

IN THE INCOME TAX APPELLATE TRIBUNAL "J" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI AMARJIT SINGH, AM

आयकर अपील सं/ I.T.A. No.3512/Mum/2015

(निर्धारण वर्ष / Assessment Year: 2009-10)

Tata AIG General Insurance Company Ltd. 15 th Floor, Tower A, Peninsula Corporate Park, G. K. Marg, Lower Parel, Mumbai-400013.	बनाम / Vs.	ACIT-2(3) Aayakar Bhavan, Maharshi Karve Marg, Mumbai-400020.
स्थायी लेखा सं. / जीआइआर सं. / PAN/GIR No. : AABCT3518Q		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri Percy Pardiwala/Shri Nishant Thakkar/Ms. Jasmin Amalsadvala
Revenue by:	Shri Samuel Pitta (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 24/04/2023

घोषणा की तारीख /Date of Pronouncement: 30/06/2023

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-58, Mumbai dated 09.03.2015 for AY. 2009-10.

2. The additional grounds of appeal preferred by the assessee reads as under: -

“Modified Additional Ground No.1 - (The Additional ground No. 1

1. The transfer pricing order dated 30 January 2013 passed by the learned Additional Director of Income-tax, Transfer Pricing - (6), Mumbai (the ‘learned Transfer Pricing Officer’), is void and bad in law as it has been passed beyond the period of limitation under section 92CA read with section 153. Consequently, the final assessment order passed by the learned Assistant Commissioner of Income-tax 2(3), Mumbai (the ‘learned AO’) is also time barred.

Additional Ground No.2

2. Without prejudice to additional ground no. 1 above, the assessment order dated 26 April 2013 passed by the learned AO under section



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143(3) read with section 144C(3) of the Income-tax Act, 1961 is void and bad in law as it has been passed beyond the period of limitation referred to in section 153 of the Act.

Additional Ground No.3

3. The learned CIT(A) erred in confirming the action of the learned AO of not allowing the claim of depreciation amounting to Rs 10,76,38,455 made in accordance with the provisions of section 32 of the Act.

The Appellant craves leave to add, alter, vary, omit, substitute or amend the grounds of appeal, at any time before or at, the time of hearing of the appeal, so as to enable the Hon'ble Income-tax Appellate Tribunal to decide this appeal according to law.”

3. The assessee vide letter dated 01.02.2013 has raised the additional grounds that the impugned Transfer Pricing (TP) order dated 30.01.2013 passed u/s 92CA(3) of the Income Tax Act, 1961 (hereinafter “the Act”) is *barred by limitation* and hence bad in law. Further, the final assessment order dated 26.04.2013 passed u/s 143(3) r.w.s 144C(13) of the Act is *non-est* in the eye of law being barred by limitation. The aforesaid additional grounds are admitted being purely legal grounds which if found valid, goes to the root of the transfer pricing order as well as final assessment order. And since adjudication of the legal issue doesn't require any new facts to be examined, in the light of the order of the Hon'ble Supreme Court in the case of NTPC Vs. CIT (229 ITR 383) (SC), we admit the legal issues for adjudication. The Ld. Sr. Counsel for assessee, Shri Percy Pardiwala, drew our attention to the chronology of date of events which are relevant for appreciating the legal issue are as under;-

Sr. No.	Particular	Relevant Date Period
	Assessment Year	2009-10
1	Period of Limitation for making an order of assessment as per section	2 Years from the end of the assessment



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	153 of the Act as the law stood	year (i.e 31.03.2012)
2	Extension of period of limitation in case a reference is made u/s 92CA of the Act	12 Months (i.e. 31.03.2013)
3	Date on which reference was made to the Transfer Pricing Officer	17.02.2011
4	Assessment Proceedings should be completed on/or before	31.03.2013
5	Date prior to the date on which period of limitation expires (stated in Sr. No. 3 above)	30.03.2013
6	60- day period expires on: March = 30 days (excluding 31.03.2013) February = 28 days January = 2 days	30.01.2013
7	Transfer Pricing Order u/s 92CA(3) of the Act Ought to be passed on/or before	29.01.2013
8	Date on which Transfer Pricing Order u/s 92CA(3) is passed	30.01.2013
9	Date on which Final Assessment order was passed	26.04.2013

4. According to Sr. Counsel, as per the Section 153 of the Act (*as it stood in the AY. 2009-10, the time limit for completing of assessment was two years from the end of the assessment year*), no order of assessment can be made u/s 143 or Section 144 of the Act at any time, after the expiry of the aforesaid period which means in the present case it would expire on 31.03.2012. However, according to him, since the AO referred the issue relating to Transfer Pricing to the TPO u/s 92CA of the Act on 17.02.2011, the period of limitation stands extended for one more year i.e, from the two years to three years as per the third (3rd) proviso to Section 153 of the Act. Therefore, assessment proceeding should be completed by AO on or before 31.03.2013 by passing the final assessment order. Further, according to him, as per Section 92CA (3A) of the Act, the TPO has to pass the transfer pricing order before the sixty (60) days prior to the date on which the period of limitation referred to in Section 153 of the Act expires. Therefore, excluding the date 31.03.2013, the TPO had to pass the TP order on or before 29.01.2013; and since in the present case, the TPO has passed the TP order u/s 92CA(3A) of the Act on 30.01.2013, according to the Ld. Senior Counsel, the TPO became “*functus officio*” on the mid-



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night of 29.01.2013. Therefore, according to him, the order passed by TPO dated 30.01.2013 is barred by limitation and so it is *non-est* eye of law and relied on the decision of the Hon'ble Madras High Court in the case of M/s. Pfizer Health Care India Pvt. Ltd. Vs. JCIT (2021) 124 taxmann.com 536) (Mad).

5. Thereafter, coming to the next legal issue, he drew our attention to Section 144C(15)(b) of the Act wherein the definition of '*eligible assessee*' is given which is reproduced as under: -

“For the purposes of this section-

(a)

(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.”

6. According to the Ld. Sr. Counsel in the facts of the case, it is undisputed that clause (ii) (supra) is not applicable; and only clause (i) (supra) was attracted in order to be a '*eligible assessee*' for the purpose of Section 144C of the Act. However, since in this case, the TPO order u/s 92CA(3A) of the Act is non-est eye of law, therefore, for the purpose of Section 144C of the Act, the assessee cannot be termed as an '*eligible assessee*' [*since, there would be no variation to the returned income in consequence of order u/s 92CA(3) of the Act*]. And therefore, according to him, the AO had to pass the assessment order within the period prescribed i.e. 31.03.2013. And since the AO



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has passed the assessment order on 26.04.2013, the same is barred by limitation. And for that proposition of law, he relied on the decision of the Tribunal in the case of IPF India Property Cyprus (No. 1) Ltd. v/s. DCIT reported in [2020] 115 taxmann.com 78; b. Decision of the Mumbai Bench of the Tribunal in the case of Precilion Holdings Ltd. v/s. ACIT [ITA No. 7412/Mum/2018]; c. Decision of the Mumbai Bench of the Tribunal in the case of Mausami SA Investments LLC v/s. ACIT [ITA No. 7026/Mum/2018]. Accordingly, Ld. Sr. Counsel submitted that impugned order of the TPO as well as the AO is non-est in eyes of law and referred to the decision of this Co-ordinate Bench of this Tribunal in the case of M/s. Strides Shasun Ltd vs. DCIT for AY. 2009-10 (ITA. No. 2877/Mum/2014) wherein in that case also the facts were similar and was pertaining to AY. 2009-10 and the TPO order has passed the TP order on 30.01.2013 (like in the assessee's case). And the Tribunal held the action of TPO in that case to be bad in law being passed after the limitation period which expired on 29.01.2013. The Tribunal held in the case M/s. Strides Shasun Ltd (supra) as under: -

“3. The assessee vide letter dated 9th June 2022 has raised additional grounds that the impugned transfer pricing order dated 30th January 2013 passed u/s 92CA(3) is barred by limitation and hence bad in law. Further in another petition dated 20th June 2022, assessee has challenged that the facts and circumstances and in law, the impugned order dated 26th Feb. 2014 passed u/s 143(3) r.w.s. 144C(13) is void-ab-initio being barred by limitation.



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4. Since the aforesaid additional grounds are purely legal ground challenging the validity and limitation of passing of the transfer pricing order as well as final assessment year, therefore the same are admitted and is being adjudicated hereinafter.

5. To appreciate the aforesaid additional grounds, the following chronologies of events are relevant, which are as under:-

Sr. No.	Particulars	Relevant date/period
	Assessment Year involved	2009-10
1	Period of limitation for making an order of assessment as per section 153 of the Act	Two years 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	31.03.2013
4	Date prior to the date on which period of limitation expires (stated in Sr. No. 3 above)	30.03.2013
5	60 day period expires on March = 30 days (excluding 31.03.2013) February = 28 days January = 2 days	30.01.2013
6	Transfer pricing order u/s 92CA(3) of the Act ought to be passed on/or before	29.01.2013
7	Date on which Transfer pricing order u/s 92CA(3) is passed	30.01.2013

6. Before us, Ld. Counsel for the assessee submitted that now in view of the decision of Hon'ble Madras High Court in the case of Pfizer Healthcare India Pvt. Ltd. vs. JCIT reported in (2021) 124 taxmann.com 536, the TPO order is barred by limitation and therefore, the whole transfer pricing adjustment deserves to be quashed. Further, it has been stated that once there is no TP adjustment or there is no valid transfer pricing order, then assessee is no longer 'eligible assessee' and therefore, AO is legally bound to pass the final assessment order within time limit of section 153, i.e., on or before 31st March 2013. Accordingly, the impugned order dated 26th February 2014 is barred by limitation and in support of it, placed reliance the following decisions, which are as under:- a. Decision of the



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Mumbai Bench of the Tribunal in the case of IPF India Property Cyprus (No. 1) Ltd. v/s. DCIT reported in [2020] 115 taxmann.com 78; b. Decision of the Mumbai Bench of the Tribunal in the case of Precilion Holdings Ltd. v/s. ACIT [ITA No. 7412/Mum/2018]; c. Decision of the Mumbai Bench of the Tribunal in the case of Mausami SA Investments LLC v/s. ACIT [ITA No. 7026/Mum/2018]

7. Apart from that, it has also been submitted that in the following decisions, held that in case of an 'eligible assessee' a final assessment order passed by the AO without passing a draft assessment order is bad in law, which are as under:-

International Air Transport Association v/s. DCIT [2016] 241 Taxman 249 (Bombay HC);

Dimension Data Asia Pacific Pte. Ltd. v/s. DCIT [2018] 257 Taxman 442 (Bombay HC); and

PCIT v/s. Andrew Telecommunications Pvt. Ltd. [ITA No. 144 of 2017](Bombay HC at Goa]

8. In sum and substance, the assessee has submitted as under:-

a) The Appellant is not an 'eligible assessee' in terms of section 144C(15)(b)(i) since, there would be no variation to the returned income in consequence of Order passed u/s. 92CA(3) of the Act;

b) No draft Assessment Order was required to be passed in the case of Appellant;

c) Accordingly, the Final Assessment Order dated 26 February 2014 passed u/s. 143(3) r.w.s 144C(13) of the Act is invalid being barred by limitation and therefore, all the adjustments made to the returned income stands quashed and ought to be deleted.

9. On the other hand, Ld. DR relied on the orders passed by the revenue authorities and submitted that merely because transfer



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pricing order is delayed by a day, that does not mean TP adjustments should be quashed or the entire assessment order.

10. We have heard the rival submissions and also perused the relevant findings given the impugned order as well as material placed on record on the aforesaid legal issue. The facts in brief are that assessee is engaged in the business of manufacturing and trading of pharmaceuticals. Since there is international transaction with AE, the reference was made by the AO in respect to the transaction in Form 3CEB to the Addl. Commissioner of Income Tax (TP-II(4) vide letter dated 23.06.2011. The TPO vide his order dated 30.01.2013 had made TP adjustment of Rs. 65,78,98,712/- on account of following adjustments: -

Sr. No.	Nature	Para no. of TPO	Amount
1	Interest on delayed export receivable	Para 7.4	Rs. 1,40,01,089/-
2	Interest on Share Application money	Para 7.5	Rs. 61,00,91,759/-
3	Guarantee commission	Para 7.8	Rs. 3,38,05,864/-
		Total	Rs. 65,78,98,712/-

11. Accordingly, in the draft assessment order dated 28.03.2013, the TP adjustment was proposed alongwith various additions on corporate grounds and finally, the assessee was completed at an income of Rs. 1,35,35,98,974/-. The assessee raised objections before the Ld. DRP and Ld. DRP vide order dated 30.12.2013 given certain direction and in pursuance of that, final assessment order passed has been passed vide order dated 26.02.2014 and various additions /disallowances in the final assessment order has been made and income has been computed at Rs. 1,24,66,73,601/-.



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12. Here in this case, from a perusal of the chronology of events as incorporated above, it can be seen that the transfer pricing order u/s 92CA(3) as per the statute ought to have been passed on 29.01.2013, i.e., the period of 60 days prior to the date of limitation i.e. 31st March 2013, starts with 30.03.2013 as per the following calculation:-

60 day period expires on

March = 30 days (excluding 31.03.2013)

February = 28 days

January = 2 days

Thus, the date on which transfer pricing shall have been passed was 29.01.2013, whereas the transfer pricing order u/s 92CA (3) has been passed on 30.01.2013.

12. In the recent judgment, the similar issues have come up before us in the case of Atos India Pvt. Ltd. vs. DCIT (ITA No. 1795/Mum/2017 dated 23.02.2023), wherein the whole arguments of both the parties have been made and dealt in on similar issues, which are as under:-

14. He further submitted that the Hon^{ble} Madras High Court in the case of M/s. Pfizer Healthcare India Private Limited vs. JCIT/ Dy. CIT (Writ Petition No.32699 of 2019) [2021] 124 taxmann.com 536 (Madras)/[2021] 433 ITR 28 (Madras) has allowed the writ petition filed and has accepted the Assessee's contention that the order of the TPO passed during the 60 days period prior to the due date of completion of assessment is barred by limitation under section 92CA(3A) r.w.s. 153(1) of the Act and therefore the said order is to be quashed. The relevant extracts of the decision are reproduced below:-

"29. The provisions of Section 144C prescribe mandatory time limits both pre and post the stage of passing of a



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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 am 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



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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."

15.Thus, the entire TPO order is barred by limitation, which deserves to be quashed.

16.He further submitted that in absence of TPO order, i.e., if it is barred by limitation, then the entire proceedings initiated by the AO u/s 144C also becomes bad in law, because the assessee would no longer qualify as an „eligible assessee“ as defined u/s 144C of the Act. Accordingly, passing a draft assessment order by invocation of provisions of section 144C of the Act will not be mandated under the Act.

17.His next line of argument is that, in absence of valid TPO order, AO was required to complete the assessment within the due date u/s 153, i.e. He should pass the final assessment order by 31st March 2016 and instead, he has passed the draft assessment order on 29th March 2016 and the final assessment order on 31st March 2017, which is beyond the period of limitation.

18.On the other hand, Ld. DR submitted that AO has made reference to the TPO u/s 92CA(1) for determination of arm's length price on the international transactions entered by the assessee with its AE's. The TPO proposed adjustment vide his order dated 31st January 2016 and therefore, in accordance with provision of section 144C(1), the AO was required to pass the draft assessment order, which he has done. He further submitted that the time limit prescribed in section 92CA(3A) is that AO



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should have passed order 60 days from the period of limitation as per section 153 and the phrase “may be made in time before 60 days prior to the date on which period of limitation referred to section 153.....” The word „may be“ means that the time limit for passing of the order by the TPO u/s 92CA(3) should be adhered in consonance with overall time limit provided in section 153 and AO should have 60 days for passing the draft assessment order or the final assessment order as the case may be. The limitation provided in section 153 has to be taken into consideration while interpreting the word „may be“ as provided in sub section 3A of section 92CA. Here in this case, AO had 60 days for passing of the order after the TPO has passed the order from 31st January 2016.

19.Regarding the judgment of Hon“ble Madras High Court in the case of M/s. Pfizer Healthcare India Private Limited (supra), he submitted that though this issue has been decided in favor of the assessee that the 60 days have to be counted from one day prior to the date on which the period of limitation referred to section 153 expire, i.e., 60 days have to be calculated from 30th March and not from 31st March. However, overall provision of section 92CA (3A) r.w.s. 153 has to be given a harmonious construction and the word „may be“ has to be interpreted as „so far as may be“, because in terms of section 92CA (4), AO has no option but to adopt the adjustment made by the TPO and there is no application of mind by the AO once the TPO has given his order. The reference to the TPO and determination of arm“s length price is part of the overall process of assessment and determination of income for which the time limit has been prescribed for 3 years in section 153. Assessment thus has to be completed in the time limit of 3 years. The purpose of



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legislature was to give time to the AO for completion of assessment which is 60 days and it would be too strict interpretation the way, the Hon'ble High Court has held that 'may be' has to be read as 'shall'. Thus, he submitted that AO clearly had 60 days for passing of the assessment order after the TPO had passed order on 31st January 2016. 20. In so far as the other contention of the assessee is that, once the TPO's order is barred by limitation, then the assessee is no longer „eligible assessee“. Ld. DR submitted that when the reference was made to the TPO in section 92CA and TPO had proposed adjustment, then assessee was clearly an 'eligible assessee' and therefore, AO was justified in passing a draft assessment order u/s 144C(1). He further submitted that even for the technical reason delay of one day in passing the TPO order is declared as time barred, then it does not mean that assessee does not qualify as „eligible assessee“ and in TPO's order there was a clear cut variation as consequence of the order of TPO. Here in this case, TPO had proposed TP adjustment of more than Rs. 78.88 crores and therefore, assessee was clearly „eligible assessee“ u/s 144C(1) r.w.s. Clause (b) of Sub-section (15) of section 144C. At the most, only the TP addition may not be considered but other corporate addition will be sustained and same has to be decided on merits.

21. Ld. Counsel for the assessee by way of rejoinder submitted that once there is no TP adjustment, there is no question of assessee being treated as „eligible assessee“ and consequently the AO was required to pass final assessment order and not the draft assessment order, accordingly the whole assessment order passed by AO is bad in law and is barred by period of limitation. Therefore, the entire corporate grounds also cannot be sustained.



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In support, he relied on the judgment of ITAT, Mumbai Bench in the case of Fedex Express Transportation and Supply Chain Services (India) Pvt. Ltd. vs. DCIT (2019) 108 taxman.com 542 (Mum-Trib) and drew our attention para 19 of the said order which reads as under:-

“19. Before we proceed further, it would be appropriate to briefly touch upon the scheme of reference to Dispute Resolution Panel contained in Sec. 144C of the Act. Prior to the introduction of Sec. 144C of the Act by the Finance (no.2) Act, 2009 with retrospective effect from 01.04.2009, if assessee was aggrieved by any of the additions/disallowances made by the Assessing Officer, an appeal would lie to the Commissioner (Appeals) under Section 246A of the Act. However, a new scheme of dispute resolution was brought into the Act by insertion of Sec. 144C of the Act in the context of „eligible assessee“ prescribed therein. Sec. 144C of the Act contains 15 subsections and provides for a mechanism for dispute resolution, powers of Dispute Resolution Panel, definition of Dispute Resolution Panel, eligible assessee, etc. In terms of the schematic arrangement prescribed in Sec. 144C of the Act, firstly a „draft proposed order of assessment“ would be passed in the case of an „eligible assessee“; thereafter such „eligible assessee“ is permitted within 30 days of receipt of the order, either to file objections before the DRP or accept such draft assessment order and communicate the same to the Assessing Officer. If the assessee opts for filing objections before the DRP, the DRP hears such assessee and gives directions to the Assessing Officer for completion of assessment. Thereafter, the Assessing Officer passes a „final assessment order“ within the period prescribed. If the assessee chooses to accept such draft



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assessment order or fails to communicate the Assessing Officer within one month, the Assessing Officer shall pass the final assessment order within the period prescribed therein. As a perusal of Sec. 144C(1) of the Act shows, the Assessing Officer is required to forward the draft of the proposed order of assessment only to an „eligible assessee“, and not to every assessee under the Act. The meaning of the expression „eligible assessee“ can be found in clause (b) to sub-section 15 of Sec. 144C of the Act, which reads as under :-

“(15) For the purposes of this section, - (a) (b) “eligible assessee” means, - (i) any person in whose case the variation referred to in subsection (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and (ii) any foreign company.” Ostensibly, the expression „eligible assessee“ has a restrictive meaning as it covers only two types of persons. Firstly, any person in whose name the TPO has proposed variation in the order passed under Section 92CA(3); and, secondly, any foreign company. In the instant case, FEIPL, the entity in whose name the draft assessment order has been passed, was not a foreign company and, therefore, it can be understood to be an „eligible assessee“ only if it falls within Sec. 144C(15)(b)(i) of the Act. Notably, sub-clause (i) of clause (b) of sub-section 15 of Sec. 144C of the Act refers to a „person“ in whose case variation is proposed by the order of TPO. The word „person“ has been defined in Sec. 2(31) of the Act to mean, inter-alia, a „company“, which in turn has been defined in Sec. 2(17) of the Act. Broadly speaking, a „company“ is understood to mean an „Indian



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company or any institution, association or body corporate registered/incorporated/declared". It is also notable that the expression „Indian company“ has also been defined in Sec. 2(26) of the Act to mean „a company which is formed and registered under the Companies Act, 1956“. Therefore, on a conjoint reading of the above provisions, it is justifiably canvassed by the assessee before us that qua the instant case, the „eligible assessee“ under Section 144C of the Act has necessarily to be a „person“ which is an Indian company formed and registered under the Companies Act, 1956 in whose case the transfer pricing order has been passed proposing a variation. Notably, in the instant case, the erstwhile entity, FEIPL, was an Indian company, but it ceased to exist on 01.10.2013 pursuant to the scheme of amalgamation sanctioned by the Hon'ble Bombay High Court vide order dated 05.07.2013, i.e. before the date of passing of the transfer pricing order by the TPO under Section 92CA(3) of the Act in the name of FEIPL. Thus, as on the date of passing of order by the TPO on 30.01.2015, FEIPL did not exist as an Indian company under the Companies Act, 1956 as understood by Sec. 2(26) of the Act and consequently, there does not exist any „person“ as contemplated under Section 2(31) of the Act. Thus, it is a case where the TPO proposed variation in the case of a non-existent entity, which is not even understood as a „person“ under the Act. This also brings out that FEIPL could not be understood as an „eligible assessee“ in the eyes of law under Section 144C(15)(b)(i) of the Act; and, in any case, on the date of passing of order by the TPO, the existing entity was



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FETSCS, but it is nobody's case that the TPO has passed any order in the name of FETSCS proposing any variation in the returned income. Therefore, in this background, it has to be inferred that in the absence of an „eligible assessee“ as understood for the purposes of Sec. 144C(15)(b)(i) of the Act, no draft of the proposed order of assessment could have been passed by the Assessing Officer under Section 144C(1) of the Act, much less in the name of FEIPL. Therefore, the draft assessment order passed in the present case in the name of erstwhile FEIPL is invalid in the eyes of law.”

DECISION

22. We have heard the rival submissions on the aforesaid legal issue as raised in additional grounds and we have also perused the judgment of Hon“ble Madras High Court in the case of M/s. Pfizer Healthcare India Private Limited (supra). Here in this case, the reference was made by the AO to the TPO u/s 92CA(1) in August 2014 and TPO had proposed transfer pricing adjustment of more than Rs. 78.88 crores on rendering of software development services and intra group services vide his order 31st January 2016. Thereafter draft assessment order was passed on 29.03.2016 wherein aforesaid TP adjustment was also made and further additions were made on corporate tax issues as enumerated above. After the receiving of draft assessment order, assessee filed objection before the DRP and DRP issued direction on 28.12.2016 and accordingly, final assessment order was passed on 31.01.2017.

23. Sub-section 3A of section 92CA provides a time limit for passing of the order by the TPO u/s 92CA (3) in the following manner:- "(3A) Where a reference was made under sub-section



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(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:"

24.Ergo, the TPO can pass an order u/s 92CA of the Act at any time before 60 days prior to the date on which period of limitation referred to u/s 153 expires. Thus 60 days have to be counted prior to the date of last date of limitation u/s 153.

25.Section 153 of the Act as applicable for the AY 2012-13 reads as under:-

'153. (i) 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 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



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words "two years", the words "three years" had been substituted." 26. Thus, in case where a reference is made to the TPO u/s 92CA(1), the time limit for completion of assessment is 3 years. Here in this case, in terms of section 153, the time limit for completing the assessee for AY 2012-13 was 31st March 2016. If the time limit provided in section 192CA(3A) r.w.s. 153(1) of the Act is juxtaposed, then here in this case, time limit for passing of the TPO order would be on or before 30th January 2016, because, if one day prior to the date of limitation u/s 153 is taken, then 60 days have to be counted from 30th March 2016. The 60 days from 30th March would be (30 days of March + 29 days of February being a leap year + 1 day of January).

27. Now whether in these circumstances, the TPO order gets time barred or not, has come up for consideration before Hon^{ble} Madras High Court in the case of M/s. Pfizer Healthcare India Private Limited (supra) by the division bench wherein single bench Judge in Writ Appeal No. 1120 of 2001 and others, the Hon^{ble} Madras High Court after considering the relevant provision as well as arguments made by both the parties and various judgments had made the following observations:-

22. From Section 153, the regular time for passing the assessment order ends on 31.12.2018 and with extension on the matter being referred to TPO, the time limit to pass assessment order would lapse on 31.12.2019. What is not to be forgotten, while interpreting a taxing statute, is the explicit and clear language used by the parliament while enacting the law. If the language employed in any statute is clear and unambiguous from its plain and natural meaning, external aid for interpretation are unnecessary. In the present case, we are called



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upon to adjudicate the period of limitation applicable to TPO under Section 92CA(3A) and incidentally under Section 153.

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26. Further, the general interpretation by resorting to the meaning conveyed under the General Clauses Act cannot be adopted while interpreting 92CA (3A), because, the context and the language employed therein are completely different and it is pertinent to note that the words “from” and “to” have not been used. Even the employment of the General Clauses Act will not aid the Revenue, the reason of which will be disclosed a little later in this judgment. But, right now, it is relevant to consider the scope of the word “to”.

27. The word “to” is used as a preposition or as an adverb. In popular sense, it is used to express the direction in which a person, thing, or time travels. The flow of direction is to be gauged from the preceding word or words used, like “prior to” or “upto”. Keeping the same in mind, if we look at the wording of Section 92CA (3A), we cannot accept the contention of the Revenue that the time to be reckoned is from 31.12.2019 and not 30.12.2019 as has been rightly done by the learned Judge.

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



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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) 4 SCC 297 : 2002 SCC On Line SC 413], 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



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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



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period of 60 days is calculated, the 60th day would fall on 01.11.2019 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.

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. SubSection (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)



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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 07.09.2020, 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



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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 sub-section 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.

28. Now if we compare the case of Pfizer Healthcare India Pvt. Ltd. and assessee on the relevant dates then following picture emerges:-

Sr. No.	Particulars	Relevant Dates	
		Pfizer Healthcare India Pvt. Ltd. (Madras High	Appellant



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		Court)	
A	Assessment Year	2016-17	2012-13
B	Period of limitation for making an order of assessment as per Section 153 of the Act	21 months from the end of Assessment Year	24 months from the end of Assessment Year
C	Extension of period of limitation in case reference is made under section 92CA of the Act	12 months	12 months
D	Proceeding for assessment should be completed on / before this date	31.12.2019	31.3.2016
E	A date prior to the date on which period of limitation expires	30.12.2019	30.3.2016
F	Sixty day period expires	01.11.2019	31.1.2016
G	Transfer Pricing Officer's order to be passed any time on / before this date	31.10.2019	30.01.2016
H	Date on which Transfer Pricing Officer's order is passed	01.11.2019	31.01.2016
	Note 1. Calculation of breakup of sixty days.	December: 30 days (excluding 31.12.2019) November: 30 days	March: 30 days (excluding 31.03.2016) February: 29 days January: 1 day

29. Thus, if we follow the principle and ratio laid down by the Hon^{ble} Madras High Court, then the time limit for passing the TPO order in the case of assessee would expire on mid-night of 30th January 2016 i.e. (00:00 Hrs of 30th January 2016). Here in this case, the order of TPO has been passed on 31st January 2016 and accordingly, the TPO order is clearly barred by limitation by one day by virtue of time limit provided under section 92CA(3). The TPO order admittedly has been passed after the limitation has expired and consequently, the same has to be treated as bad in law and is hereby quashed. Thus, in such a situation it has to be reckoned, as if there is no TPO order and consequently, the entire transfer pricing adjustment proposed by the TPO on the international transaction becomes non-est and liable to be quashed.

13. Thus, if we apply the aforesaid decision which is based on the judgment of Hon^{ble} Madras High Court in the case of Pfizer Healthcare India Pvt. Ltd. vs. JCIT (supra), we find that



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the order of TPO was passed u/s 92CA (3) on 30.01.2013 is clearly barred by limitation as the same could have been passed on or before 29.01.2013. Thus, the TPO order dated 30.01.2013 is quashed as barred by limitation.

14. Now coming to the second issue that once the TP order is held to be nullity or quashed on the ground of barred by limitation, then could AO have passed the draft assessment order treating it to be as eligible assessee. The similar issue has also been considered in the case of Atos India Pvt. Ltd. (supra) wherein it has been observed and analysed as under:-

30. Now another issue which crops up, is, whether, once the TPO order is held to be nullity or quashed on the ground of being barred by limitation, then could AO have passed the draft order treating it to be as „eligible assessee“. Section 144C was brought on the statute as special scheme of assessment and to provide alternative dispute resolution scheme to certain categories of „eligible assessee“. Section 144C provides that the AO has to pass and forward a draft assessment order in the case of „eligible assessee“ if he proposes to make any variation which is prejudicial to the interest of such assessee, Sub-section 15 has defined „eligible assessee“ for the purpose of section 144C. The relevant provisions of section 144C(1) and sub section 15 reads as under:-

144C. (1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation which is prejudicial to the interest of such assessee.



...

(15) For the purposes of this section,—

(a) "Dispute Resolution Panel" means...

(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.”

31. The aforesaid section envisages that, AO in the first instance has to forward a draft of the proposed order of assessment to the "eligible assessee", if he proposes to make any variation which is prejudicial to the interest of such assessee. The draft assessment order is to be forwarded to an "eligible assessee", which means that, for this section to apply a person has to be an "eligible assessee" Here, the draft assessment order is to be forwarded only to an "eligible assessee" and not to every assessee under the Act.

32. Thus, under the aforesaid provision, the expression "eligible assessee" is followed by an expression "means" and there are two categories referred therein (i) any person in whose case the variation arises as a consequence of TPO's order and (ii) any NR or Foreign company. The use of the word "means" indicates that the definition "eligible assessee" for the purposes of Section 144C(15)(b) is a hard and fast definition and can only be applicable in the above two categories. Ostensibly, the expression 'eligible assessee' has a restrictive meaning as it covers only the two types of persons mentioned above.



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33. Further, considering the express language employed in defining the term „eligible assessee“ under section 144C(15)(b) and section 144C(1) in forwarding a draft assessment order to such an „eligible assessee“ only, is plain, clean and unambiguous; the said statute must be interpreted strictly without there being any role of „equity or intendment“ in such interpretation.

34. In the present case, the assessee is an Indian company and, thus, a resident in India under section 6 of the Act. Thus, the second condition under section 144C (15)(b)(ii) of the Act for qualifying as an „eligible assessee“ is not applicable. As regards the first condition under section 144C(15)(b)(i) of the Act, the same applies where there is a transfer pricing variation arising as a consequence of the order of the Ld. TPO under section 92CA(3) of the Act. In the instant case, it will be apparent that there is no transfer pricing variation arising as a consequence of the order of the Ld. TPO once the said transfer pricing order is held to be time-barred, non-est and void-ab-inito from the very date of its existence and inception. The entire premise to adopt the special procedure under section 144C of the Act and treat the appellant an „eligible assessee“ rests on the fact that the order passed under section 92CA(3) of the Act has resulted in transfer pricing variations prejudicial to the interest of the appellant. However, once the transfer pricing order under section 92CA(3) of the Act, per-se, becomes a nullity, there remains no transfer pricing variation arising/ resulting or remaining as a consequence thereto. The effect of passing a null and void transfer pricing order here is that it has to be considered as non-est, meaning thereby, that it entails all the consequences of not having been passed at all and is ignored for all practical



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purposes. Thus, in absence of any transfer pricing order being passed at all and any variations arising there from, the entailing consequence in instant case is that the appellant cannot be said to be an „eligible assessee“ under section 144C(15)(b)(ii) of the Act. 35. Accordingly, once the assessee becomes an „ineligible assessee“, the very foundation for proceeding to pass the draft assessment order does not survive, meaning thereby, that the draft assessment order passed in the instant case becomes legally invalid and hence, all consequential proceedings on the basis of the said order fail. In the instant case, a reference was made by the Ld. AO to the Ld. TPO as per the provisions of section 92CA(1) of the Act and accordingly the timelines prescribed u/s 153 of the Act remain extended by a year in view of the 3rd proviso of section 153 of the Act. Accordingly, the time limit to complete assessment proceedings u/s 143(3) of the Act in the instant case expired on 31 March 2016. As on the date of passing draft assessment order u/s 144C(1) of the Act i.e. on 29 March 2016, the Ld. AO had already received the order passed by the Ld. TPO dated 31 January 2016, which as discussed above, is time barred, illegal and void ab initio, thereby making the Appellant not an eligible assessee u/s 144C(15) of the Act. In view of the same, the Ld. AO was ostensibly required to pass the final assessment order u/s 143(3) of the Act on that day. Having said that, the draft assessment order passed by the Ld. AO under the provisions of law is also illegal and void ab initio which deserves to be quashed.

36. It is a well-settled proposition now that a draft order passed in case of an „ineligible assessee“ vitiates the entire exercise of assessment and all subsequent proceedings are liable to be quashed has been held in the following cases:



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- (i) Honda Cars India Ltd. v. Dy. CIT [2016] 67 taxmann.com 29/240 Taxman 707/382 ITR 88 (Delhi);
- (ii) Pankaj Extrusion Ltd. v. Asstt. CIT [2011] 10 taxmann.com17/198 Taxman 6 (Guj.)
- (iii) FedEx Express Transportation and Supply Chain Services (India) (P.) Ltd. v. DCIT [2019] 108 taxmann.com 542 (Mumbai - Trib.)

In case of FedEx Express, the relevant portion of which has been reproduced in the foregoing paras, wherein the Tribunal has expressed the provision and finally deleted the corporate grounds also. We accordingly follow the same reasoning here in this case also.

37. Similarly, in a reverse case scenario, i.e., where a draft assessment order was required to be passed on an 'eligible assessee' as per section 144C(1) of the Act but the same was not so passed, in the following decisions as well, the entire assessment proceedings have been held to be invalid and liable to be quashed:

- (i) Vijay Television (P.) Ltd. v. DRP [2014] 46 taxmann.com 100/225 Taxman 35/369 ITR 113 (Madras) affirmed by the Division Bench of the Hon^{ble} Madras HC in [2018] 95 taxmann.com 101 (Madras);
- (ii) International Air Transport Association v. Dy. CIT [2016] 68 taxmann.com 246 (Bombay);
- (iii) Zuari Cements Ltd. v. ACIT [Writ Petition No. 5557 of 2012, dated 21-2- 2013] (Andhra Pradesh)- Revenue's SLP dismissed by the Hon^{ble} Apex Court in CC No. 16694/2013 on 27th September 2013

38. What culminates from the aforesaid two sets of parallel decisions is that the provisions of section 144C of the Act are



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specific and provides for a special code which must be strictly followed since it impacts the rights of an assessee substantively, i.e., the ability to accept or object a draft order proposition, file objections before the Dispute Resolution Panel and ensure a speedy disposal thereof. Any lapse in treating an assessee as „eligible assessee“ where it is otherwise not one and vice-versa results in fatality, since it becomes a jurisdictional defect and goes on to the roots in deciding the validity of the entire assessment proceedings against the revenue. In this context, on the issue of passing a correct assessment order in first instance (either a draft or a final one), the findings of the Hon“ble Madras High Court in case of ACIT v. Vijay Television (P.) Ltd [2018] 95 taxmann.com 101 (Madras) are extremely critical which reads as follows:

“47. The necessity for the Parliament to incorporate Section 144-C is not only to safeguard the Revenue, but also the assessee and any mistake committed by any one of them, the said party is supposed to face the consequences and cannot put the hands of the clock back and start afresh.” 39. Further, in case of Zuari Cements Ltd. v. ACIT [Writ Petition No. 5557 of 2012, dated 21-2-2013] (Andhra Pradesh), the Division Bench (DB) of the Andhra Pradesh High Court categorically held that the failure to pass a draft assessment order under Section 144C (1) of the Act would result in rendering the final assessment order "without jurisdiction, null and void and unenforceable." In that case, the consequent demand notice was also set aside. The decision of the Andhra Pradesh High Court was affirmed by the Supreme Court by the dismissal of the Revenue's SLP (C) [CC No. 16694/2013] on 27th September, 2013.



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40. The various judgments which have been cited before us that 144C(1) will not apply and there is no variation in the return of income which cannot be disputed. Thus in our view, Ld. AO to acquire a legal and valid jurisdiction for the purpose of forwarding a draft assessment order at the first instance under section 144C(1) of the Act, it is necessary that the assessee must be an „eligible assessee“ within the restrictive and strict four corners of how the said expression has been defined under section 144C(15)(b) of the Act. Here, once it is held that there is no legal or valid transfer pricing order under section 92CA(3) of the Act, there remains no variation arising as a consequence thereto and the case of the assessee, being an Indian company, falls outside the definition of „eligible assessee“ as defined under section 144C(15)(b) of the Act. Thus, the Ld. AO cannot be said to acquire a „legal or a valid“ jurisdiction under section 144C(1) r.w.s. 144C(15)(b) of the Act to pass or forward a draft assessment order to the appellant who is otherwise an „ineligible assessee“. The action of the Ld. AO in passing the impugned draft assessment order in instant case results in non-compliance of section 144C of the Act which vitiates the entire assessment exercise.

41. The issue being fairly settled and the intent of legislature in strictly interpreting the provision of section 144C of the Act being repeatedly held so, the act of the Ld. AO in proceeding to pass a draft assessment order on the basis of an order by the Ld. TPO which is barred by limitation and thus bad in law/ non-est, results in an incurable illegality which is liable to be held as null and void, and thus, consequentially holding the final assessment order to be bad in law as well.



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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) fortifies 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-HC2022(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,



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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.

15. Thus, following the aforesaid decision of the Tribunal and other decisions cited by the Ld. Counsel, we hold that the impugned order dated 26.02.2014 is clearly barred by limitation, because once the assessee is not eligible assessee, therefore no draft assessment order could have been passed and finally the assessment order should have been passed on or before 31st March 2013 i.e. within the period limitation passed u/s 153. Thus, the impugned final assessment orders dated 26.02.2014 is barred by limitation and is hereby quashed."



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7. In the light of the judicial precedent cited (supra), we find in this case, the Transfer Pricing order has been passed by the TPO on 30.01.2013 u/s 92CA(3A) of the Act whereby an adjustment of Rs.77,58,910/- was made by the TPO is bad in law being barred by limitation, since he had to pass the order on or before 29.01.2013. And therefore, final assessment order passed on 26.04.2013 u/s 143(3) r.w.s. 144C (3) of the Act is invalid and held non-est in the eyes of law and consequently quashed.

8. Since appeal of assessee has been allowed on legal issue as discussed (supra), other grounds on merits become academic.

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

Order pronounced in the open court on this 30/06/2023.

Sd/-

(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 30/06/2023.
Vijay Pal Singh, (Sr. PS)



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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, मुंबई / DR, ITAT, Mumbai
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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