

IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI B.R. BASKARAN, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.882/Mum./2022
(Assessment Year : 2015-16)

ITA no.881/Mum./2022
(Assessment Year : 2016-17)

Siemens Limited
Birla Aurora, Corporate Taxation
Level-22, Plot no.1080
Dr. Annie Besant Road, Worli
Mumbai 400 030 PAN – AAACS0764L

..... Appellant

v/s

Dy. Commissioner of Income Tax
Circle-8(2)(1), NFAC, Delhi

..... Respondent

Assessee by : Shri Nitesh Joshi
Revenue by : Shri Manoj Kumar

Date of Hearing – 02/08/2023

Date of Order – 07/08/2023

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeals have been filed by the assessee challenging the separate impugned final assessment orders dated 06/04/2021, for the assessment year 2015-16 and dated 31/03/2021, for the assessment year 2016-17, passed under section 143(3) read with section 144C(13) read with sections 143(3A) and 143(3B) of the Income Tax Act, 1961 ("*the Act*"), pursuant to the directions issued by the learned Commissioner of Income Tax (DRP-2), Mumbai-3, [*learned DRP*], issued under section 144C(5) of the Act.

2. Since the appeals pertain to the same assessee involving similar issues, therefore, as a matter of convenience, these appeals were heard together and are being disposed off by way of this consolidated order.

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Assessee's Appeal – A.Y. 2015–16

3. The present appeal is filed after a delay of 333 days. As per the assessee, the impugned final assessment order dated 06/04/2021 was received by the assessee on 07/04/2021. In response to the defect notice issued by the Registry, the assessee submitted that due to pandemic-related restrictions in the State of Maharashtra which existed in 2021, its offices were closed and physical printing as well as filing of hard copy appeal was not possible at that time. Therefore, the assessee submitted the appeal documents via email on 04/06/2021. In this regard, the assessee has also furnished a copy of the email dated 04/06/2021, marked to the Registry of the Tribunal. It is evident from the record that the assessee filed the appeal in physical form on 05/05/2022, before the Tribunal. We find that vide order dated 10/01/2022, passed by the Hon'ble Supreme Court, in M.A. no.21 of 2022, in M.A. no.665 of 2021, in Suo-Motu Writ Petition (Civil) no.3 of 2020, the limitation period for filing the appeal was extended upto 29/05/2022. In view of the above, since the present appeal has been filed within the extended time granted by the Hon'ble Supreme Court during the Covid period, therefore there is no delay in filing the present appeal and we proceed to decide the same on merits.

4. During the hearing, the learned Authorised Representative ("*learned AR*"), at the outset, seeks to press the application dated 03/04/2023, seeking admission of the following additional grounds of appeal:-

"Ground No. 32

On the facts and the circumstances of the case and in law, the final assessment order dated 06 April 2021 passed by the National e-Assessment Centre, Delhi (the learned AO) under section 143(3) read with section 144CELE) of the Act is barred by limitation in terms of the timeline prescribed under the provisions of section 153(1) of the Act, and hence, the said assessment order is void-ab-initio, bad in law and liable to be quashed.

Ground No. 33

On the facts and in the circumstances of the case and in law, the order dated 01 November 2019 passed by the Joint Commissioner of Income-tax (Transfer Pricing)-4(1) (the learned TPO) under section 92CA of the the Act is beyond the time limit prescribed under section 92CA (3A) r.w.s. 153 of the Act, thus making the transfer pricing order illegal, bad in law, null and void and liable to be quashed.

Ground No. 34

On the facts and in the circumstances of the case and in law, the transfer pricing order being illegal and void on account of being barred by limitation in terms of section 92CA(3A) r.w.s. 153 of the Act, the action of the Assessing Officer in passing the draft assessment order dated 30 December 2019 by invoking section 144C of the Act is without jurisdiction and hence, all the proceedings consequent to the draft assessment order are also illegal and bad in law and liable to be quashed.

Ground No.35

On the facts and in the circumstances of the case and in law, the transfer pricing order being illegal and void on account of being barred by limitation in terms of section 92CA (3A) r.w.s. 153 of the Act, consequently. the final assessment order dated 06 April 2021 is also barred by limitation as prescribed under section 153 of the Act, thus making the final assessment order illegal, bad in law, null and void and liable to be quashed.

The Appellant craves leave to add, alter, amend, or withdraw any of the grounds mentioned herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."

5. Since, the issue raised by way of additional grounds is a legal issue, which can be decided on the basis of material available on record, we are of the view that the same can be admitted for consideration and adjudication in view of the ratio laid down by the Hon'ble Supreme Court in NTPC Ltd vs CIT: [1998] 229 ITR 383 (SC).

6. By way of the aforesaid additional grounds, the assessee has challenged the validity of the final assessment order on the basis that the same is beyond the time limit prescribed under section 153 of the Act. Since this is a jurisdictional issue, therefore, we deem it appropriate to deal with this jurisdictional aspect first and if necessary thereafter, to deal with the other issues raised in the present appeal.

7. The brief facts of the case pertaining to this issue are: The assessee company is an infrastructure and engineering company belonging to Siemens group based in Germany. For the year under consideration, the assessee filed its original return of income on 30/11/2015, declaring a total income of Rs. 1425.44 crore. The return of income was revised on 31/03/2017, amending the total income to Rs. 1392.55 crore. The return filed by the assessee was selected for scrutiny through CASS, accordingly, statutory notices under section 143(2) as well as section 142(1) of the Act were issued and served on the assessee. The Assessing Officer ("AO") made reference under section 92CA(1) of the Act to the Transfer Pricing Officer ("TPO") for the determination of ALP of the international transactions reported by the assessee in Form 3CEB. The TPO vide order dated 01/11/2019, passed under section 92CA(3) of the Act proposed a total transfer pricing adjustment of Rs. 153.24 crore. In conformity, the AO passed the draft assessment order under section 143(3) read with section 144C(1) of the Act on 30/12/2019, wherein the total income of the assessee was proposed to be assessed at Rs 1561.69 crore, after including the transfer pricing adjustment proposed by the TPO vide order passed under section 92CA(3) of the Act. The assessee filed detailed objections before the learned DRP against the adjustments proposed by the

TPO/AO. The learned DRP issued the directions under section 144C(5) of the Act on 03/12/2020. In conformity, the AO passed the impugned final assessment order dated 06/04/2021, under section 143(3) read with sections 143(3A) and 143(3B) of the Act. Being aggrieved, the assessee is in appeal before us.

8. During the hearing, the learned AR submitted that the issue raised vide additional ground is squarely covered in favour of the assessee by the decision of the Hon'ble Madras High Court in Pfizer Healthcare India Private Limited v/s JCIT, [2021] 433 ITR 28 (Mad.). The learned AR submitted that in the present case, the due date for passing the order under section 92CA(3) of the Act expired on 31/10/2019, however, the TPO passed the order on 01/11/2019. Therefore, the same is beyond the time limit prescribed under the Act. The learned AR further submitted that since the TPO's order is barred by limitation and thus is void *ab initio*, therefore the assessee is not an "eligible assessee" for the purpose of the Act. Accordingly, the impugned final assessment order is also beyond the time period provided under the Act and thus is bad in law and liable to be quashed.

9. On the other hand, the learned Departmental Representative submitted that the orders passed by the lower authorities are within the time limit prescribed under the Act and therefore are validly passed.

10. We have considered the submissions of both sides and perused the material available on record. The assessment year under consideration before us is the assessment year 2015-16. As per the provisions of section 153(1) of the Act, the time limit for completion of the assessment is 21 months from the

end of the assessment year. Therefore, in the present case, the due date for completion of the assessment was 31/12/2017. Section 153(4) of the Act further provides that in case of a reference to the TPO under section 92CA(1) of the Act, the period available for completion of the assessment shall be extended by 12 months. In the present case, it cannot be disputed that the reference under section 92CA(1) of the Act was made by the AO on 19/09/2017, for the determination of ALP of all the international transactions reported by the assessee. Thus, the aforesaid time period for completion of the assessment was extended to 31/12/2018. We further find that in the present case, the assessee had entered into an Advance Pricing Agreement ("APA") with CBDT on 08/06/2017, in respect of its healthcare sector for a period of 4 years commencing from the previous year 2013-14 to the previous year 2016-17. Thus, the year under consideration, i.e. 2015-16 forms part of the period for which the aforesaid APA was signed. We further find that as per section 92CD(5)(b) of the Act in the case of APA, the period of limitation as provided under section 153 of the Act for completion of the assessment is further extended by a period of 12 months. Accordingly, in view of the above, the period of limitation for completion of the assessment, in the present case, was extended to 31/12/2019. Further, the provisions of section 92CA(3A) of the Act reads as under:-

"(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:"

11. We find that while interpreting the provisions of section 92CA(3A) of the Act, the Hon'ble Madras High Court in Pfizer Healthcare India Private Ltd (supra), observed 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 a m of 1-1-2020. However, this would mean that an order of assessment can be passed at 12 a m 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."

12. Therefore, in Pfizer Healthcare India Private Ltd (supra), the Hon'ble Madras High Court held that the TPO should pass the order on or before 31st October in case the limitation period for completing the assessment is expiring on 31st December of the year. We further find that the Hon'ble Madras High Court in DCIT v/s Saint Gobain India (P.) Ltd, [2022] 444 ITR 636 (Mad.) affirmed the decision rendered in Pfizer Healthcare India Private Ltd (supra). Since, in the present case, the due date for completing the assessment proceedings was 31/12/2019, therefore, in view of the aforesaid decisions, the due date for passing the order under section 92CA(3) of the Act was 31/10/2019. However, as noted above, the TPO passed the order under section 92CA(3) of the Act on 01/11/2019. Thus, respectfully following the aforesaid judicial pronouncements, we are of the view that the TPO has passed the order beyond the time limit prescribed under section 92CA(3A) of the Act,

and accordingly, the same is barred by limitation and is quashed being void *ab initio*.

13. We find that the coordinate bench of the Tribunal in Mondelez India Foods (P.) Ltd. v. Addl. CIT [IT Appeal No. 1492 (Mum.) of 2015, dated 14/11/2023, held that once the order of the TPO is beyond the period of limitation and thus is not a valid order, there is no “*eligible assessee*” in terms of the definition provided in sub-section (15) to section 144C of the Act. Further, it was held that if there is no eligible assessee, no reference to DRP could have been made. Therefore, in view of the above, in the present case, the assessee does not qualify to be an “*eligible assessee*” as per section 144C(15)(b) of the Act. Thus, the AO erred in assuming the jurisdiction under section 144C(1) of the Act for passing the draft assessment order on 30/12/2019. Accordingly, the time limit for completing the assessment in the present case, as per section 153 of the Act, expired on 31/12/2019, after including the extended time period provided under section 153(4) as well as section 92CD(5)(b) of the Act as noted above. However, in the present case, the impugned final assessment order was passed by the AO on 06/04/2021, and therefore the same is also barred by limitation and is void *ab initio*.

14. Accordingly, the impugned final assessment order passed on 06/04/2021, is quashed and the additional grounds raised by the assessee are allowed. As we have quashed the impugned order for this short reason, we see no need to deal with other issues raised by the assessee in the present appeal. Those aspects of the matter, as of now, are rendered academic and infructuous.

15. In the result, the appeal by the assessee is allowed.

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16. In the present appeal also, the assessee has sought admission of the following additional grounds of appeal filed vide application dated 03/04/2023:-

"Ground No. 34

On the facts and the circumstances of the case and in law, the final assessment order dated 31 March 2021 passed by the National e-Assessment Centre, Delhi ('the learned AO) under section 143(3) r.ws 144C(13) and 144C(13) read with sections 143(3A) & 143(3B) of the Income-tax act (the Act) is barred by limitation in terms of the timeline prescribed under the provisions of section 153(1) of the Act, and hence, the said assessment order is void-ab-initio, bad in law and liable to be quashed.

Ground No. 35

On the facts and in the circumstances of the case and in law, the order dated 01 November 2019 passed by the Joint Commissioner of Income-tax (Transfer Pricing)-41) (the learned TPO) under section 92CA of the the Act is beyond the time limit prescribed under section 92CA (3A) r.w.s. 153 of the Act, thus making the transfer pricing order illegal, bad in law, null and void and liable to be quashed.

Ground No. 36

On the facts and in the circumstances of the case and in law, the transfer pricing order being illegal and void on account of being barred by limitation in terms of section 92CA(3A) r.w.s. 153 of the Act, the action of the Assessing Officer in passing the draft assessment order dated 30 December 2019 by invoking section 144C of the Act is without jurisdiction and hence, all the proceedings consequent to the draft assessment order are also illegal and bad in law and liable to be quashed.

Ground No.37

On the facts and in the circumstances of the case and in law, the transfer pricing order being illegal and void on account of being barred by limitation in terms of section 92CA (3A) r.ws. 153 of the Act, consequently, the final assessment order dated 31 March 2021 is also barred by limitation as prescribed under section 153 of the Act, thus making the final assessment order illegal, bad in law, null and void and liable to be quashed.

The Appellant craves leave to add, alter, amend, or withdraw any of the grounds mentioned herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."

17. Since, the issue raised by way of additional grounds is a legal issue, which can be decided on the basis of material available on record, we are of the view that the same can be admitted for consideration and adjudication in view of the ratio laid down by the Hon'ble Supreme Court in NTPC Ltd vs CIT: [1998] 229 ITR 383 (SC).

18. By way of the aforesaid additional grounds, the assessee has challenged the validity of the final assessment order on the basis that the same is beyond the time limit prescribed under section 153 of the Act. Since this is a jurisdictional issue, therefore, we deem it appropriate to deal with this jurisdictional aspect first and if necessary thereafter, to deal with the other issues raised in the present appeal.

19. In the present appeal, the time limit for passing the order under section 92CA(3) of the Act can be computed as under:-

<i>Sr. no.</i>	<i>Particulars</i>	<i>Relevangt date / period</i>
1.	<i>Assessment Year involved</i>	<i>2016-17</i>
2.	<i>Period of limitation for making an order of assessment as per 31-11 section 153(1) of the Income-tax Act, 1961 ["the Act"]</i>	<i>31-12-2018 (i.e., 21 months from the end of the Assessment Year)</i>
3.	<i>Extension of period of limitation in case reference is made u/s 92CA</i>	<i>12 months</i>
4.	<i>Therefore, assessment proceedings should be completed on/or before</i>	<i>31-12-2019</i>
5.	<i>Date prior to the date on which period of limitation expired 30-12 (stated in Sr. No. 3 above)</i>	<i>30-12-2019</i>

6.	<i>Sixty-days period expired on [December = 30 days (excluding 31-12-2019) November 30 days]</i>	<i>01-11-2019</i>
7.	<i>Transfer Pricing Order u/s 92CA(3) of the Act should have been passed on/or before</i>	<i>31-10-2019</i>
8.	<i>Transfer Pricing Order u/s 92CA(3) actually passed on</i>	<i>01-11-2019</i>

20. Thus, in the present case, the time limit for completion of the assessment under section 153(1) read with section 153(4) of the Act was till 31/12/2019. Accordingly, the due date for passing the order under section 92CA(3) of the Act was 31/10/2019. However, the TPO passed the order under section 92CA(3) of the Act on 01/11/2019. Thus, respectfully following the aforesaid decisions of the Hon'ble Madras High Court as cited supra, we are of the view that the TPO has passed the order beyond the time limit prescribed under section 92CA(3A) of the Act, and accordingly the same is barred by limitation and is quashed being void *ab initio*.

21. Accordingly, in the present case also, the assessee does not qualify to be an "eligible assessee" as per section 144C(15)(b) of the Act. Thus, the AO erred in assuming the jurisdiction under section 144C(1) of the Act for passing the draft assessment order on 30/12/2019. Accordingly, the time limit for completing the assessment in the present case, as per section 153 of the Act, expired on 31/12/2019. However, the impugned final assessment order was passed by the AO on 31/03/2021, and therefore the same is also barred by limitation and is quashed being void *ab initio*.

22. As a result, the additional grounds raised by the assessee are allowed. As we have quashed the impugned order for this short reason, we see no need

to deal with other issues raised by the assessee in the present appeal. Those aspects of the matter, as of now, are rendered academic and infructuous.

23. In the result, the appeal by the assessee is allowed.

24. To sum up, both appeals by the assessee are allowed.

Order pronounced in the open Court on 07/08/2023

Sd/-
B.R. BASKARAN
ACCOUNTANT MEMBER

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

MUMBAI, DATED: 07/08/2023

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Mumbai; and*
- (5) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai