous and ignore the same. In this connection, it is pertinent to note the judgment of the Apex Court in Grasim Industries Ltd. v. Collector of Customs 2002 taxmann.com 1803, wherein, it was held as follows :*

"10. No words or expressions used in any statute can be said to be redundant or superfluous. In matters of interpretation one should not concentrate too much on one word and pay too little attention to other words. No provision in the statute and no word in any section can be construed in isolation. Every provision and every word must be looked at generally and in the context in which it is used. It is said that every statute is an edict of the legislature. The elementary principle of interpreting any word while considering a statute is to gather the mens or sententia legis of the legislature. Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to take upon itself the task of amending or alternating (sic altering) the statutory provisions. Wherever the language is clear the intention of the legislature is to be gathered from the language used. While doing so, what has been said in the statute as also what has not been said has to be noted. The construction which requires for its support addition or substitution of words or which results in rejection of words has to be avoided. As stated by the Privy Council in *Crawford v. Spooner* [(1846) 6 Moore PC 1 : 4 MIA 179] "we cannot aid the legislature's defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are left there". In case of an ordinary word there should be no attempt to substitute or paraphrase of general application. Attention should be confined to what is necessary for deciding the particular case. This principle is too well settled and reference to a few decisions of this Court would suffice. (See : *Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. v. Custodian of Vested Forests* [1990 Supp SCC 785 : AIR 1990 SC 1747] , *Union of India v. Deoki Nandan Aggarwal* [1992 Supp (1) SCC 323 : 1992 SCC (L&S) 248 : (1992) 19 ATC 219 : AIR 1992 SC 96] , *Institute of Chartered Accountants of India v. Price Waterhouse* [(1997) 6 SCC 312] and *Harbhajan Singh v. Press Council of India* [(2002) 3 SCC 722 : JT (2002) 3 SC 21] .)"

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. *As rightly pointed out by Mr. Ajay Vohra, learned senior counsel for the respondents in WA. Nos.1148 and 1149/2021, the word "may" has to be sometimes read as "shall" and vice versa depending upon the context in which it is used, the consequences of the performance or failure on the overall scheme*

*and object of the provisions would have to be considered while determining whether it is mandatory or directory.*

*37. At this juncture, it is noteworthy to mention the commentary of Justice G.P.Singh on the interpretation of statutes, Principles of Statutory Interpretation (1st Edn., Lexis Nexis 2015), which is quoted below for ready reference: '*

*The intention of the legislature thus assimilates two aspects: In one aspect it carries the concept of "meaning" i.e. what the words mean and in another aspect, it conveys the concept of "purpose and object" or the "reason and spirit" pervading through the statute. The process of construction, therefore, combines both literal and purposive approaches. In other words the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. This formulation later received the approval of the Supreme Court and was called the "cardinal principle of construction".'*

*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."*

After taking into consideration the material placed on record it is undisputed fact that transfer pricing officer has passed order u/s 92CA(3) on 01.11.2019 whereas the limitation for passing the said order u/s 92CA(3) expires on 31.10.2019 Therefore, taking into consideration

the provision of the Act and decision of Hon'ble Madras High Court in the cases referred supra the order u/s 92CA(3) of the Act is time barred by 1 day. Further the ld. Counsel has mentioned the provisions of Sec. 144C(15) of the Act pertaining to the eligible assessee the same is reproduced as under:

*“(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) (ii) any non-resident not being a company, or any foreign company.”*

After referring the aforesaid provisions the ld. Counsel contended that since the order of the TPO was barred by limitation, therefore, there was no eligible assessee in the case of the assessee in terms of provisions of subsection (15) to Sec. 144C of the Act.

11. In this regard, we find that coordinate bench of the ITAT on the similar issue on identical facts in the cases i.e (i) Strides Shasum Limited Vs. DCIT, Circle 15(3)(2) vide ITA No. 2877/Mum/2014 dated 28.02.2023 (ii) M/s Mondelez India Foods Private Limited Vs. Ad. CIT, Range 5(1) vide ITA Nos. 1492, 1576 & 2340/Mum/2015 dated 14.11.2022 and (iii) M/s Tubacex Prakash India Pvt. Ltd. Vs. The ACIT/JCIT/DCIT/ACIT-national E-assessment Centre, Delhi and DCIT, circle 14(1)(2), dated 24.03.2023 held that the order of the TPO and draft assessment order are barred by limitation, therefore, resulting in assessee not being a eligible assessee u/s 144C(15)(b)(i) of the Act. Consequently, the final assessment was also bad in law. Therefore, since the issue on hand being squarely covered on similar fact and circumstances, therefore, we find merit in the submission of the assessee and allow the additional ground raised by the assessee. No argument were made by the ld. Counsel for the assessee in respect of

the original ground of appeal, other additional ground of appeal therefore they are left open for adjudication if the need arises.

12. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on 22.06.2021

Sd/-  
(Aby T Varkey)  
Judicial Member

Sd/-  
(Amarjit Singh)  
Accountant Member

Place: Mumbai

Date 22.06.2023

Rohit: PS

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

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

सत्यापित प्रति //True Copy//  
आदेशानुसार/ BY ORDER,

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