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

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND MS ASTHA CHANDRA, JUDICIAL MEMBER

SA No. 80/DEL/2022

([A/o ITA No. 417/DEL/2022 [A.Y. 2017-18])
&

ITA No. 417/DEL/2022 [A.Y. 2017-18]

Haier Appliances [I] Pvt Ltd Building No. 1, Okhla Industrial Estate, Okhla Phase – III, Delhi	Vs.	The Dy. C.I.T IT & TP Delhi 2(1)(1)

PAN: AABCH 3162 L

(Applicant) (Respondent)

Assessee By : Shri Nageshwar Rao, Adv
Shri Parth, Adv
Shri Akshay Uppal, Adv

Department By : Shri Rajesh Kumar, CIT-DR
Shri Manu Chaurasia, Sr. DR

Date of Hearing : 11.10.2023
Date of Pronouncement : 17.10.2023

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order dated 31.01.2022 framed u/s 143(3) r.w.s 144C(13) r.w.s 144B of the Income-tax Act, 1961 [hereinafter referred to as 'The Act'] pertaining to A.Y. 2017-18.

2. The grievances of the assessee read as under:

> "Based on the facts and circumstances of the case and in law, Haier Appliances India Pre Limited (hereinafter referred to as Haler India or the Appellant) craves leave to prefer an appeal against the order passed by the National Faceless Assessment Centre Delhi (hereinafter referred to as "NEAC or AO) pursuant to directions issued by the Hon'ble Dispute Resolution Panel thereinafter referred to as DRP) under 144C(13) read with Section 254 and 144B of the Income-tax Act, 1961 (hereinafter referred to as the Act) on the following grounds:
>
> 1. On the facts and circumstances of the case and in law, the assessment order/directions passed by id AO/ Transfer Pricing Officer (TPO)/ DRP are bad in law.

2. On the facts and circumstances of the case and in law, the final assessment order is bad in law as the AO/TPO have not followed the DRP directions.

3 On the facts and circumstances of the case and in law, the final assessment order is bad in law as the AO/ TPO have exceeding their jurisdiction by going beyond DRP's directions

4. On the facts and circumstances of the case and in law, the assessment proceedings are time barred as the same have not been completed within prescribed timelines.

5. On the facts and circumstances of the case and in law, the final assessment order is bad in law since it violates the order of Hon'ble High Court in Appellant's own case by making an adjustment using Brightline Test and enforcing demand on the same.

6. Without prejudice to the above, even if adjustment made using Brightline Test is help to be protective on the facts and circumstances of the case and in law the final assessment order is bad in law as an adjustment is made on protective basis which has no legal existence as per the provisions of the Act.

GROUNDS AGAINST CONSIDERING ADVERTISEMENT, MARKETING AND PROMOTION ("AMP") FUNCTION AS AN INTERNATIONAL TRANSACTION

7. The TPO /AO erred on facts and in law by assuming jurisdiction in respect of the AMP expenditure when such expenditure did not

satisfy the requisites of being international transaction under Section 92B read with Section 92F(v) of the Act;

8. The TPO /AO erred on facts and in law by determining arm's length price on account of AMP expenses in the absence of any machinery provisions in Chapter X of the Act which are applicable to AMP expense.

9. The TPO /AO erred on facts and in law by holding that the Appellant should have been compensated by the Associated Enterprises ("AEs") for the AMP expenses incurred without demonstrating the existence of any understanding or an agreement between the Appellant and its AEs which requires the Appellant to spend excessively towards brand promotion.

10. The TPO /AO erred on facts and in law by holding that the Appellant was incurring expenditure primarily for promoting Haier brand and creating marketing intangibles for the parent company and ignoring that the same directly benefitted the Appellant's sale;

11. The TPO AD erred on facts and in law by assuring that AMS expenses incurred by Appellant have led to creation of marketing intangibles.

12. The TPO / AO erred on facts and in law by incorrectly holding the AMP expense incurred by the Appellant to be 'non-routine on the basis of a "bright line test".

13. The TPO / AO erred on facts and in law by considering routine selling expenses for computing the alleged excess AMP expenditure.

GROUNDS AGAINST BENCHMARKING OF AMP FUNCTION

14. The TPO /AO erred on facts and in law by undertaking multiple assessments of the same transaction using different methodologies without appreciating the tact a transaction can only be benchmarked using the "Most Appropriate Method" (MAM) only once

15. The TPO /AO erred on facts and in law by bundling and unbundling AMP transaction with the main business in the same order.

16. The TPO /AO erred on facts and in law by ignoring that the AMP function is already subsumed in net profits earned by the company and hence, appropriately benchmarked using Transactional Net Margin Method.

17. The TPO /AO erred on facts and in law by making incorrect adjustments under garb of intensity adjustment which is not as per prescribed Rules for application of Transactional Net Margin Method (TNMM) and that in absence of availability of adequate and accurate data in public domain, ad-hoc adjustment is not permissible under provision of Act and Rules.

18. The TPO /AO erred on facts and in law by not appreciating that AMP/Sales ratio is not measure of intensity of AMP function.

19. Without prejudice to any other grounds. Intensity adjustment used to adjust net profit margin of comparable companies purportedly to equalise functions, appears to be mere mirror image of already invalidated Bright Line Test (BLT) adopting same ratio, rationale and parameters

20. Without prejudice to any other contentions, the AMP transaction can be benchmarked using the adjusted Resale Price Method (RPM) which is preferred by the HC over segregation approach in Appellant's own case.

21. The TPO /AO erred on facts and in law by treating certain items of income as non-operating in nature, in complete ignorance of the commercial/business realities of the Appellant's business.

22. The TPO /AO erred on facts and in law by including extraordinary expenses in the operating cost base while computing operating profitability of the Appellant.

23. The TPO /AO erred on facts and in law by using inappropriate companies as comparable for the mark-up on alleged brand building/AMP expenditure.

24. The TPO /AO erred on facts and in law by excluding grant received from AES while computing its operating margins from the business. Without prejudice, the AO/ TPO has erred on facts and in law by reducing only a proportion of revenue grant received while computing the final adjustment.

GROUNDS PERTAINING TO PROTECTIVE ADJUSTMENT

25. The preceding grounds already address issues regarding computation of adjustments on protective basis.

GROUND AGAINST CORPORATE TAX ADDITION

26. That on the facts and circumstances of the case, the AO/ DRP has erred in making an addition of Rs 1,50,66,205/- under Sec 28(iv) of the Act, without considering that:

a. There arose no benefit or perquisite from the exercise of business activities of the Appellant,

b. The Appellant was bound to issue the share capital at face value, owing to the regulations prescribed by Companies Act, 2013,

c. The issuance of share capital is a capital transaction and hence, cannot be made taxable as a revenue receipt,

d. There wasn't any non-monetary benefit that arose out of the impugned transaction of receipt of share capital, which may warrant the applicability of section 28(iv).

e. The action of AO/ DRP in mis-interpretating the provision of Law and its application thereof is patently bad, untenable and illegal in the eyes of law.

GROUNDS PERTAINING TO PENALTY PROCEEDINGS

27. That on facts and in laws, the AO/ TPO/ DRP erred in holding that the Appellant has underreported its income in respect of each item of disallowance/ additions and in initiating penalty proceedings under section 270A read with section 274 of the Act.

The Appellant craves leave to add, alter, modify or delete such other objections before or during the course of hearing before the Hon'ble Income Tax Appellate Tribunal (ITAT"), so as to enable the Hon'ble ITAT to decide on the grounds raised by the Appellant, as per law."

3. The substantive ground argued before us is Ground No. 4 which reads as under:

"4. On the facts and circumstances of the case and in law, the assessment proceedings are time barred as the same have not been completed within prescribed timelines."

4. Briefly stated, the facts of the case are that the assessee is primarily engaged in distribution of various home appliances, products which, mainly includes freezers, refrigerators, color televisions, washing machine, air conditioners, water heaters, microwave ovens, etc. Return of income was electronically filed on 30.11.2017 declaring an income of Rs. 43,97,33,630/-.

5. TP adjustment was completed vide order dated 28.01.2021. Draft assessment order was framed on 31.03.2021. The DRP disposed the objections of the assessee vide letter dated 26.11.2021. The order

giving effect to the directions is dated 27.01.2022 and final assessment order was passed on 31.01.2022.

6. The entire quarrel revolves around the date of order of the DRP and final assessment order. The bone of contention is the provisions of section 144C clause (13) of the Act which says that :

> **"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 [51a][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."**

7. Apparently, it can be seen that the order of the DRP is dated 26.11.2021 and assessment order is dated 31.01.2022. In light of the provisions of clause (13) of section 144C of the Act, the Assessing Officer has to pass order within one month from the end of the month in which such direction is received.

8. This is the starting point of the entire quarrel.

9. The representatives of both the sides were heard at length, the case records carefully perused. Relevant documentary evidences brought on record duly considered in light of Rule 18(6) of the ITAT Rules. Judicial decisions considered wherever necessary and relevant.

10. The ld. counsel for the assessee vehemently claimed that the DRP order was received by the Assessing Officer on 30.11.2021. Therefore, the assessment order framed on 31.01.2022 is barred by limitation.

11. Refuting the claim of the assessee, the ld. DR strongly stated that the directions of the DRP u/s 144C(5) of the Act were not accessible to FAU on ITBA before 01.12.2021. Therefore, the receipt of direction in terms of section 144C(13) of the Act cannot be considered any time before . Therefore, finalization of the assessment order on 31.01.2022 was done well within the time prescribed u/s 144C(13) of the Act.

12. The ld. counsel for the assessee referred to various emails and clarifications mentioned in the written submissions of the CIT - DR dated 27.06.2022 and pointed out that even the Revenue has accepted that the DRP directions were issued by the DRP Secretariat through the

ITBA on 30.11.2021, though subsequently, it has been clarified as under:

"2.1 In order to verify the contents of the e-mail as well as its authenticity, this office has sent an e-mail communication to DRP-1, New Delhi. The DRP-1 has given a reply vide e- mail dated 10.06.2022 which is enclosed as "Annexure A" to these submissions for kind perusal. The reply of the DRP is reproduced as under for clarity sake:

"In the mail sent on 2nd June 2022, an inadvertent mistake was made whereby the DRP mentioned to have been "delivered" instead of "issued" on 30.11.2021. The DRP Secretarial can only confirm the issuance of the DRP directions via the ITBA portal on 30.11 2021 (DIN no: ITBA/DRP/S/91/2020-21/1037373340(1). The Secretarial cannot confirm the date of receipt of the DRP order by the A0 as there is no option on ITBA to confirm the same. The receipt of the DRP order by the AO can only be confirmed by the AO or NeFAC, as the case maybe."

13. Further clarification by the Revenue reads as under:

An e-mail communication was also sent to the jurisdictional Assessing Officer i.e. ACIT, Circle 10(1) in order to confirm the date of receipt of the direction of the DRP. The reply received from the jurisdictional Assessing Officer is being reproduced as under-

"In this regard, it is informed that as per ITBA case history noting, the Direction of DRP was never received in this office. On receiving the request from Ne FAC, the same was obtained from the DCIT, TP 2(1)(1), New Delhi through e-mail in January, 2022. A perusal of the same shows that DRP order dated 26-11-2021 was sent to the assessee on 30-11-2021 by generating DIN No. ITBA/DRP/S/91/2021-22/1037373340(1). The DRP order was not marked to the JAO. It was endorsed to the CIT(TP)-2, Delhi, AC/DCIT (IT&TP)-2(1)(Delhi and National e-Assessment Centre, Delhi. The DRP order was received manually in the office of CIT(TP)-2 Delhi & AC/DCIT (IT&TP)-2(1)(1), Delhi on 01-12-2021 and 06-12-2021 respectively (Copy of evidence in the form of office stamp attached). Accordingly, the TPO passed the order giving effect to the directions of the DRP on 27-01-2022 through ITBA common module which was received by the JAO and concerned FAO. The undersigned (JAO) uploaded the same on 28-01-2022. Thereafter, the FAO passed the final assessment order case on 31-01-2022. Screen shot of case history noting for the relevant period is attached"

14. A perusal of the aforementioned email shows that the directions of the DRP were never forwarded to the Jurisdictional Assessing Officer. Directions of the DRP were received by the CIT (TP)-2, Delhi

and AC/DCIT (IT & TP) 2(1)(1) Delhi on 01.12.2021 and 06.12.2021 respectively.

15. Assessment history is also part of the record and as per the case history recorded on 31.01.2022, it is clearly mentioned by the Assessing Officer of the Assessment Unit that the DRP order is not yet received and in the same case history, the JAO has also mentioned that the draft assessment order was prepared u/s 144C(13) of the Act on the basis of order giving effect of DRP order by the TPO and DRP order was not recorded till date of proposal for generation of final order u/s 144C(13) of the Act.

16. It would be pertinent to refer to the reply received from Faceless Assessing Officer, heavily relied upon by the ld. DR, which reads as under:

> ***"I am directed to forward the trail mail received from ITBA in the above matter and to convey as under:-A perusal of the mail shows that the direction of DRP u/s 144C(5) was not accessible to FAU on ITBA before 01. 12.21 at 2.30.06 AM Hence the receipt of direction in terms of section 144C(13) cannot be considered anytime before. As such it is clear that the finalization of assessment order on 31.01.2022 was done well within the time***

prescribed u/s144C(13) of the Act Kindly let us know if any further details are required in this matter."

17. The ld. DR also referred to the following mail received by the DDIT 4 Systems ITBA :

"Please refer to your below email on the subject cited above. In this regard, I am directed to attach herewith the case history/noting of the case, as desired. Besides, I am also directed to provide the below details as provided by the technical team for taking necessary further action at your end:-

1. Order u/s 144C(5) for PAN AABCH3162L was passed as Manual to system with creation date (date of upload): 30.11.2021 2.19:47 PM and issue date (user entered): 26.11.2021 2:19:47 PM

2. Intimation entry of the document related to DIN was created on 30.11.2021 2:21:44 PM. Due to technical error, it was generated corrupt, so intimation was retriggered and issued on 01.12.2021 2:30:06 AM

3. Order u/s 144C(5) was not visible to the FAQ in his case/history/noting."

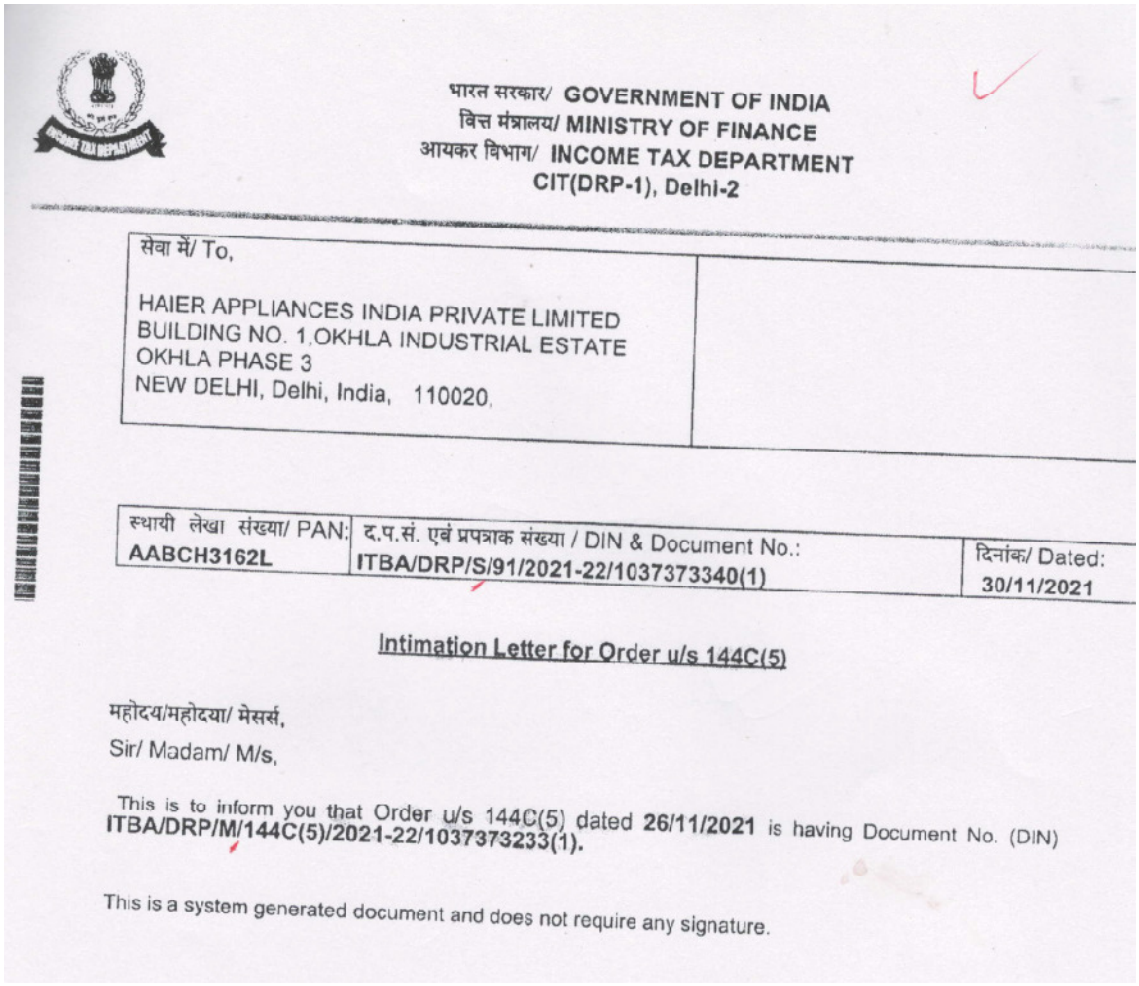
18. Based upon the aforementioned information/clarification/email, the ld. DR stated that the order of the DRP containing the directions was issued only on 30.11.2021. However, due to technical error, it got corrupted and so intimation was retriggered and issued on 01.12.2021, which makes the directions of the DRP issued only on 01.12.2021 and, therefore, the same could not have been received by the Assessing Officer before 01.12.2021 and, therefore, the impugned assessment order is well within the period of limitation.

19. To buttress his submissions, the ld. DR referred to the provisions of section 144C(13) of the Act and pointed out that the provisions starts with ***"Upon receipt of the directions".*** It is the say of the ld. DR that since the provision refers to only receipt by the Assessing Officer, therefore, period of limitation has to be considered from the date of directions received by the Assessing Officer. It can be Faceless Assessing Officer [FAO] or Jurisdictional Assessing Officer [JAO].

20. At this stage, it is pertinent to mention that if due to some technical glitch the intimation had to be retriggered on 1st December, then how come the Assessing Officer has not received the order till 31.01.2022 as per the case history filed by the ld. DR?

21. The ld. counsel for the assessee explained the meaning of "Receipt" within the framework of faceless assessment vis a vis relevant provision of Information Technology Act, 2000 and stated that as per the relevant provision, the date of receipt would be 30.11.2021 and, therefore, the impugned assessment order is barred by limitation.

22. We have carefully perused the written submissions of the ld. DR and have carefully considered the rival contentions. Following is the Intimation Letter for order u/s 144C(5) of the Act:



भारत सरकार/ GOVERNMENT OF INDIA
वित्त मंत्रालय/ MINISTRY OF FINANCE
आयकर विभाग/ INCOME TAX DEPARTMENT
CIT(DRP-1), Delhi-2

सेवा में/ To,

HAIER APPLIANCES INDIA PRIVATE LIMITED
BUILDING NO. 1,OKHLA INDUSTRIAL ESTATE
OKHLA PHASE 3
NEW DELHI, Delhi, India, 110020.

स्थायी लेखा संख्या/ PAN:	द.प.सं. एवं प्रपत्राक संख्या / DIN & Document No.:	दिनांक/ Dated:
AABCH3162L	ITBA/DRP/S/91/2021-22/1037373340(1)	30/11/2021

Intimation Letter for Order u/s 144C(5)

महोदय/महोदया/ मेसर्स,
Sir/ Madam/ M/s,

This is to inform you that Order u/s 144C(5) dated **26/11/2021** is having Document No. (DIN) **ITBA/DRP/M/144C(5)/2021-22/1037373233(1).**

This is a system generated document and does not require any signature.

23. From the above, it can be seen that the order u/ 144C(5) of the Act is dated 26.11.2021 having a DIN Number manually generated which was intimated on 30.11.2021 having System Generated DIN Number. This has also been confirmed through email by the Secretary, DRP which reads as under:

> **"The above referred case came up for hearing before the Hon'ble I- Bench, ITAT Delhi on 09.06.2022 The AR of the assessee stated that the assessment of the above case has been barred by the limitation as the last date of assessment was 31.12.2021 and the assessment of this case was completed u/s 143(3) sub sec. 144(C) on 31.01.2022. The assessee has also enclosed the copy of the e-mail dated 02.06.2022 by the DRP-1. The content of the e-mail filed by the assessee during the course of hearing is reproduced as under:**
>
> ***"From : delhi.secretay.drp I***
>
> ***Sent : 02 June 2022 15:37***
>
> ***To : Priya Sharma***
>
> ***Cc : amia. Singh: bsgusain: Rachit Arora***
>
> ***Subject : inspection/request to confirm date of dispatch of Panel's order in the case of Haier Appliances India Private Limited (PAN AABCH31621) for the A.Y 2017-18 reg.***
>
> ***Please refer to your letter dated 01.06 2022 with regard to the above mentioned subject.***

In this regard, it is to inform you that directions 26.22.2021 of the Hon'ble Panel in the above mentioned case has been delivered to the concerned Assessing Officer through ITBA on 30.11.2021."

24. However, this has been subsequently clarified that it has been wrongly mentioned as "delivered" instead of "issued" on 30.11.2021. Now, the controversy boils down to decide whether "issue" and "receipt" are two different events, or both are inter-changeable.

25. At this stage, it would be pertinent to understand the relevant provisions for the purpose of faceless assessment, which are provided u/s 144B(6)(v) of the Act and read as under:

> v) **the time and place of dispatch and receipt of electronic record shall be determined in accordance with the provisions of section 13 of the Information Technology Act, 2000 (21 of 2000);"**

26. The provisions are absolutely clear. Time and place of dispatch has to be in accordance with the provisions of Section 13 of the Information Technology Act, 2000. This provision was examined and interpreted by the Hon'ble Supreme Court in the case of G.S. Chatha

Rice Mills and Another 2021 2 SCC 209 at page 263 Para 85 of the order which reads as under:

"85. Section 13 of the Information Technology Act, 2000 contains provisions for the time and place of the dispatch and receipt of electronic records. It reads as follows:

"13. **Time and place of dispatch and receipt of electronic record** - (1) Save as otherwise agreed to between the originator and the addressee, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator.

(2) Save as otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely-

(a) if the addressee has designated a computer resource for the purpose of receiving electronic records,-

(i) receipt occurs at the time when the electronic record enters the designated computer resource; or

(ii) if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;

(b) if the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resources of the addressee." (emphasis supplied)

> The dispatch of a record occurs when it enters a computer resource outside the control of the originator. The time of receipt of the electronic record is fixed by the provisions of sub-section (2) of Section 13. When the addressee has designated a computer resource, receipt occurs when the record enters the computer resource so designated. Otherwise, where no computer resource is designated, the receipt of the record is when it is retrieved by the addressee. These provisions have been incorporated in the law to enable the dispatch and receipt of a record in the electronic form to be defined with precision with reference to both time and place."

27. A perusal of the above shows that dispatch of electronic record [DRP in this case] occurs when it enters a computer resource outside the control of the originator [in this case order entered the computer resource on 30.11.2021] and as per section 13(2A)(i) of the Act, receipt occurs at the time when the electronic record enters the designated computer resource i.e. 30.11.2021 on facts of the case discussed hereinabove.

28. If the contention of the ld. DR is accepted for the sake of argument, then, as per the email communication, the Assessing Officer has not received the directions of the DRP till date and he has categorically admitted that final order is being generated based on TPO's order giving effect to the DRP's order dated 27.1.2022.

29. This fact has been admitted and can be seen from the order sheet entry dated 31.01.2022 submitted by the ld. DR as received by him from Faceless Centre. It would not be out of place to extract the entire notings which are as under:

"Notings /Remarks: Objection filled by Assessee. DRP order is not yet received by this office. TPO's order effect of DRP order is received on 27.01.2022.

Signature:

31/01/2022	**Added Additional remarks**	**AO-Assessment Unit**	**-**	

Notings/Remarks: Office Note: One of the reasons being TP Risk Parameters the case was transferred to the TPO and the TPO in his order u/s. 52CA (3) of the Act on 28.01.2021 made adjustments of Rs.3,33,20,79,821/- out of which Rs.1, 68, 86, 67, 646/- is the addition made on Substantive basis and Re 1,64,34,12,175/- is the addition made on Protective basis. The other reasons mentioned in the CASS have been verified and an addition of Rs.1,50,66,205/- after disallowance of Shares issued above book value. 2. The assessee being aggrieved by the Draft Assessment Order u/s.144C of the Act filed objections along with Form No.35A on 29.04.2021 before Dispute Resolution Panel-1, New Delhi. During the DRP proceedings, the assessee had objected to the Determination of ALP by the TPO regarding AMP

(Advertising Marketing and Promotional) expense and Adjustment on account of trading segment [Substantive Adjustment (Intensity) & Protective Adjustment (Brightline Test)]. 3. The TPO in its order vide DIN & Order No: ITBA/COM/F/17 /2021-22/1039115464 (1) dated 27.01.2022 re-calculated the arm's length pr ice based upon the directions of the Hon'ble DRP. After including the effect of the direction of the Hon'ble DRP by the TPO, the total income of the assessee is computed as under: Income as per ITR Rs.43,97,33,630/- Additions:- 1. Substantive Adjustment as per directions of the DRP Rs.26,78,22,689/- 2. Protective Adjustment as per directions of the DRP Rs.43,76,04,795/- 1. Disallowance of Shares issued above book value Rs.1,50,66,205/- Total Assessed Income Rs.1,16,02,27,319/- Rounded off (u/s. 288A) Rs.1,16,02, 27, 320/- Penalty proceedings u/s. 270A read with section 274 of the IT Act is initiated separately for under reporting of income of Rs.1,50,66,205/-. 4. Order Giving Effect dtd. 27.01.2022 has been received on 27.01.2022 from TPO - DC/ACIT-2 (1) (1), Delhi in case history notings and 360 * profile. However, on perusal of the 360* profile, case history notings, view/download notices/order, it is found that the copy of the DRP order has not been received by this office till 31.01.2022. However, considering the limitation date of 31.01.2022 for the case under consideration it is pertinent that final order should be generated on 31.01.2022 itself. As DRP order is not received by this office till generation of final order u/s 144C (13) on 31.01.2022, final order is being generated based on TPO's order Giving Effect dtd. 27.01.2022 of DRP's Order. Further, for the purpose of

calculation of time limitation on system on ITBA for passing order u/s 144C (13) of the Act in the case under consideration, date of TPO's Order Giving Effect of DRP i.e. 27.01.2022 is considered.

(Emphasis by us)

Signature:

31/01/2022	Documents /Response received from 'Uploading of documents based on DIN/ PAN AY'screen	DC/ACIT (NEAC)-2(2)(2) DEL	AO-Assessment Unit	AABCH3162L 17.Rar

30. The above admission also goes to show that the Assessing Officer has framed the final assessment order without receiving directions of the DRP issued u/s 144C(5) of the Act but based upon the TPO's order giving effect to the directions of the DRP. This, in itself, makes the assessment order bad in law and non-est.

31. At this stage, if the arguments of the ld. DR are to be accepted, then if the Assessing Officer does not receive the assessment order, (as in the present case) then the period of limitation prescribed u/s 144(C)(13) of the Act would be at the mercy of the Assessing Officer.

32. Coming back to the controversy of “issue” and “receipt”, we are aware of the decision of the Hon'ble Supreme Court who had an occasion to resolve this dispute in the case of VRA Cotton Mills Pvt Ltd Vs. UOI & Ors in Special Leave to Appeal [Civil] No. 34846/2011 arising from the judgment and order dated 27.09.2011 in CWP No. 18193/2011 of the Hon'ble High Court of Punjab and Haryana at Chandigarh.

33. The challenge in the aforementioned Writ Petition is to the notice dated 30.09.2010 issued u/s 143(2) of the Act. The petitioner challenged that this notice was not served on the assessee till 30.09.2010, which is the last date of limitation.

34. The Hon'ble Supreme Court referring to the provisions of section 143(2(ii) of the Act, which contemplates that no notice under the said clause shall be served on the assessee after expiry of six months. The Hon'ble court put to question what is the meaning of the expression “served”, whether such expression is to be used literally, so as to mean that actual physical receipt of notice by the assessee or the expression “served” is inter-changeable with the word “issue”.

35. The relevant findings of the Hon'ble Supreme Court read as under:

"We are of the opinion that the expressions 'serve' and 'issue' the opinion that are interchangeable, as has been noticed in Section 27 of the General Clauses Act, 1887 and also in a judgment of Hon'ble Supreme Court reported as Banarsi Devi Ys. The Income Tax Officer, District IV. Calcutta and others AIR 1964 SC 1742. In the aforesaid case, an argument was raised that Section 4 of the Amending Act (Act No.1 of 1959) only saves a notice issued after the prescribed time, but does not apply to a situation where notice is issued within but served out of time. The Court observed as under:

"(10).....Section 4 of the Amending Act was enacted for saving the validity of notices issued under Section 34(1) of the Act. When that Section used a word interpreted by courts in the context of such notices, it would be reasonable to assume that the expression was designedly used in the same sense. That apart, the expressions "issued" and "served" are used as inter-changeable terms both in dictionaries and in other statutes. The dictionary meaning of the word "issue" is "the act of sending out, put into circulation, deliver with authority or delivery". Section 27 of the General Clauses Act (Act X of 1897) reads thus:

"27. Meaning of service by post - Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre- paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

It would be seen from this provision that Parliament used the words "serve", "give" and "send" as inter-changeable words. So too, in Sections 553, 554 and 555 of the Calcutta Municipal Act, 1951, the two expressions "issued to" or "served upon" are used as equivalent expressions. In the legislative practice of our country the said two expressions are sometimes used to convey the same idea. In other words, the expression "issued" is used in a limited as well as in a wider sense. (emphasis supplied). We must, therefore, give the expression issued in Section 4 of the Amending Act that meaning which carries out the intention of the Legislature in preference to that which defeats it. By doing so we will not be departing from the accepted meaning of the expression, but only giving it one of its meanings accepted, which fits into the context or setting in which it appears."

The Hon'ble Supreme Court in *Collector of Central Excise. Madras Vs. M/s M.M.Rubber and Co. Tamil Nadu 1992 Supp (1) SCC 471* examined the provisions in the context of time for the commencement of limitation such as "from the date of decision or order". It has been held that limitation shall commence in the cases where a right of the party is to avail remedy of appeal etc. is concerned from the date of communication of the decision or order appealed against. But if an authority is to exercise a power or to do an act affecting the rights of the parties, he shall exercise that power within the period of limitation. The decision of such authority comes into force and is operative from the date, it is signed by him. The Court held:

"9. The words "from the date of decision or order" used with reference to the limitation for filing an appeal or revision under certain statutory provisions had come up for consideration in a number of cases, We may state that the ratio of the decisions uniformly is that in the case of a person aggrieved filing the appeal or revision, it shall mean the date of communication of the decision or order appealed against. However, we may note a few leading cases on this aspect.

11. The ratio of these judgments was applied in interpreting Sec. 33A(2) of the Indian Income Tax Act, 1922 in *Muthia Chettiar v. C.I.T., ILR 1951 Mad 815* with reference to a right of revision provided to an aggrieved assessee. Section 33A(1) of the Act on the other hand authorised the Commissioner to suo motu call for the records of any proceedings under the Act in which an order has been passed by any authority subordinate to him and pass

such order thereon as he thinks fit. The proviso, however, stated that the Commissioner shall not revise any order under that sub-section "if the order (sought to be revised) has been made more than one year previously". Construing this provision the High Court in Muthia Chettiar's case held that the power to call for the records and pass the order will cease with the lapse of one year from the date of the order by the subordinate authority and the ratio of date of the knowledge of the order applicable to an aggrieved party is not applicable for the purpose of exercising suo motu power. Similarly in another decision reported in *Viswanathan Chettiar v. Commr, of Income Tax, Madras, 25 ITR 79 Mad,* construing the time limit for completion of an assessment under Section 34(2) of the Income Tax Act, 1922, which provided that it shall be made "within four years from the end of the year in which the income, profit and gains were first assessable", it was held that the time limit of four years for exercise of the power should be calculated with reference to the date on which the assessment or reassessment was made and not the date on which such assessment or reassessment order made under Section 34(2) was served on the assessee.

12. It may be seen, therefore, that, if an authority is authorised to exercise a power or do an act affecting the rights of parties, he shall exercise that power within the period of limitation prescribed therefore. The order or decision of such authority comes into force or becomes operative or becomes an effective order or decision on and from the date when it is signed by him. The date of such order or decision is the date on which the order

or decision was passed or made: that is to say when he ceases to have any authority to tear it off and draft a different order and when he ceases to have any locus panetentiae. Normally that happens when the order or decision is made public or notified in some form or when it can be said to have left his hand. The date of communication of the order to the party whose rights are affected is not the relevant date for purposes of determining whether the power has been exercised within the prescribed time.(emphasis supplied)

13. So far as the party who is affected by the order or decision for seeking his remedies against the same, he should be made aware of passing of such order Therefore Courts have uniformly laid down as a rule of law that for seeking the remedy the limitation starts from the date on which the order was communicated to him or the date on which it was pronounced or published under such circumstances that the parties affected by it have a reasonable opportunity of knowing of passing of the order and what it contains. The knowledge of the party affected by such a decision, either actual or constructive is thus an essential element which must be satisfied before the decision. can be said to have been concluded and binding on him. Otherwise the party affected by it will have no means of obeying the order of acting in conformity with it or of appealing against it or otherwise having it set. This is based upon, as observed by Rajamanner, CJ in Muthia Chettiar v. C.I.T. (supra) "a salutary and just principle". The application of this rule so far as the aggrieved

party is concerned is not dependent on the provisions of the particular statute, but is so under the general law

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18 Thus if the intention or design of the statutory provision was to protect the interest of the person adversely affected, by providing a remedy against the order or decision any period of limitation prescribed with reference to invoking such remedy shall be read as commencing from the date of communication of the order. But if it is a limitation for a competent authority, to make an order the date of exercise of that power and in the case of exercise of suo motu power over the subordinate authorities' orders, the date, on which such power was exercised by making an order are the relevant dates for determining the limitation. The ratio of this distinction may also be founded on the principle that the Government is bound by the proceedings of its officers but persons affected are not concluded by the decision."

(Emphasis by us)

The said principle of the issue of a notice or communication has also come up for consideration before the Hon'ble Supreme Court in the context of the provisions of Section 4 of the Contract Act, 1872. It has been held that the moment the proposer puts his proposal in the course of transmission, it is complete as against the acceptor i.e addressee. Therefore, the moment the notice it signed and put in the course of action by the

department, the notice is deemed to be served as the communication is t of the proposer.

(Emphasis by us)

It has been so held by the Hon'ble Supreme Court in Bhagwandas Goverdhandas Kedia Girdharilal Farshottamdas & CO., AIR 1966 SC 343, wherein it has been held to the following effect

"By the second clause of Section 4, the communication of an acceptance is complete as against the proposer, when it is put in a course of or to him, so as to be out of the power of the acceptor. This implies that where communication of an acceptance is made and it is put in a course of transmission to the proposer, the acceptance is complete as against the proposer as against the acceptor, it becomes complete when it comes is the knowledge of the proposer. In the matter of communication of revocation it is provided that as against the person who makes the revocation it becomes complete when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it, and as against the person to whom it is made when it comes to his knowledge".

Subsequently in *State of Punjab v Khemi Ram, AIR 1970 SC 214*, the Court observed as:

"16…… It will be seen that in all the decisions cited before us, it was the communication of the impugned order which was held to be essential and not its actual receipt by the officer concerned and such communication was held to be necessary because till the

order is issued and actually sent out to the person concerned the authority making such order would be in a position to change its mind and modify it if it thought fit But once such an order is sent out, it goes out of the control of such an authority, and therefore, there would be no chance whatsoever of its changing its mind or modifying it. In our view, once an order is issued and it is sent out to the concerned government servant, it must be held to have been communicated to him, no matter when he actually received it.

(Emphasis by us)

We find it difficult to persuade ourselves to accept the view that it is only from the date of the actual receipt by him that the order becomes effective. If that be the true meaning of communication, it would be possible for a government servant to effectively thwart an order by avoiding receipt of it by one method or the other till after the date of his retirement even though such an order is passed and despatched to him before such date. An officer against whom action is sought to be takes, thus, may go away from the given by him for service of such orders or may deliberately give a wrong address and thus prevent or delay is receipt and be able to defeat its service on him. Such a meaning of the word 'communication" ought not to be given unless the provision in question expressly so provides. Actually knowledge by him of an order where it is one of dial may perhaps, become necessary because of the consequence which the decision in *The State of Punjab v Amar Singh Harika AIR 1966 SC 1313* contemplates. But such consequences would not occur in the ease

of officer who has proceeded on leave and against whim an order of suspension is passed because, in his case there is no question of his doing any act or pasting any order and such act or order being challenged as invalid"

Learned counsel for the petitioner has also relied the upon judgment of Hon'ble Supreme Court *in Assistant Commissioner of Income Tax and another Vs. Hotel Blue Moon (2010) 3 SCC 259* But the said judgment does not provide any help to the argument raised. In fact, in para 7 of the said judgment, it has been observed that the Assessing Officer has to issue notice under Section 143 (2) within the prescribed time-limit to make the assessee aware that his return has been selected for scrutiny assessment.

In *AVI-OIL India P. Ltd. case (supra),* the provisions of the Contract Act, the judgments of the Hon'ble Supreme Court were not brought to the notice of the Bench; therefore, the Bench has taken a view on the literal meaning of word expression "serve". In view of the above, the judgment rendered by the Division Bench of this Court in *AVI-OIL India P. Ltd. case* (supra) is in ignorance of the statutory and other binding precedents, therefore, does not lay down any binding principle and the same is per incuriam.

Another judgment relied upon by the petitioner *is Kanj Behari Vs Income Tax Officer, District-II (VD). Amritsar and others 1983 (139) ITR 73.* The issue raised in the aforesaid case is not of issuance of serving of a notice, but method of

substituted service. The issue raised is not necessary to be decided in the present case, as notice has been issued within the time prescribed. That issuance of notice is sufficient compliance of the provisions of Section 143(2) of the Act. We may notice that Hon'ble Supreme Court in *Commissioner of Sales Tax and others Vs. Subhash & Co. (2003) 3 SCC 454* observed as under:

12. Whether service of notice is valid or not is essentially a question of fact. In the instant case, learned Single Judge found that certain procedures were not followed while effecting service by affixture. There was no finding recorded that such service was non est in the eye of the law. In a given case, if the assessee knows about the proceedings and there is some irregularity in the service of notice, the direction for continuing proceedings cannot be faulted. It would depend upon the nature of irregularity and its effect and the question of prejudice which are to be adjudicated in each case on the basis of surrounding facts. If, however, the service of notice is treated as non est in the eye of the law, it would not be permissible to direct de novo assessment without considering the question of limitation. There also the question of prejudice has to be considered.

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22. The emerging principles are:

(i) Non-issue of notice or mistake in the issue of notice or defective service of notice does not affect the jurisdiction of the

assessing officer, if otherwise reasonable opportunity of being heard has been given.

(ii) Issue of notice as prescribed in the Rules constitutes a part of reasonable opportunity of being heard.

(iii) If prejudice has been caused by non-issue or invalid service of notice the proceeding would be vitiated. But irregular service of notice would not render the proceedings invalid; more so, if the assessee by his conduct has rendered service impracticable or impossible.

(iv) In a given case when the principles of natural justice are stated to have been violated it is open to the Appellate Authority in appropriate cases to set aside the order and require the assessing officer to decide the case de novo,"

36. The Hon'ble Supreme Court concluded as under:

"In view of the said judgment, the date of receipt of notice by the addressee is not relevant to determine, as to whether the notice has been issued within the prescribed period of limitation. The expression serve means the date of issue of notice. The date of receipt of notice cannot be left to be undetermined dependent upon the will of the addressee.

(Emphasis by us)

Therefore, to bring certainly, and to avoid attempts of the addressee to evade the process of receipt of notice, the purpose of the statute will be better served, if the date of issue of

notice is considered as compliance of the requirement of proviso to Section 143(2) of the Act. In fact that is the only conclusion that can be arrived at to the expression serve" appearing in Section 143(2) of the Act."

37. Though we are conscious about the fact that the aforementioned decision of the Hon'ble Supreme Court [supra] is in the context of service of notice u/s 143(2) of the Act, but the ratio decidendi squarely applies on the present controversy which relates to dispatch and receipt of electronic record as contemplated u/s 132 of the Information Technology Act, 2000, as discussed at Para 30 above.

38. Considering the peculiar facts of the case from all possible angles, we are inclined to accept that the DRP directions were communicated on 30.11.2021 making the assessment order dated 31.01.22 barred by limitation.

39. The assessment order is, accordingly, quashed as time barred. Since we have quashed the assessment order, we do not find it necessary to dwell into the merits of the case.

40. Stay Application becomes infructuous.

39. In the result the appeal of the assessee in ITA No. 417/DEL/2022 is allowed on the ground argued before us. Stay Application disposed of as above.

The order is pronounced in the open court on 17.10.2023.

Sd/-	**Sd/-**
[ASTHA CHANDRA**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 16th OCTOBER, 2023.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
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