

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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI RAHUL CHAUDHARY, JM

ITA No. 7861/Mum/2019

(Assessment Year: 2012-13)

Panasonic Life Solutions India
Private Limited
(Formerly known as Anchor
Electricals Private Limited)
3rd Floor, B Wing,
I – Think Techno Campus,
Pokhran Road No.2, Thane
(West)

(Appellant)

Asst. Commissioner of
Income-tax
Central Circle 7(2)
Vs. 655, 6th Floor, Aaykar Bhavan
M.K. Road,
Mumbai-400 020

(Respondent)

PAN No. AAECA2190C

Assessee by : Shri M.P. Lohia
Shri Nikhil Tiwari, AR
Revenue by : Shri Manoj Kumar, CIT DR

Date of hearing: 08-12-2023

Date of pronouncement : 19.12.2023

ORDER

PER PRASHANT MAHARISHI, AM:

01. This appeal is filed by the assessee /appellant against the assessment order passed by the Asst. Commissioner of Income Tax, Central Circle, 7(2), Mumbai (the learned Assessing Officer) under Section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (the Act) in pursuance to the direction issued by the Dispute Resolution Panel-2 (the learned DRP) and order passed by the Addl. Commissioner of Income Tax, Transfer Pricing, 1(1)(2), Mumbai (the learned TPO), wherein the return of

income filed by the assessee was assessed at ₹142,78,72,787/-. The only adjustment is with respect to the international transaction at higher Arm's Length Price by ₹11,72,725/- and further disallowance of partial deduction under CH VI A u/s 80IC of the Act

02. Assessee has raised following grounds of appeal:-

""Based on the facts and circumstances of the case, Panasonic Life Solutions India Private Limited (hereinafter referred to as the 'Appellant) craves leave to prefer an appeal against the order passed by the Learned Assistant Commissioner of Income-Tax, Central Circle -7(2) (hereinafter referred to as the 'the learned AO] under section 143(3) read with section 144C(13) of the Income-tax Act, 1961 (hereinafter referred to as the 'Act) in pursuance of the directions issued by the Hon'ble Dispute Resolution Panel- 2, (hereinafter referred to as the "Hon'ble DRP) and the order passed by the Learned Additional Commissioner of Income-Tax. Transfer Pricing-1(1)(2), Mumbai (hereinafter referred to as the 'Learned TPO) on the following grounds, each of which are without prejudice to one another.

On the facts and in the circumstances of the case and in law the learned AO based on directions of DRP and the Hon'ble DRP:

General Ground

1. erred in computing the total income at INR 142,78,72,790 and raising a demand of INR 13,96,46,300

Time barring and validity of the order of the TPO and the AO

2. erred in holding that the order of the assessment order dated 30 November 2018 was not time barred in terms of the provisions of section 153 of the Act,

3. erred in holding that the order of the transfer pricing order under section 92CA(3) of the Act dated 30 October 2018 was valid;

4. erred in holding that the reference to the TPO made by the AO was valid, having failed to appreciate that:

- erred vide letter dated 5 September 2017 intimated that reference to the TPO is being made which was prior to issue of notice under section 143(2) of the Act and without disposing off objections to reassessment filed by the appellant:
- reference under 92CA of the Act to TPO dated 2 November 2017 was made before issue of notice under section 143(2) of the Act and prior to expiry of a period of 4 weeks after disposing off the objections to reassessment proceedings:
- the Hon'ble Bombay High Court vide order dated 27 April 2017 in writ petition no. 44

of 2018 had extended the time limit for completion of reassessment proceedings by a period of 10 weeks and had mentioned that the jurisdiction to refer the appellant's case to the TPO would arise on the AO disposing off the appellant's objections to reassessment;

5. erred in holding that the jurisdiction under section 92CA of the Act of the AO was put under abeyance by the order of the Hon'ble High Court and was revived by issue of letter dated 7 June 2018 to the TPO after disposal of objections of the appellant against the reassessment proceedings

Validity of reassessment proceedings

6. erred in upholding the validity of the reassessment proceedings under section 147 of the Act.

7. erred in not appreciating that the reassessment proceedings initiated are bad in law in the absence of any fresh tangible material to satisfy income escaping assessment & ought to be quashed:

8. erred in not appreciating the fact that reassessment proceedings have been initiated only with a view to revive original assessment proceedings which got time barred and hence ought to be quashed,

Without prejudice, passing the final assessment order as against the draft assessment order

9. *without prejudice, erred in upholding the validity of the draft order dated 30 November 2018 issued alongwith the notice of demand under section 156 of the Act and notice initiating penalty proceedings under section 271(1)(c) which makes the same as final order which is in contravention of the provisions of section 144C of the Act and hence it is prayed that the order passed by the AO is bad in law and merits to be quashed;*

Transfer Pricing Grounds:

Adjustment on account of payment of royalty for use of trademarks (Disallowance INR 11,00,72,725-Tax effect INR 3,66,87,239)

10. *erred in making adjustment of INR 11,00,72,725 on international transaction of payment of royalty for use of trade marks to AES,*

11. *erred in not considering/ accepting the comparability analysis as documented by the appellant in the Transfer Pricing Study Report for benchmarking the international transaction of payment of royalty to AEs;*

12. *erred in rejecting the Transactional Net Margin Method (TNMM') adopted by the Appellant for benchmarking the international transaction of payment of royalty to AES:*

13. *erred in selecting Comparable Uncontrolled Price (CUP) as the most appropriate method for*

benchmarking the international transaction of payment of royalty to AEs;

Corporate tax grounds

Error in calculation of total income (INR 37.79.428-Tax effect INR 12,59,683)

14. erred in considering gross total income of INR 192,79,86,767 as starting point for computation of total income as against the total income of INR 192,42,07,339;

Deduction under section 80-IC of the Act (INR 12.24.60,000-Tax effect INR 4.08,15,918)

15. erred in holding that receipt by way of scrap sales is not eligible for deduction under section 80-IC of the Act;

16. without prejudice, erred in considering the entity level income from scrap sales of INR 21,64,00,000 for making disallowance while computing profits eligible for deduction under section 80-IC of the Act as against the scrap sales of INR 4,35,53,654 pertaining to Haridwar unit;

17. erred in reducing interest income of INR 18,64,00,000 while computing deduction under section 80-IC of the Act without appreciating that the appellant has suo moto reduced it from profits eligible for deduction under section 80-IC of the Act:

18. erred in holding that other income is not eligible for deduction under section 80-IC of the Act:

19. without prejudice, erred in considering the entity level amount of other income of INR 54,00,000 for making disallowance while computing profits eligible for deduction under section 80-IC of the Act as against the other income of INR 24,37,118 pertaining to Haridwar unit;

Non grant of credit for DDT (Tax effect INR 4,83,38,022)

20. erred in not granting credit for Dividend Distribution Tax paid of INR 4,83,38,022;

Charging of interest under section 234B (Tax effect INR 4,05,81,440)

21. erred in charging interest under section 234B of INR 4,05,81,440

Initiation of penalty proceedings under section 271(1)(c)

22. erred in initiating penalty proceedings under section 274 r.w.s. 271(1)(c) of the Act;

The Appellant further prays that any other relief as your Honor may deem fit be granted. Each of the above ground is independent and without prejudice to one another."

03. Before us, assessee has challenged as per ground no.9 that the learned Assessing Officer has passed the assessment order which was based on the draft assessment order passed on 30th November, 2018, issued along with notice of demand under Section 156 of the Act and also followed with notice initiating penalty proceedings under Section 271(1)(c) of the Act which makes the draft assessment order as final assessment order which is in contravention of provision of Section 144C of the Act, so the final assessment order passed by the learned Assessing Officer is based on such bad draft assessment order is also invalid. Plethoras of judicial precedents were relied up on.
04. Brief facts of the case shows that assessee is a company engaged in manufacturing of electrical components, filed its return of income on 29th November, 2012 at a total income of ₹119,22,45,100/-. This return of income was not scrutinized.
05. Subsequently, a notice under Section 148 of the Act was issued on 29 March 2017. In response to that as per letter dated 3rd April, 2017, assessee reiterated its return of income. Subsequently, the assessee challenged the reopening proceedings before the Hon'ble High Court, certain directions were given.
06. As the assessee has entered into an international transaction, the reference was made to the learned Transfer Pricing Officer on 2nd November, 2017, which resulted into an order passed under Section 92CA (3) of

the Act dated 30th October, 2018, wherein Arm's Length Price of royalty is determined at 1.15% of the net selling price and an adjustment to the extent of 0.85% of the net selling price was made. Consequently, on royalty payment adjustment was made of ₹11,72,725/-.

07. Consequent to that, a draft assessment order was passed under Section 143(3) read with section 147 read with section 144C(1) of the Act on 30th November, 2018, wherein over and above the adjustment in respect of international transaction of ₹11,72,725/-, the assessee was also denied the deduction under Section 80IC of the Act of ₹73,26,45,705/-. Thus, the draft assessment order determined the total income of the assessee at ₹203,80,58,490/-.

08. In paragraph no.6 of the draft assessment order, the Assessing Officer mentioned that

“Assessed under Section 143(3) read with section 144C (13) of the Income-tax Act, 1961 (the Act). Penalty proceedings are hereby initiated under Section 271(1) (c) of the Act. Credit for taxes paid is allowed as per records. Interest is charged under Section 234A, B and C of the Act as applicable and notice of demand is issued under Section 156 of the Income-tax Act, 1961 (the Act). Tax calculation sheet (ITNS 150 is annexed).”

09. Thus, along with the draft assessment order dated 30th November, 2018, a notice of demand amounting to



₹41,62,76,780/-, was issued. Subsequently, the learned Assessing Officer came to know that the draft assessment order dated 30th November, 2018, received by the assessee on 6th December, 2018, is also served with a demand notice for ₹41,62,76,780/-, then on 28th December, 2018, the learned Assessing Officer addressed a letter that 'inadvertently, the draft assessment order was served with the demand notice and therefore, he rectified under Section 154 of the Act on 26th December, 2018, that such demand notice is withdrawn on the screenshot of ITBA portal', however, net amount payment is still shown to be ₹20,26,15,450/-. Subsequently, on 20th February, 2019, the Centralized Processing Centre issued a notice to the assessee to make arrangement to make the immediate payments of the outstanding demand. The ITBA showing the outstanding demand status as on 20th February, 2019, of outstanding tax Demand of ₹41,62,76,780/-, arising out of the demand order dated 30th November, 2018 (draft assessment order). With respect to the penalty proceedings, following draft assessment order, show cause notice under Section 274 of the Act read with section 271(1)(c) of the Act was also issued on 11th June, 2019. The assessee objected to such penalty notice vide letter dated 19th June, 2019, wherein it has been stated that the penalty notice has been issued on the basis of the draft assessment order and despite the fact intimated to the learned Assessing Officer that assessee has already filed objections before the learned Dispute Resolution Panel. Coming to know about this, the



learned Assessing Officer on 24th June, 2019, addressed a letter to the assessee in response to the communication of the assessee dated 19th June, 2019, that the notice issued under Section 271(1)(c) of the Act has wrongly been issued. He further stated that as the order passed under Section 143(3) read with section 147 of the Act dated 30th November, 2018, is a draft order under Section 144C(1) of the Act, no penalty under Section 271(1)(c) of the Act has been initiated.

010. Based on the above facts, the learned Authorized Representative submitted that as the draft assessment order passed by the learned Assessing Officer is not the draft assessment order in pursuance to section 144C(1) of the act but as it is accompanied with notice of demand under Section 156 of the Act and also followed with the notice under Section 274 of the Act read with section 271(1)(c) of the Act for initiation of penalty is in fact the final assessment order. The learned Assessing Officer should have passed the draft assessment order and should not have raised demand of tax as well as initiated the penalty proceedings. He submits that the learned Assessing Officer withdrew the demand however, still the assessee was asked to pay the demand by Central Processing Centre and therefore, the assessee is prejudiced by issue of demand notice and penalty show cause notice. He therefore submits that such draft assessment order passed is invalid and subsequently, final assessment order passed therein is also vitiated. Therefore, the final assessment order passed by the



learned Assessing Officer is also bad in law because same is based on an unsustainable draft assessment order. He referred to several judicial precedents on this issue.

011. The learned Departmental Representative vehemently submitted that when learned Assessing Officer has withdrawn the notice of demand by passing an order under Section 154 of the Act and further also withdrawing the show cause notice issued for initiation of penalty proceedings, the so called error of the draft assessment order is already been rectified and therefore, now there is no prejudice caused to the assessee. He submitted that it is not the case of the assessee that based on the demand notice issued along with the draft assessment order resulted into recovery of taxes. Further, show cause notice for initiation of penalty proceedings was also withdrawn by the learned Assessing Officer and thereafter, penalty proceedings were not levied in pursuance of the draft assessment order. Therefore, the errors cited by the assessee have been rectified by the learned Assessing Officer and further, the same has not been acted upon by the learned Assessing Officer, the draft assessment order is valid. He further submitted that assessee has been heard by the learned Dispute Resolution Panel on its objections and thereafter, the final assessment order is passed. This final assessment order is challenged before the co-ordinate bench. Therefore, now the validity of draft assessment order cannot be challenged.



012. We have also found that in the original appeal memo filed by the assessee, there were four grounds with respect to transfer pricing. The assessee wrote a letter dated 13th December, 2022, stating that with respect to the ground nos. 10 to 13, the transfer pricing adjustments are contested. Further, pursuant to Mutual Agreement Procedure [MAP] application filed by its Associated Enterprises, the Indo Japanese Competent authorities have entered into a MAP Resolution. The same was accepted by the assessee and therefore, by this letter it withdrew the grounds of appeal no.10 to 13 on the transfer pricing adjustment. Therefore, now these transfer pricing adjustments are not part of appeal before us.
013. Further, the assessee has submitted vide letter dated 7th December, 2023 that as assessee has accepted the MAP Resolution and therefore, it undertakes to discharge its tax liability arising on account of Map Resolution irrespective of the outcome of the appeal filed before us as assessee has already withdrawn the grounds of appeal relating to transfer pricing adjustments from this appeal. The assessee also submitted that identical issue arose in case of ITAT in ITA No.163/Pun/2013 for A.Y. 2008-09 dated 12th July, 2019, wherein the co-ordinate Bench has held that in such circumstances the learned Assessing Officer is directed to adopt the amount of return of income plus the amount of transfer pricing adjustment accepted by the assessee under MAP as the income of assessee.



014. We have carefully considered the rival contentions and perused the orders of the lower authorities. Admittedly, in this case, the draft assessment order dated 30th November, 2018, passed by the learned Assessing Officer contained the last paragraph no.6, wherein Id AO mentions that the assessee is assessed under Section 143(3) read with section 144C (13) of the Act. He also initiated the penalty proceedings under Section 271(1)(c) of the Act and further, issued the demand notice under Section 156 of the Act. The notice of demand under Section 156 of the Income-tax Act, 1961 (the Act) dated 30th November, 2018, was issued for the impugned assessment year determined the outstanding demand of ₹41,62,76,780/-. As per paragraph no.2 of that notice, the assessee was also directed to pay the same within 30 days, further on failure to pay the interest under Section 220(2) of the Act as well as imposition of penalty under Section 221 of the Act was to be initiated. As per paragraph no.6, the assessee was directed to file an appeal before the learned CIT (A)-21, Mumbai. This notice of payment was signed by the learned Assessing Officer and served on the assessee. Subsequently, the learned Assessing Officer came to know that he has made a mistake by serving the notice of demand along with the draft assessment order. He passed the order under Section 154 of the Act on 26th December, 2018. Further intimation was given to the assessee on 28th December, 2018 about passing such rectification order. It was accepted by the learned Assessing Officer that such notice



of demand was issued inadvertently. However, the issue does not end there, subsequently, on 20 February 2019, the Central Processing Centre, issued a letter to the assessee directing to make the payment immediately of the same. It is to be noted that the final assessment was framed on 24th October, 2019, on even prior to that on 20th February, 2019, the assessee was directed to pay the tax. Similarly, penalty notice under Section 271(1)(c) read with section 274 of the Act was issued to the assessee on 11th June 2019. Vide letter dated 19th June, 2019, when the assessee informed the learned Assessing Officer that he intends to levy the penalty on the basis of draft assessment order, he immediately wrote a letter dated 24th June, 2019, intimating to the assessee that notice under Section 274 read with section 271(1)(c) of the Act is wrongly issued, he withdrew it. In these circumstances, we do not have any hesitation to hold that where the draft assessment order is passed by the learned Assessing Officer on 30th November, 2018, along with the notice of demand of even date and subsequent show cause for penalty vitiates the final assessment order passed by the learned Assessing Officer. It is not here only that notice of demand has been issued inadvertently but the learned Assessing Officer admitted the same but once again thereafter Central Processing Centre asking the assessee to pay the tax. Similarly, penalty notice is issued and further asking the assessee to furnish the explanation and then after withdrawing the same clearly shows that the draft assessment order passed by the learned Assessing

Officer is not in accordance with the law. According to the provisions of Section 144C (1) of the Act, the learned Assessing Officer is required to pass draft of the assessment order in case of impugned assessee. But here draft assessment order is accompanied with Notice of demand u/s 156 of the Act and followed with a show cause notice for levy of penalty u/s 274 read with section 271 (1) (c) of the Act. Both Notice of demand and penalty proceedings are further followed by subsequent communication. Therefore, it is merely not an error but for all practical purposes, the Id AO passed the final assessment order instead of Draft Assessment order. In penultimate paragraph also Id AO mentions section 144 (13) of the Act.

015. Undisputed facts of the case are, in the draft assessment order, the Assistant Commissioner has ordered issuance of demand notice and to initiate penalty proceeding under section 271(1)(c). Both the draft assessment order and the demand notice are dated 30-11-2018. Now the issue is squarely covered against the revenue by order of Honourable Karnataka high court in case of **Cisco Systems Services B.V.** [2023] 149 taxmann.com 486 (Karnataka)[24-02-2023] | where in it has been further held that

"21. Mr. Aravind also contended that the demand notice was not enforced. It is settled that demand notice stems out of an order of assessment and it is enforceable. It meets the assessee with civil consequences. The argument on behalf of the



Revenue that the demand notice was not enforced is fallacious and noted only to be rejected.

22. We have carefully considered section 292B of the Act. The mistake which the ACIT has done in passing the final order at the stage of draft order is not curable under section 292B of the Act.”

016. Same is also the mandate of Honourable telengana High court in Hyundai Motor India Engineering (P.) Ltd. [2023] 156 taxmann.com 265 (Telangana), Honorable Madras High court in GE Oil & Gas India P. Ltd. [2021] 126 taxmann.com 275 (Madras). Therefore without multiplying the authorities we find that draft assessment order passed coupled with the Notice of demand u/s 156 of the Act and followed by notice u/s 274 rws 271(1)(c) of the Act makes the draft order as final. Thus, the draft assessment order dated 30-11-2018 passed by Id AO is invalid and further as the final assessment order is based on an invalid order, same is also quashed.

017. However before parting, as assessee has already withdrawn grounds No 10 to 13 of the appeal, respectfully following decision of coordinate bench in ITA No.163/Pun/2013 for A.Y. 2008-09 dated 12th July, 2019, we hold that total income of the assessee shall be the amount of returned income and added thereto amount of income agreed by the assessee in MAP proceedings.

018. Accordingly ground no 9 of the appeal is allowed.



019. As by allowing Ground no 9 of the appeal, we have quashed the assessment order, all other surviving grounds of appeal are not required to be adjudicated.

020. In the result, Appeal of assessee is partly allowed.

Order pronounced in the open court on 19.12.2023.

Sd/-
(RAHUL CHAUDHARY)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 19.12. 2023

Sudip Sarkar, Sr.PS

Copy of the Order forwarded to:

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

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai