IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I', NEW DELHI

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Yogesh Kumar US, Judicial Member

ITA No. 2957/Del/2022 : Asstt. Year: 2018-19

Aero Club, 867, Joshi Road, Karol Bagh, New Delhi-110005	Vs	ACIT, Central Circle-49(1), New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AAFFA1530L		

Assessee by : Sh. Pradip Dinodia, CA &
Sh. R. K. Kapoor, CA
Revenue by : Sh. Rajesh Kumar, CIT DR

Date of Hearing: 22.06.2023		**Date of Pronouncement: 09.08.2023**

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by assessee against the order dated 28.10.2022 passed by the AO u/s 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961.

2. Following grounds have been raised by the assessee:

"1) That the Ld. Assessing Officer (AO) Ld. Transfer Pricing Officer ("TPO") and consequently the Dispute Resolution Panel (DRP) have grossly erred in law and on facts and circumstances of the appellant's case in proposing and sustaining a Transfer Pricing adjustment to the income of the appellant amounting to INR 12,23,24,828/- in relation to the Specified Domestic Transaction between the Units that are eligible for availing Profit Linked Incentives under the Income Tax Act, and the other units of the assessee firm. The adjustment proposed is wholly

illegal, erroneous and untenable in law and on the facts of the case of the appellant and is prayed to be deleted.

2) That the Ld. Assessing Officer (AO) and consequently the Dispute Resolution Panel (DRP) have grossly erred in law and on facts and circumstances of the appellant's case in proposing and sustaining a disallowance to the income of the appellant amounting to INR 4,24,39,963/- under sec 36(1)(va) of the Income Tax Act, 1961. The adjustment proposed is wholly illegal, erroneous and untenable in law and on the facts of the case of the appellant and is prayed to be deleted.

3) That the order of Assessment including order of the Ld. TPO and the DRP Directions are bad in law and erroneous on the facts of the appellant.

Transfer Pricing Grounds

Choice of Method

4) That the Hon'ble DRP as well as Ld, TPO have grossly erred in law and on facts of the assessee's case in rejecting the Other Method applied by the assessee as the Most Appropriate Method (MAM) to determine the arm's length price of the Specified Domestic Transactions entered into by the assessee without any cogent reasons.

5) That the Hon'ble DRP as well as Ld, TPO have grossly erred in law and on facts of the assessee's case in applying the Transaction Net Margin Method to determine the arm's length price of the Specified Domestic Transactions entered into by the assessee without any cogent reasons.

6) That the Ld. TPO and consequently the Hon'ble DRP, have erred in law and on facts, in disregarding, the details and data furnished for the benchmarking of the SDTs by the assessee as required under Rule 10(BXT) for the Other Method, in

i. the Transfer Pricing Study in which detailed analysis was submitted for the Other Method

ii. the data submitted in support for the Other Method in the original TP assessment proceedings and again re-iterated and supported with further data in appeal effect proceedings, the date submitted in support for the Other Method before the DRP in appellate proceedings.

without any cogent reasons, which is bad in law and prayed not to be upheld.

Corporate Grounds

7) That the Ld. A.O, and consequently the Hon'ble DRP have grossly erred in law and on the facts and circumstances of the appellant case in proposing and sustaining the disallowance of amounts deposited beyond the due date as per the specific PF/ESI/LWF Acts but before the due date of the Income Tax Return as per sec 43B of the Act as filed by the assessee u/s 139(1) of the Act-us 36(1)va) of the Act amounting to Rs. 4,24,39,963/-, which is unjust and not as per the intention of the legislature vide amendment to Finance Act, 2021, and is accordingly prayed to be deleted.

By That the Ld. AO has erred in law in relying on Hon'ble SC ruling in case of Checkmate Services Pvt. Ltd. vs. Commissioner of Income Tax-1 in Civil Appeal No. 2833 OF 2016, which is distinguishable on facts from the assessee'e case.

9) That the Ld. AO has failed to appreciate that the Explanation 2 to Sec 36(1)(va) inserted w.e.f. 01.04.2021 is prospective in nature and does not apply to the year under consideration Le FY 2017-18.

10) That the Ld. TPO and consequently the Ld. AO have erred in law and in the circumstances of the appellant by initiation of penalty proceedings u/s 270A of the Act for underreporting of income."

3. The assessee has also raised the following additional grounds of appeal under Rule 29 of Income Tax (AT) Rules, 1963:

> *"3.1 That the Assessment Order dated 28.10.2022 passed by Ld. AO u/s 143(3) r.w.s. 144C(13) pursuant to Hon'ble DRP directions dated 23.06.2022 is time barred and prayed to be quashed."*

4. Admission of the additional ground has been opposed in principle by the ld. DR. Keeping in view, the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. Vs CIT (1998) 229 ITR 383, the additional ground filed by the assessee is accepted. The relevant portion of the judgment is as under:

> *"5. Under Section 254 of the Income-tax Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering*

questions of law arising in assessment proceedings although not raised earlier.

6. In the case of Jute Corporation of India Ltd. v. C.I.T. . this Court, while dealing with the powers of the Appellate Assistant Commissioner observed that an appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with all the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income-tax Officer. This Court further observed that there may be several factors justifying the raising of a new plea in an appeal and each case has to be considered on its own facts. The Appellate Assistant Commissioner must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The Appellate Assistant Commissioner should exercise his discretion in permitting or not permitting the assessee to raise an additional ground in accordance with law and reason. The same observations would apply to appeals before the Tribunal also.

7. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner of Income-tax (Appeals) takes too narrow a view of the powers of the Appellate Tribunal [vide, e.g., C.I.T, v. Anand Prasad (Delhi), C.I.T. v. KaramchandPremchand P. Ltd. and C.I.T. v. Cellulose Products of India Ltd. . Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings we fail to see why such a question should not be allowed to be raised

when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

8. The reframed question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits."

5. Respectfully following the above judgment of the Hon'ble Apex Court, the additional grounds taken up by the assessee are hereby admitted.

6. The ld. AR argued that the Assessment order is bad in law. In this regard, it was submitted that the Final order of assessment passed u/s 143(3)/44C(13)/ 144B being time barred by limitation as per the provisions of Section 144C(13) of the Act is *null and void*.

7. The ld. AR argued that the ld. DRP has passed its directions u/s 144C of the Act on 23.06.2022, with intimation letter to the assessee dated 27.06.2022. Thus, as per the provisions of Section 144C(13) of the Act, the Assessing Officer shall, in conformity with the directions of ld. DRP, complete the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received which date was 31.07.2022. The ld. AR argued that contrary to the above provisions of Section 144C of the Act, the AO (NaFAC) has passed the final order of assessment u/s 143(3) r.w.s. 144C(13) r.w.s. 144B of the Act on 28.10.2022 i.e. after lapse of the prescribed period for completion of assessment and hence

invalid. Bringing to our notice, the ld. AR submitted that the TPO passed the consequential order in 21 July 2022. However the AO passed final order on 28.10.2022 which is barred by limitation of time prescribed u/s 144C(13).

8. Rebutting the arguments of ld. DR Sh. Rajesh Kumar, CIT vehemently argued that as per the provisions of Section 144C(13), the due date starts from the date, the Assessing Officer receives the directions of the ld. DRP and since the order has been passed within the due date from the date of the receipt of Assessing Officer on 15.09.2022, the order has been rightly passed on 28.10.2022.

9. The arguments of the ld. DR in writing are as under:

"MAY IT PLEASE YOUR HONOURS

Subject:- Submission of report from the AO in the case of M/s Aero Club in ITA no. 2957/D/2022 for A.Y. 2018-19 reg.-

Kindly refer to the above.

(A) This case was heard as part heard matter on 22 June 2023 before the Hon'ble Bench. During the course of hearing, the undersigned was granted permission to file report from the AO with regard to the technical ground taken by the assessee i.e. the assessment order passed u/s 143(3) r.w.s. 144C(13) is time barred.

As directed, the report from the AO has been received and the copy of the same is enclosed for the kind perusal of the Hon'ble Bench. In the enclosed report, the AO has stated the fact that the order u/s 143(3) r.w.s. 144C(13) has been passed within the stipulated time.

Besides the report of the AO, the following submissions on the technical/legal ground taken by the assessee, are made for kind consideration of the Hon'ble Bench.

(B) This case was selected for scrutiny under CASS and statutory notice u/s 143(2) was issued on 22.09.2019. Further, the case was referred to TPO u/s 92(CA)(1) and TPO passed order u./s 92CA (3) on 31.07.2021. Afterwards, the draft assessment order with TP adjustment of Rs. 60,54,09,008 was passed on 21.09.2021. As the draft assessment order contained transfer pricing addition also, the assessee went to the DRP and Hon'ble DRPs directions to the AO were passed on 27.06.2022.

The final assessment order was passed by the jurisdictional AO on 28.10.2022 u/s 143(3) r.w.s. 144C(13) of the IT Act. In the final assessment order, two types of additions/adjustments were made, which are mentioned below:-

(i) TP adjustment of Rs. 12,23,24,828/-.
(ii) Corporate addition i.e. disallowance of employees contribution of provident fund/ESI u/s 36(1)(va) r.w.s 2(24)(x) of the Rs. 4,24,39,963/-.

In this case, besides other grounds, the assessee, has also taken the additional ground, that was filed on 8th May 2023, that the assessment order passed u/s 143(3) r.w.s. 144C(13) in pursuance to Hon'ble DRP directions, is time barred and prayed for quashing of the same. With regard to this ground, the undersigned requested the Hon'ble Bench to grant time for submission of report from AO and the Hon'ble Bench was kind enough to grant time of one month from the last date of time of hearing i.e. on 22.06.2023 for submission of report from AO which is duly submitted today.

(C) Though the AO in his report has clearly mentioned that the final order passed u/s 143(3) r.w.s. 144C(13) was passed within time limit, however even for a moment, for speculation sake, it is assumed that the order has not been passed within time limit prescribed, the following facts may please be considered.

As stated in the above noted paras, the assessment order contained two types of additions one TP addition and the other corporate addition and because of TP addition, the AO passed the draft order and after that the assessee went to DRP. From the grounds of appeal, it is clearly evident that the passing of draft assessment order is not in dispute. It is submitted that the provisions of sections reate to 144C was mainly brought in as Dispute Resolution Mechanism mainly to address the concern of the multinational companies and the eligible assessee for going to DRP was the person in whose case TP addition are made or any foreign company. In the instant case, the assessee has approached DRP because TP adjustment. It is humbly prayed that even if it assumed that the final assessment order is not passed within the stipulated time, then the humble submission is that, only, the addition pertaining to transfer pricing should get affected and not the other corporate additions because the passing of draft assessment order was never disputed. This becomes more important because of the fact that the corporate addition i.e. disallowance of employees contribution to PF/ESI u/s 36(1)(5a) r.w.s 2(24)(x) of the IT Act of Rs. 4,24,39,963/- has been upheld by even the Hon'ble Supreme Court in the case of M/s Checkmate Services private limited vs. CIT(l) in 143 taxmann.com 178(SC) 2022.

Thus the corporate addition has attained finality after the Supreme Court decision and even during the course of hearing; the assessee has not disputed these addition. Thus it is respectfully submitted that in view of the above submission and also the facts that

corporate addition has already been upheld by the Hon'ble Supreme Court and also considering revenue interest, the final assessment order should not be quashed.

(D) Besides the above submissions, reliance is also placed on some of the recent decisions of Hon'ble High Court in the case, where the violation of section 144C were there but the Hon'ble High Courts, in all those cases, did not quash the entire assessment proceedings and mainly annulled the assessment order only, with the directions to restore back the proceedings back to DRP/AO for passing the fresh orders. In other words, the Hon'ble High Courts considered these violations as procedural defects, which can be cured and not fatal defects. On the same lines, it is most humbly prayed that the error committed by the Assessing Officer may not be treated as fatal one because this will result in lot of revenue loss to the Govt.. It is specifically submitted that above decision are with regard to non incorporation of DRPs directions in the assessment order by the AO's, which is the clear cut violation of section 144C, the Hon'ble Jurisdictional Delhi High Court, Hon'ble Karnataka High Court and the Hon'ble Madras High Court have treated these violation of section 144C as procedural/technical lapses of not incorporating DRP directions in the final assessment order /by passing final order without waiting for DRP directions and directed the department to rectify the same by remitting the proceedings to the level of DRP/Assessing Officer for fresh examination.

The citations of decision of Hon'ble jurisdictional Delhi High Court, Karnataka High Court and Hon'ble Madras High Court for ready reference are mentioned below-

1. *Anand NVH Products Pvt. Ltd. vs. National E Assessment Centre ANR dated 06.08.2021 WP(C) 7936/Del/2021*

2. *Fiber Home India Vs. National E Assessment Centre ANR 15.12.2021 WP(C) 11609/2021*
3. *SRF Ltd. Vs. National E Assessment Centre and ANR WP(C) 6484/2021*
4. *Marvel India Pvt. Ltd. vs. National faceless Assessment Centre, Delhi 138 taxmann.coml45 (Karnataka) (2022)*
5. *TT Steel Service India Pvt. Ltd. 137 taxmann.com 151 (Karnataka) (2022)*
6. *Ford India Pvt. Ltd. Vs. National E Assessment Centre WP(C) 12701/2021, Madras High Court*

Thus as the decisions are from Hon'ble jurisdictional Delhi High Court and also other High Courts and being on violations of section 144C, the ratio of the decisions is applicable to the instant case and considering the revenue involved in the case, specially on the corporate tax issue which is, confirmed by the Hon'ble Supreme Court also, the entire assessment order may not be quashed.

(E) Also, all the above decisions are recent once and are with respect to the assessment orders passed after the launch and implementation of faceless scheme of assessment. Without prejudice to the above, it is mentioned that the Govt., of India has launched/implemented the faceless scheme of assessment which is the biggest direct tax reforms in India launched for bringing efficiency, transparency and accountability in the system. The faceless system was launched by none other than the Hon'ble Prime Minister and it emphasized his vision of making tax administration fully transparent, efficient and completely accountable to the tax payer. This has brought about a paradigm shift in working of the Income Tax Department with regard to assessment and appeals and the same is based on data analytics and Artificial Intelligence (Al). In fact faceless system has transformed the working of Income Tax department and has ended the human interface and brought about

the complete transparent and efficient tax administration. The faceless scheme is, in its nascent stage and department after implementation of faceless scheme is facing certain technical/procedural issues.

(F) Reliance is also placed on the decision of Hon'ble Supreme Court of India in the case of M. Pirai Choodi vs. ITO (2012) 20 taxmann.com. 733 (SC) wherein the Hon'ble Supreme Court set aside the order of the Hon'ble High Court which quashed the entire assessment proceedings because opportunity to cross examine was not granted to the assessee. In this case, the Hon'ble Supreme Court has held that the Hon'ble High Court should not have quashed the entire assessment proceedings and instead should have directed the AO to grant an opportunity to the assessee to cross examine the concerned witnesses. By applying the ratio laid down by the Hon'ble Supreme Court, it is humbly stated that the entire proceedings should not be quashed and at max, only, the additions pertaining to transfer pricing may be deleted, if the assessment order is proved to be passed after the due date.

(G) Cases are to be decide on merits then on technicalities
Also the undersigned would like to rely on the landmark decision of the Hon'ble Supreme Court of India in the case of Shyam Lai Murari and other (1976) 1 SCC 719 wherein the Hon'ble Supreme Court has clearly mentioned that the Courts are supposed to decide the cases on merits and not on technicalities. In fact the operative part of the order of the Hon'ble Supreme Court being very pertinent is reproduced below:

"It is obvious that even taking a stern view, every minor detail in r. 3 cannot carry a compulsory or /imperative import. After all what is required for the Judges to dispose of the appeal is the memorandum of appeal plus the judgment and the paper book. Three copies would

certainly be a great advantage, but what is the core of the matter is not the number but the presence, and the over-emphasis laid by the Court on three copies is, we think, mistaken. Perhaps, the rule requires three copies and failure to comply therewith may be an irregularity. Had no copy been furnished of any one of the three items, the result might have been different. In the present case, copies of all the three documents prescribed, have been furnished but not three copies of each. This omission or default is only a breach which can be characterized as an irregularity to be corrected by condonation on application by the party fulfilling the condition within a time allowed by the Court. We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, tho' procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammar apart, if the breach can be corrected without injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After, all Courts are to do justice, not to wreck this end product on technicalities. Viewed in this perspective, even what is regarded as mandatory traditionally may, perhaps, have to be moderated into wholesome directions to be complied with in time or in extended time. Be that as it may, and ignoring for a moment the exploration of the true office of procedural conditions, we have no doubt that what is of the essence of r. 3 is not that three copies should be furnished, but that copies of all the three important documents referred to in that rule, shall be produced. We further feel that the Court should, if it thinks it necessitous, exercise its discretion and grant further time for formal compliance with the rule if the copies fall short of the requisite Number. In this view and to

the extent indicated, we over-rule the decision in Bikram Dass's (supra) case."

The above stated landmark Judgment of the Supreme Court besides clearly decided that if and procedural lapses can be corrected without any prejudice to the party concerned then breach of such procedural lapses should be corrected and decision should be on merits of the cases and not on the technicalities. The ratio laid down by the Hon'ble Supreme Court in the above noted case applies to the facts of the instant case.

(H) In view of the above, even at the cost of repetition, it is submitted that the entire assessment order may not be quashed because it will result in huge revenue loss to the Government as the assessment order contained addition on an issue which is already decided in favour of the revenue by the Hon'ble Supreme Court and has attained finality.

It is humbly prayed that the above written submissions on technical issues may kindly be taken on record."

To,
The Commissioner of Income Tax,
(DR), I Bench, ITAT,
New Delhi.

Sub:- INCOME TAX DEPARTMENT Factual Report of Assessing Officer who completed assessment in the case of Aero Club (PAN: AAFFA1530L) for A.Y. 2018-19.

Sir,

In this case, the draft order shared with the assessee on 21.09.2021 with following additions:

1. Adjustment on account of transaction with AE : Rs.1,10,00,000/-

2. Adjustment on account of Domestic Transaction : Rs.59,44,09,008/-

Further, the assessee challenged the additions before the Hon'ble DRP, Panel -1, New Delhi and the Hon'ble DRP, Panel-1, New Delhi passed directions under section 144C(5) of the Income Tax Act, 1961 directing the A.O. vide para 3.4.4. to verify the factual contention of the assessee on account of Provident Fund and ESI and Labour Welfare Fund issue and take necessary action accordingly and also directing the TPG vide para 3.7.7 to verify the computation on the adjustment on account of Domestic Transaction and consider the submissions regarding the Transfer Pricing Issue and directed the TPO to pass speaking order on the issue involved.

The give effect order from TPO was received on 15.09.2022. It is also necessary to mention here that the TPO neither mentioned the copy to the Jurisdictional Assessing Officer nor sent the copy to the JAO in time, the same was communicated only by the way of E-Mail dated 15.09.2022.

On the basis of the email received from TPO, an acknowledgement of the DRP Order mentioned in the order sheet on 16.09.2022 and a show cause notice sent to the assessee on 18.10.2022. Due to non-compliance of the said show cause notice order under section 143(3) r.w.s. 144C(13) was passed on 28.10.2022.

Therefore, the order passed under section 143(3) r.w.s. 144C(13) is within time as the TPO order ,passed on the directions on the DRP received on 15.09.2022, and acknowledgment of which generated on 16.09.2022."

10. Heard the arguments of both the parties and perused the material available on record.

11. As per the facts of the case below is the time chart of the various orders passed by the revenue authoritie:

Particulars	**Date of order**
AOs Draft Order u/s 144C- NFAC	21.09.2021
DRP directions u/s 144C(5) dated 23.06.2022 (intimated to AO on 27.06.2022 via letter having DIN)	23.06.2022
TPO order giving effect to DRP directions	21.07.2022
AO Final order giving effect to DRP directions- JAO	28.10.2022

12. The provisions of Section 144C are as under:

"Reference to dispute resolution panel.

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.

(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order,—

(a) file his acceptance of the variations to the Assessing Officer; or

(b) file his objections, if any, to such variation with,—
(i) the Dispute Resolution Panel; and

(ii) the Assessing Officer.

(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if—

(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or

(b) no objections are received within the period specified in sub-section (2).

(4) The Assessing Officer shall, notwithstanding anything contained in section 153 or section 153B, pass the assessment order under sub-section (3) within one month from the end of the month in which,—

(a) the acceptance is received; or

(b) the period of filing of objections under sub-section (2) expires.

(5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.

(6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:—

(a) draft order;
(b) objections filed by the assessee;

(c) evidence furnished by the assessee;

(d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;

(e) records relating to the draft order;

(f) evidence collected by, or caused to be collected by, it; and

(g) result of any enquiry made by, or caused to be made by, it.

(7) The Dispute Resolution Panel may, before issuing any directions referred to in sub-section (5),—

(a) make such further enquiry, as it thinks fit; or

(b) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.

(8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

Explanation.—For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.

(9) If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.

(10) Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.

(11) No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.

(12) No direction under sub-section (5) shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 or section 153B, the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

(14) The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections filed under sub-section (2) by the eligible assessee.
(14A) The provisions of this section shall not apply to any assessment or reassessment order passed by the Assessing Officer with the prior approval of the Principal Commissioner or Commissioner as provided in sub-section (12) of section 144BA.

(14B) The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of issuance of directions by the dispute resolution panel, so as to impart greater efficiency, transparency and accountability by—

(a) eliminating the interface between the dispute resolution panel and the eligible assessee or any other person to the extent technologically feasible;

(b) optimizing utilization of the resources through economies of scale and functional specialization;

(c) introducing a mechanism with dynamic jurisdiction for issuance of directions by dispute resolution panel.

(14C) The Central Government may, for the purpose of giving effect to the scheme made under sub-section (14B), by notification in the Official Gazette, direct that any of the provisions of this Act shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification:

Provided that no direction shall be issued after the 31st day of March, 12[2024].

(14D) Every notification issued under sub-section (14B) and sub-section (14C) shall, as soon as may be after the notification is issued, be laid before each House of Parliament.

(15) For the purposes of this section,—

(a) "Dispute Resolution Panel" means a collegium comprising of three Principal Commissioners or Commissioners of Income-tax constituted by the Board for this purpose;

(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."

13. We have perused the order of the ld. DRP dated 23.06.2022 and the intimation letter addressed to the assessee dated 27.06.2022. The page 15 (last page) of the order of the ld. DRP shows the signature of the Secretary of DRP-1 along with File No. which reads F.No.DRP-I/Del/Obj.No.283/2022-23/532 dated 27.06.2022 which also clearly reflects copy to,

1. The Commissioner of Income Tax, TP-1, New Delhi
2. The DCIT TPO-1(1)(1), New Delhi
3. NFAC, New Delhi
4. The Assessee

14. Thus, the record of the ld. DRP clearly shows that the copy has been marked to NFAC, New Delhi on 27.06.2022. Further, the TPO has also followed the directions of the ld. DRP and passed an order on 21.07.2022 whereas the Assessing Officer has passed the order on 28.10.2022.

15. A concurrent reading of Section 144C(5) and Section 144C(13) reveals that the ld. DRP shall issue directions for the guidance of the Assessing Officer to enable him to complete the assessment and the Assessing Officer on receipt of directions issued under sub-Section (5) shall complete the assessment without providing any further opportunity of being heard to the assessee within one month from the end of the month in which such direction is received. The contention of the revenue that the order giving effect to the directions of the ld. DRP by the TPO dated 21.07.2022 was received on 15.09.2022 and hence the final Assessment Order is passed in due date cannot be accepted as the revenue could not explain how the AO received the order from the TPO on E-mail only on 15.9.2022 whereas the ld. DRP passed directions on 23.06.2022 and forwarded the copies on 27.06.2022 to NFAC. Further, as per sub-Section (5) & (13), the ld. DRP orders are to be received by the AO but not by the TPO.

16. Reliance is being placed on the

Airbnb Payments India Pvt. Ltd. Vs. NFAC, New Delhi

In the present case the Ld. DRP passed an order on 16.11.2021 and final AO order was passed on 30.01.2022. The Delhi ITAT considering the provision s of Sec 144C held that-

"*Para 6- Alas, the final order passed by the Assessing Officer is beyond the period of limitation as provided u/s 144C of the Income Tax Act 1961 and hence, the same is liable to be declared as null and void.*"

Adobe Systems India Pvt. Ltd., ITAT Delhi

"11. Undoubtedly, in this case, the assessment order has been passed beyond the time limit prescribed u/s 144C(13) being more than one month after the date of receipt of the directions of the DRP by the AO, as per the information provided in the paper book submitted by the assessee 's counsel. The factual veracity of these dates has not been disputed by the Revenue. In this view of the matter, we agree with the contention that the order passed by the AO is void ab initio and liable to be quashed as the final assessment order is time barred. We hold and direct accordingly."

ARM Embedded Technologies Pvt. Ltd., ITAT Bangalore

"7. We have heard the rival contentions and perused the material on record. The DRP's directions in the instant case were passed on 24.01.2022. Therefore, the final assessment order ought to have been passed on 28.02.2022 as per the terms of Section 144C(13) of the Act. Hence, the impugned final assessment order passed on 05.08.2022 is barred by limitation. In the judicial pronouncements cited by the learned A.R. it has been categorically held that the final

assessment order needs to be passed in compliance with the time frame under Section 144C(13) of the Act. Therefore, the impugned final assessment order is bad in law and barred by limitation. Since the final assessment order has been quashed, the other grounds on merits are not adjudicated and are left open. Ordered accordingly."

Fresenius Kabi Oncology Ltd., ITAT Delhi

"10. From the aforesaid provisions it is clear that the AO shall pass the assessment order inconformity with the direction given by the DRP within one month from the end of the month in which such direction has been received. In the aforesaid provisions, the use of the word "shall" makes it mandatory for the AO to comply with the directions of the Id. DRP and pass the assessment order within one month of the receipt of such directions. It is also noticed that this sub-Section (13) of Section 144C of the Act has an overriding effect on the provisions contained in Section 153 of the Act because the sentence starts with non-obstante clause and it has been provided in Section 144C(13) of the Act that "notwithstanding'' anything to contrary, contained in Section 153 or Section 153B of the Act, the assessment shall be completed within one month from the end of the month in which directions given by the DRP are received by the AO."

Dentsply India (P) Ltd., ITAT Delhi

"15. However, in the present case it is an admitted fact that the final assessment order has been passed after the end of one month from the date of receipt of the directions of the DRP by the Assessing Officer. Therefore, we find merit in the contention of the Ld. Counsel for the assessee that the order passed by the Assessing Officer is void ab initio and liable to be quashed as the final assessment order is time barred. We hold and direct accordingly."

IHG IT Services (India) Pvt. Ltd., ITAT Delhi

"5…..On careful reading of the above provisions, it is clear that section 144C(13) provides that the order should have been passed within one month from the end of the month in which such direction is received. In the instant case, the Id. DRP gave directions on 24.09.2014 and as per above referred letter dated 03.11.2015, such directions were received by concerned AO on or before 28.10.2014. Therefore, the final order should have been passed on or before 30.11.2014, but the same has been passed on 30.01.2015, which is clearly beyond the period of limitation as prescribed u/s. 144C of the Act. Therefore, in our considered opinion, the order passed u/s. 143(3) read with section 144C(13) is bad in law ab initio and not sustainable having been passed beyond the period of limitation. Accordingly, the order appealed against is liable to be quashed.

6. Once the final order passed by the AO has been held as invalid on the legal aspect of the case, we do not deem it appropriate to adjudicate upon the other grounds raised before us on merits of the addition. The appeal of the assessee, accordingly, deserves to be allowed."

Mane India Private Limited, ITAT Hyderabad

"In the present case, AO received DRP's directions by 27.06.2022 having 30.06.2022 as the last date of that month, thus, the period u/s 144C(13) expired on 31.07.2022, however the impugned order was passed on 17.08.2022."

17. Accordingly, the ITAT quashed the final assessment order as barred by limitation and non-est in the eye of law relying on views consistently being adopted by Delhi ITAT ruling in

Dentsply India (P) Ltd and Bangalore ITAT rulings in Altran Technologies India Pvt. Ltd1 and IPG DXTRA India Pvt. Ltd.

18. Based on the above facts, legal provisions and judicial precedents, the final assessment order is time barred by limitation as per the mandatory provisions of Section 144C(3) of the Act, liable to be quashed and treated as null and void.

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

Order Pronounced in the Open Court on 09/08/2023.

Sd/-	Sd/-
(Yogesh Kumar US)	**(Dr. B. R. R. Kumar)**
Judicial Member	**Accountant Member**

Dated: 09/08/2023

Subodh Kumar, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR