

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

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND  
SHRI RAHUL CHAUDHARY, HON'BLE JUDICIAL MEMBER**

**ITA NO. 1440/MUM/2020 (A.Y: 2010-11)**

M/s. Gammon India Ltd 3 <sup>rd</sup> Floor, Plot No. 3/8 Hamilton House, J.N. Heredia Marg Ballard Estate, Mumbai- 400038  <b>PAN: AAACG3821A</b>	v.	DCIT-Central Circle 7(2) Room No. 655, 6 <sup>th</sup> Floor Aayakar Bhavan M.K. Road, Mumbai- 400020
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA NO. 2990/MUM/2019 (A.Y: 2010-11)**

DCIT, Central Circle 7(2) Room No. 655, 6 <sup>th</sup> Floor Aayakar Bhavan, M.K. Road Mumbai- 400020	v.	M/s. Gammon India Ltd 1, Gammon House Veer Savarkar Marg Prabhadevi, Mumbai - 400025  <b>PAN: AAACG3821A</b>
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee Represented by</b>	<b>:</b>	<b>Shri Madhur Agrawal &amp; Shri Vinod Modi</b>
<b>Department Represented by</b>	<b>:</b>	<b>Vachaspati Tripathi</b>
<b>Date of conclusion of Hearing</b>	<b>:</b>	<b>09.08.2023</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>22.09.2023</b>

## **ORDER**

### **PER S. RIFAUR RAHMAN (AM)**

1. These cross appeals are filed by assessee and revenue against order of the Learned Commissioner of Income Tax (Appeals)-56, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 14.02.2019 for the A.Y.2010-11.

2. Aggrieved with the order of the final Assessment Order dated 15.05.2014, assessee has raised following grounds in its appeal: -

- "1. a) *On the facts and in the circumstances of the case, the Learned Commissioner of Income Tax (Appeals) - 56, Mumbai ["CIT(A)"], erred in confirming additions of Rs. 13,15,590/- towards adjustment of Arm's Length Price ("ALP") on account of Compensation for Corporate and Bank Guarantees issued for Gammon Al Matar Joint Venture ("JV") and Rs.2,21,91,316/- towards adjustment of ALP on account of Hire Charges on Machineries provided to the JV, as the said transactions did not fall within the purview of "international transactions" and that the provisions of Transfer Pricing as contained in Chapter X of the Income Tax Act, 1961 ("the Act") were not applicable to the said transactions with the JV, since 100% of the share of profit in the JV belonged to the Appellant.*
- b) *On the facts and circumstances of the case, the Learned CIT(A) erred in confirming the additions of Rs. 13,15,590/- towards adjustment of Arm's Length Price ("ALP") on account of Compensation for Corporate and Bank Guarantees issued for JV and Rs. 2,21,91,316/- towards adjustment of ALP on account of Hire Charges on Machineries provided to the JV, without appreciating that the said impugned adjustments of ALP has resulted in taxing the same income twice in the hands of the Appellant.*
- c) *On the facts and circumstances of the case, the Learned CIT(A) erred in concluding and confirming that the JV is a*

*person distinct from the Appellant and is an Associated Enterprises ("AE") as defined in Chapter X of the Act.*

- d) *On the facts and circumstances of the case, the Learned CIT(A) erred in making addition by way of adjustment of ALP by selecting the comparables as well as selecting the TNMM as the most appropriate method for benchmarking and determining the ALP of the Hire Charges on Machineries provided to the JV.*
- e) *On the facts and circumstances of the case, the Learned CIT(A) erred in determining the ALP and confirming the adjustment on account of Corporate Guarantees and Bank Guarantees extended by the Appellant for the JV, Gammon and Billimoria LLC ("GBLLC"), P.Van Eerd Beheersmaatschappij B.V., ATSL Holdings B.V., Gammon Holdings B.V., SAE Powerlines S.r.l., Gammon International LLC, Gammon International B.V., Franco Tosi Mechanical S.p.A.. Sadelmi, Campo Puma Oriente, @ 0.50%, without appreciating the Appellant's contention that such transactions do not fall within the purview of the term "International Transaction" as defined in Section 92B(1) of the Act as amended by Finance Act, 2012 retrospectively with effect 1<sup>st</sup> April 2002 by insertion of Explanation to Section 92B(1) of the Act, since the said transactions of extending Corporate and Bank Guarantees have no bearing at all on the profits, income, losses or assets of the Appellant and that these guarantees did not cost anything to the Appellant.*

2. *On the facts and circumstances of the case, the Learned CIT(A) erred in confirming the disallowance of Rs. 4,67,98,571/-, being purchases made by the Appellant from M/s. Prakash Re-rollers Pvt. Ltd., by holding that the genuineness of and having incurred the said expenses wholly and exclusively for the Appellant's business is not proved.*

3. *On the facts and circumstances of the case, the Learned CIT(A) erred in confirming the disallowance of Rs. 2,78,87,591/-, being 100% of the expenditure on account of Sub-Contract Expenses to M/s Sun Construction Co., Rs. 1,12,02,660/-, being 33.33% of expenditure on account of purchases from M/s. Naveen Traders, Rs. 94,21,136/-, being 33.33% of expenditure on account of purchases from M/s. Narayan Suppliers and Rs. 1,47,89,932/-, being 100% of expenditure on account of purchases from Shri Ranjit Pattnayak, by holding that the genuineness of and having incurred the said expenses wholly and exclusively for the Appellant's business is not proved satisfactorily.*

4. *Each of the above grounds and sub-grounds is without prejudice to one another.*

5. *The Appellant craves leave to add, alter, modify or vary anyone or more grounds."*

**3.** Further, assessee has raised following additional grounds in its appeal: -

1. *The Transfer Pricing Assessment Order dated 30<sup>th</sup> January, 2014 is illegal, bad-in-law and without jurisdiction, inter alia, on the ground that it is barred by limitation."*

2. *The Assessment Order dated 15<sup>th</sup> May, 2014 is illegal, bad-in-law and without jurisdiction, inter alia, on the ground that it is barred by limitation."*

**4.** Ld. Counsel for the assessee submitted that the above additional grounds of appeal are purely legal grounds and do not require any fresh examination of facts. Therefore, Ld. Counsel for the assessee prayed, it may be admitted.

**5.** Ld. DR objected for admission of the additional grounds as they were never raised before lower authorities and therefore cannot be admitted.

**6.** Ld. DR 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 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.

**7.** Considered the rival submissions and material placed on record, we observe that as the said additional grounds are legal grounds, wherein, the facts are on record and facts do not require fresh investigation, following the decision of Hon'ble Supreme Court in the case of National Thermal Power Co., Limited *v.* CIT 229 ITR 383 (SC), we admit the said additional grounds of appeal.

**8.** We observe that the issue raised by the assessee in additional grounds of appeal goes to the root of the matter and accordingly, admitted and proceeded to adjudicate the same. Since it is a jurisdictional issue we proceed to decide this issue without going into merits of the case. In the additional ground No.2 raised by the assessee, the issue is raised towards validity of the Assessment Order. Ld. AR submitted that this addresses multiple issues involving Roca Bathroom jurisdictional

issue, however, he submitted that this issue is not pressed at this stage. But he submitted that the final Assessment Order passed is bad in law by relying on the case of M/s. Atos India Pvt Ltd., v. DCIT in ITA.No.1795/Mum/2017 dated 23.02.2023. Accordingly, the issue of Roca Bathroom is not considered for adjudication.

9. At the time of hearing, Ld. AR of the assessee pressed the Additional grounds relating to the validity of Transfer pricing order and submitted that the issue under consideration is covered by the decision of the Coordinate Bench in the case of M/s. Mondelez India Food Private Limited v. Addl. CIT in ITA.No. 1492/Mum/2015 dated 14.11.2022. Copy of the order is placed on record. Ld. AR of the assessee also submitted that a chart of relevant data relating to assessment of this case. For the sake of clarity, it is reproduced below:

<b>Sr. no.</b>	<b>Particulars</b>	<b>Relevant date/ period</b>
	<i>Assessment Year involved</i>	<i>2010-11</i>
1.	<i>Period of limitation for making an order of assessment as per Section 153B of the Income Tax Act, 1961 ("the Act")  Date of Search – 08.07.2010</i>	<i>24 Months from the end of the Financial year in which the last of the authorization for the search u/s 132 was executed</i>
2.	<i>Extension of period of limitation in case reference is made u/s 92CA of the Act.</i>	<i>12 Months</i>
3.	<i>Assessment proceedings should be completed on or before</i>	<i>31.03.2014</i>
4.	<i>Date prior to the date on which period of limitation expires (stated in Sr. no. 3 above)</i>	<i>30.03.2014</i>

<b>Sr. no.</b>	<b>Particulars</b>	<b>Relevant date/ period</b>
5.	<i>Sixty day period expires on March – 30 days (excluding 31.03.2014) February- 28 days January- 2 days</i>	<i>30.01.2014</i>
6.	<i>Transfer Pricing order u/s 92CA(3) of the Act to be passed on or before</i>	<i>29.01.2014</i>
7.	<i>Date on which Transfer Pricing Order u/s 92CA(3) is passed.</i>	<i>30.01.2014</i>

**10.** He submitted that the Assessment year involved also same as in the case of M/s. Mondelez India Food Private Limited v. Addl. CIT (supra) i.e., A.Y. 2010-11 and the transfer pricing order u/s. 92CA(3) of the Act should have been passed on or before 29.01.2014 whereas the present order is passed on 30.01.2014. He submitted that the issue involved is exactly similar to the case of M/s. Mondelez India Food Private Limited v. Addl. CIT (supra). Further, he submitted that similar issue was considered by the Coordinate Bench in the case of Atos India Pvt. Ltd., v. DCIT in ITA.No. 1795/Mum/2017 dated 23.02.2023 and held that the Assessment Order passed also bad in law. He submitted that the TPO order is bad in law and even Assessment Order is bad in law.

**11.** On the other hand, Ld. DR relied on the orders of the Authorities below. Further, Ld. DR filed his written submissions objecting for

admission of additional grounds vide letter dated 09.08.2023, for the sake of clarity, it is reproduced below: -

" *In addition to the original grounds of appeal made before the Hon'ble Bench, the Appellant vide letter dated 20.03.2023 and 28.07.2023 filed an additional ground of appeal challenging the jurisdiction of the TPO and the validity of the draft assessment order passed u/s 144C r.w.s.143(3) of the Act.*

2. *Further, in addition to the oral arguments made before the Hon'ble Bench during the physical hearing, the following written submission in the above referred case may also kindly be considered.*

2.1 *This is 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 30.01.2014 and therefore, in accordance with provision of section 144C (1), the AO was required to pass the draft assessment order, which he has done.*

2.2 *It is further submitted that the time limit prescribed in section 92CA(3A) is that AO 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 dated 30.01.2014*

2.3. *Regarding the judgment of Hon'ble Madras High Court in the case of Pfizer Healthcare India (P) Ltd. (supra), this is 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 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, it is submitted that AO clearly had 60 days for passing of the assessment order after the TPO had passed order on 30.01.2014*

*2.4. 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'. It is submitted that when the reference was made to the TPO in section 92CA and TPO had proposed an adjustment, then assessee was clearly an eligible assessee' and therefore, AO was justified in passing a draft assessment order u/s 144C(1).*

*2.5 It is also 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 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.*

*2.6. This is further submitted that the order of the Hon'ble Madras High Court in the case of M/s Pfizer Healthcare Pvt Ltd is not an order passed by the Hon'ble Jurisdictional High Court and therefore is not binding in nature.*

*Further, the department has not accepted the above order of the Hon'ble Madras High Court and has filed SLP in Hon'ble Supreme Court which is pending for adjudication till date.*

*3. In view of the above, it is submitted that the additional grounds of the assessee should not be admitted. Alternatively, it is also requested that matter may kindly be kept in abeyance till the issue attains finality."*

**12.** Considered the rival submissions and material placed on record, we observe that in the case of M/s. Mondelez India Food Private Limited v.

Addl. CIT (supra) identical issue has been considered by the Coordinate Bench and decided the issue observing as under: -

"10. We have heard the submissions made by rival sides on the limited issue of validity of order passed by TPO u/s. 92CA(3) of the Act and the subsequent proceedings arising there from. The Id. Counsel for the assessee has restricted his submissions to the legal grounds raised in additional grounds of appeal No.48 & 49.

11. The assessee has questioned the validity of order passed u/s.92CA(3) of the Act alleging the same to be barred by limitation. Before proceeding further to adjudicate this issue it would be imperative to have a glance on the relevant dates.

Date	Events
30/01/2014	TPO passed order u/s. 92CA of the Act
28/03/2014	A.O Passed draft assessment order
19/12/2014	Directions of the DRP u/s.144C(15) of the Act
29/01/2015	Final assessment order.

The contention of the assessee is that the order passed u/s.92CA(3) of the Act is time barred by one day. The period of limitation for passing the order u/s. 92CA(3) of the Act is computed by the assessee as under:-

Events	Relevant Dates
Assessment Year ('AY')	2010-11
End of Assessment Year	31-03-2011
Due date for completion of assessment under Third Proviso to section 153(1) of the Act (i.e. 3 years from the end of AY)	31-03-2014
Time limit for passing the order under section 92CA(3A) of the Act	60 days
Less: Date on which limitation expires under section 153 of the Act i.e. 31-03-2014	1 day
Less: Remaining days of March 2014	30 days
Less: Number of days February 2014	28 days
Less: Number of days January 2014	2 days
Last date for passing the order under section 92CA(3) of the Act	29-01-2014

<u>Events</u>	<u>Relevant Dates</u>
Date of passing the transfer-pricing order ('TP order') under section 92CA(3) of the Act	30-01-2014

12. *The relevant extract of the provisions of section 92CA(3A) and section 153(1) of the Act and the third proviso as was applicable to the impugned assessment year are reproduced herein below:*

Section 92CA (3A)

*"(3A) Where a reference was made under sub-section (1) before the 1st day of June, 2007 but the order under sub-section (3) has not been made by the Transfer Pricing Officer before the said date, or a reference under sub-section (1) is made on or after the 1st day of June, 2007, an order under sub-section (3) may be made at any time before sixty days prior to the date on which the period of limitation referred to in section 153, or as the case may be, in section 153B for making the order of assessment or reassessment or recomputation or fresh assessment, as the case may be, expires:"*

Section 153(1)

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

*Two years from the end of the assessment year in which the income was first assessable, or*

*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 1<sup>st</sup> day of April, 1988, or any earlier assessment year, is filed under sub-section(4) or sub-section (5) of section 139, whichever is later:*

*Provided xxxxxxxxxxxx*

*Provided further xxxxxxxxxxxx*

*Provided also that in case the assessment year in which the income was first assessable is the assessment year commencing on the 1<sup>st</sup> day of April, 2009 or any subsequent assessment year and during the course of the proceeding for the assessment of total income, a reference under sub-section(1) of section 92CA is made, the provisions of clause*

*(a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words "two years" the words "three years" had been substituted"*

*A conjoint reading of the relevant provisions of section 92CA(3A) and 153(1) of the Act would show that the TPO is required to pass order u/s. 92CA(3) of the Act at any time before sixty days prior to the date on which the period of limitation referred to in section 153 of the Act for making assessment order expires.*

*13. The Hon'ble Madras High Court in the case of Pfizer Healthcare India (P) Ltd. vs. JCIT (supra) has explained as to how period of limitation for making the order u/s. 92CA(3) of the Act has to be worked out. The relevant extract of the same is reproduced herein below:*

*"30. Now, coming to the question of how the 60 day period is to be computed, the critical question would be whether the period of 60 days would be computed including the 31st of December or excluding it. Section 153 states that no order of assessment shall be made at any time after the expiry of 21 months from the end of the assessment year in which the income was first assessable. The submission of the revenue is to the effect that limitation expires only on 12 am of 1-1-2020. However, this would mean that an order of assessment can be passed at 12 am on 1-1-2020, whereas, in my view, such an order would be held to be barred by limitation as proceedings for assessment should be completed before 11.59.59 of 31-12-2019. The period of 21 months therefore, expires on 31-12-2019 that must stand excluded since section 92CA(3A) states 'before 60 days prior to the date on which the period of limitation referred to section 153 expires'. Excluding 31-12-2019, the period of 60 days would expire on 1-11-2019 and the transfer pricing orders thus ought to have been passed on 31-10-2019 or any date prior thereto. Incidentally, the Board, in the Central Action Plan also indicates the date by which the Transfer Pricing orders are to be passed as 31-10-2019. The impugned orders are thus, held to be barred by limitation".*

*14. The aforesaid decision of Single Judge was assailed by the Department in writ appeal before the Division Bench. The Division Bench of the Hon'ble Madras High Court in the case of DCIT vs. Saint Gobain India (P) Ltd. (supra) upheld the decision of Single Judge and observed as under:-*

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

*"10. No words or expressions used in any statute can be said to be redundant or superfluous. In matters of interpretation one should not concentrate too much on one word and pay too little attention to other words. No provision in the statute and no word in any section can be construed in isolation. Every provision and every word must be looked at generally and in the context in which it is used. It is said that every statute is an edict of the legislature. The elementary principle of interpreting any word while considering a statute is to gather the mens or sententia legis of the legislature. Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to take upon itself the task of amending or alternating (sic altering) the statutory provisions. Wherever the language is clear the intention of the legislature is to be gathered from the language used. While doing so, what has been said in the statute as also what has not been said has to be noted. The construction which requires for its support addition or substitution of words or which results in rejection of words has to be avoided. As stated by the Privy Council in *Crawford v. Spooner [(1846) 6 Moore PC 1 : 4 MIA 179]* "we cannot aid the legislature's defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are left there". In case of an ordinary word there should be no attempt to substitute or paraphrase of general application. Attention should be confined to what is necessary for deciding the particular case. This principle is too well settled and reference to a few decisions of this Court*

*would suffice. (See : Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. v. Custodian of Vested Forests [1990 Supp SCC 785 : AIR 1990 SC 1747] , Union of India v. Deoki Nandan Aggarwal [1992 Supp (1) SCC 323 : 1992 SCC (L&S) 248 : (1992) 19 ATC 219 : AIR 1992 SC 96] , Institute of Chartered Accountants of India v. Price Waterhouse [(1997) 6 SCC 312] and Harbhajan Singh v. Press Council of India [(2002) 3 SCC 722 : JT (2002) 3 SC 21] .)"*

29. *The language employed is simple. 31-12-2019 is the last date for the assessing officer to pass his order under section 153. The TPO has to pass order before 60 days prior to the last date. The 60 days is to be calculated excluding the last date because of the use of the words "prior to" and the TPO has to pass order before the 60th day. In the present case, the word "before" used before "60 days" would indicate that an order has to be passed before 1-11-2019 i.e on or before 31-10-2019 as rightly held by the Learned Judge.*

30. *Even considering for the purpose of alternate interpretation, the scope of section 9 of the General Clauses Act, it is to be noted that an inverted calculation of the period of limitation takes place here. If the last date is taken to be the first date from which the period of 60 days is to be calculated, reading down the provision with the use of the word "from", which denotes the starting point or period of direction in general parlance, would mean that 60 days "from the last date". Even going by section 9 of the General Clauses Act, when the word "from" is used, then, that date is to be excluded, implying here that 31-12-2019 must be excluded. After excluding 31-12-2019, if the period of 60 days is calculated, the 60th day would fall on 1-11-2019 and the TPO must have passed the order on or before 31-10-2019 as orders are to be passed before the 60th day. Therefore, either way the contention of the Revenue is a fallacy and has no legs to stand.*

*Mandatory or Directory*

31. *The next contention that has been raised by the learned senior standing counsel for the appellants is that the usage of the word "may" in section 92CA (3A) indicates that the time fixed is only directory, a guideline, not mandatory and is for the sake of internal proceedings.*

32. Let us now examine the relevant procedures relating to Transfer Pricing. After an international transaction is noticed subject to satisfaction of section 92B, a reference is made to the TPO under sub-section (1) of section 92CA of the Act. The TPO after considering the documents submitted by the assessee is to pass an order under section 92CA (3) of the Act. As per section 92CA(3A), the order has to be passed before the expiry of 60 days prior to the date on which the period of limitation under section 153 expires. As per 92CA(4), the assessing officer has to pass an order in conformity with the order of the TPO. After receipt of the order from the TPO determining ALP, the assessing officer is to forward a draft assessment order to the assessee, who has an option either to file his acceptance of the variation of the assessment or file his objection to any such variation with the Dispute Resolution Panel and also the Assessing Officer. Sub-section (5) of section 144C of the Act provides that if any objections are raised by the assessee before the Dispute Resolution Panel, the Panel is empowered to issue such direction as it thinks fit for the guidance of the Assessing Officer after considering various details provided in Clauses (A) to (G) thereof. Sub-section (13) of section 144C of the Act provides that upon receipt of directions issued under sub-section (5) of section 144C of the Act, the Assessing Officer shall in conformity with the directions complete the assessment proceedings. It goes without saying that if no objections are filed by the Assessee either before the DRP or the assessing officer to the determination by the TPO, section 92CA(4) would come into operation. Therefore, it is very clear that once a reference is made, it would have an impact on the assessment unless a decision on merits is taken by DRP rejecting or varying the determination by the TPO.

33. It would only be apropos to note that as per proviso to section 92CA (3A), if the time limit for the TPO to pass an order is less than 60 days, then the remaining period shall be extended to 60 days. This implies that not only is the time frame mandatory, but also that the TPO has to pass an order within 60 days.

34. Further, the extension in the proviso referred above, also automatically extends the period of assessment to 60 days as per the second proviso to section 153.

35. Also, but for the reference to the TPO, the time limit for completing the assessment would only be 21 months from the end of the assessment year. It is only if a reference is pending, the department gets another 12 months. Once reference is made and after availing the benefit of the extended period to pass orders, the department cannot claim that the time limits are not mandatory. Hence, the contention raised in this regard is rejected.

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

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

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

38. *In case of assessments involving transfer pricing, fixing of time limits at various stages sets forth that the object of the provisions is to facilitate faster assessment involving such determination. In the present case, as rightly held by the learned Judge in paragraphs 22 to 29 of the order dated 7-9-2020, the order of the TPO or the failure to pass an order before 60 days will have an impact in the order to be passed by the Assessing Officer, for which an outer time limit has been prescribed under sections 144C and 153 and is hence mandatory. What is also not to be forgotten, considering the scheme of the Act, the inter-relatability and inter-dependency of the provisions to conclude the assessment, is the consequence or the effect that follows, if an order is not passed in time. When an order is passed in time, the procedures under 144C and 92CA(4) are to be followed. When the determination is not in time, it cannot be relied upon by the assessing officer while concluding the assessment proceedings.*

39. *Upon consideration of the judgments and the scheme of the Act, we are of the opinion that the word "may" used therein has to be construed as "shall" and the time period fixed therein has to be scrupulously followed. The word "may" is used there to imply that an order can be passed any day before 60 days and it is not that the order must be made on the day before the 60th day. The impact of the proviso to the subsection clarifies the mandatory nature of the time schedule. The word "may" cannot be interpreted to say that the legislature never wanted the authority to pass an order within 60 days and it gave a discretion. Therefore, the learned Judge rightly held the orders impugned in the writ petitions as barred by limitation, as the Board, in the Central Action Plan, has specified 31-10-2019 as the date on which orders are to be passed by the TPO, reiterating the time limit to be mandatory."*

*The period of limitation for passing the assessment order in the instant case expires on 31/03/2014. The time limit for passing the order u/s. 92CA(3A) is sixty days prior to the date on which the limitation referred in section 153 of the Act expires. Thus, the limitation in the present case for passing the order u/s. 92CA(3) of*

*the Act expires on 29/01/2014. The TPO passed the order u/s. 92CA(3) of the Act on 30/01/2014. Ergo, the order u/s. 92CA(3) of the Act is surely time barred by one day.*

*15. The Ld. Departmental Representative has referred to Finance Act 2007 – Explanatory Notes on provisions relating to Direct Taxes issued vide Circular No.3/2008 dated 12/03/2008. A perusal of clause 43 of said circular would show that the expression used to depict time limit is "months". Whereas in the Act, the Legislature has specified the period of limitation in "days". The expression two months used in clause 43(2) in the aforesaid circular to specify the period of limitation may not necessarily be equal to sixty days as specified in the Act. The words/expressions used in statute cannot be substituted in Explanatory notes or Board Circulars. If the limitation period is mentioned in days in the Act, the same expression has to be used in Circulars. Otherwise it will lead to confusion and ambiguity. "Two months" as mentioned in Circular can be more or even less than sixty days. Therefore, expression issued to evaluate limitation period as specified in the Act has to be strictly followed.*

*16. The Id.Counsel for the assessee has further pointed that reference to DRP can only be made by "eligible assessee". The expression "eligible assessee" has been defined in sub-section (15) to section 144C of the Act . The definition of eligible assessee is reproduced herein below:*

*"(b) "eligible assessee" means –*

*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"*

*A perusal of the above definition would show that eligible assessee mean any person in whose case variation arises as a consequence of the order of the TPO passed u/s. 92CA(3) of the Act. The order has to be a valid order. In the instant case since, the order of TPO was beyond the period of limitation it is not a valid order. Therefore, there is no "eligible assessee" in terms of the definition provided in*

*sub-section (15) to section 144C of the Act . If there is no eligible assessee, no reference to DRP could have been made. Once the substratum for making the assessment under transfer pricing mechanism erodes the subsequent proceedings emanating from flawed foundation is without jurisdiction.*

*17. In the light of facts of the case and decisions referred above, we find merit in the additional grounds of appeal No.48 & 49. The assessee succeeds on the aforesaid legal grounds.*

*18. No arguments were made by Id. Counsel for the assessee in respect of original grounds of appeal / other additional grounds of appeal at this stage. Hence, they are left open for adjudication, if the need arises.*

*19. In the result, appeal by the assessee is allowed.”*

**13.** Respectfully following the above said decision and taking into the provisions of law, we hold that TPO order u/s. 92CA(3) of the Act was passed on 30.01.2014 is beyond the prescribed period of limitation expiring on 29.01.2014, thus, barred by limitation and is hereby quashed. Accordingly, additional ground No.1 raised by the assessee is allowed.

**14.** Coming to the Second additional ground, the assessee has prayed that the Assessment Order is also illegal, bad in law and bared by limitation. In this regard, assessee relied on the decision of the M/s. Atos India Pvt. Ltd., v. DCIT in ITA.No. 1795/Mum/2017 dated 23.02.2023. We observe that the Coordinate Bench has considered the issue under consideration and held 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,—

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

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.

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-initio 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 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:

- (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.com 17/198 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 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.

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.*

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) forties 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, 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.** Respectfully following the above decision and taking into consideration the provisions of law, we hold that the final Assessment Order passed on 15.05.2014 is beyond the prescribed period of limitation. Accordingly, additional ground No.2 raised by the assessee is allowed.

**16.** In respect of original grounds raised by the assessee, as we have quashed the final assessment order dated 15.05.2014 by allowing the additional ground raised by the assessee, we are not adjudicating the original grounds and the same are become infructuous.

**17.** In the result, appeal filed by the assessee is allowed.

**ITA.No. 2990/Mum/2019 (Revenue appeal)**

**18.** Revenue has raised following grounds in its appeal: -

"1. (a) "On the fact and circumstances of the case and in the law, the Ld. CIT(A) erred in restricting ALP of guarantee fee, in respect of corporate guarantee given by assessee to its AEs to enable them to barrow funds from foreign bank, to 0.5% as against 3% as held by TPO/AO.

(b) Without prejudice whether the facts and circumstances of the case and in law the Ld. CIT(A) is justified in considering he guarantee commission paid by the Gammon India Ltd. to Canara Bank @ 0.4% to be considered as CUP when the guarantee commission of 0.4% was a transaction between the Canara Bank (in India) and the Gammon India Ltd, which could not be considered as comparable for transaction of guarantee when Gammon India Ltd. stands as a guarantee for foreign AES, which had lower asset base and lower credit rating that of Gammon India Ltd. and hence a defective CPU.

2. On the fact and circumstances of the case and in the law, the Ld. CIT(A) erred in directing apply 0.5% referring to Rolta India Ltd. (citation) and thus inadvertently applying the judgment in case of Everest Kanto Cylinders Limited(EKC) without taking into account.

a. That the quote obtained by EKC was in respect of Indian entity and not in respect of foreign entity and thereby ignored the important consideration of difference in credit rating of the entities. The Ld. CIT(A) ignored the fact that the entity obtaining loan in foreign jurisdiction for which EKC stood as a guarantor had lower credit rating and EKC India had much more financial strength than that of its subsidiary situated in foreign jurisdiction.

b. That the starting point in EKC's case was obtaining quote for bank guarantee (BG) by EKC which was used for benchmarking corporate guarantee (CG) despite the fact that BG and CG has some differences.

c. That the decision in the case of Everest Kanto cannot be the standard for every assessee as held the Hon'ble Tribuna, Kolkata in the case of DCIT Circle 6(1), Kolkata vs. M/s. National Engineering (ITA Nos. 986 & 987/Kol./2017).

3. Whether on the facts and circumstances of the case and in the law, the Ld. CIT(A) erred in allowing the expenditure on purchases

*of Rs.2,24,08,682/- from Naveen Traders and Rs. 1,88,45,099/- from Narayan Suppliers without appreciating the fact that the assessee failed to substantiate the purchases with any supporting documents and these were clearly the bogus entries to evade tax."*

**19.** As the appeal of the assessee is allowed by quashing the "Draft Assessment Order" and "Final Assessment Order", the grounds raised by the revenue are dismissed.

**20.** In the result, appeal filed by the Revenue is dismissed.

**21.** To sum-up, appeal filed by the assessee is allowed and appeal filed by the revenue is dismissed.

Order pronounced in the open court on 22<sup>nd</sup> September, 2023

**Sd/-**  
**(RAHUL CHAUDHARY)**  
**JUDICIAL MEMBER**

Mumbai / Dated 22/09/2023  
Giridhar, Sr.PS

**Sd/-**  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

**Copy of the Order forwarded to:**

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)  
**ITAT, Mum**