IN THE INCOME TAX APPELLATE TRIBUNAL

"I" BENCH, MUMBAI

BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.540/Mum./2023
(Assessment Year : 2018–19)

Cadmatic OY, 72, Itainen Rantakatu
Turku Finland 208100
C/o Suresh Joshi & Co., C.A.
4th Floor, Kamer Building
38, Cawasji Patel Street, Fort
Mumbai 400 001 PAN – AAECC1385P ……. Appellant

v/s

Asstt. Commissioner of Income Tax
International Taxation, Circle-2(1)(1) ..... Respondent
Mumbai

Assessee by : Shri Jitendra Singh
Revenue by : Shri Anil Sant

Date of Hearing – 18/12/2023	Date of Order – 29/12/2023

O R D E R

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned final assessment order dated 27/12/2021, passed under section 143(3) r/w section 144C(13) of the Income Tax Act, 1961 (*"the Act"*), pursuant to the directions 29/11/2021, issued by the learned Dispute Resolution Panel-1, Mumbai (*"learned DRP"*), for the assessment year 2018-19.

2. In this appeal, the assessee has raised the following grounds:–

"1. On the facts and in the circumstances of the case and in law the Ld. Deputy Commissioner of Income Tax (International Taxation)-2(1)(1), Mumbai [hereinafter referred to as 'the Ld. A.O.'] and Ld. DRP erred in making an addition of Rs.3,91,30,966/- being amount received on sale of software to Indian companies by treating the same as fees for technical services without appreciating the fact that the Appellant has not rendered any technical services by selling the software to the Indian companies. Thus, the said amount received on sale of software is not chargeable to tax in India. Therefore, the addition of Rs.3,91,30,966/- made by the Ld. A.O. / DRP is unjustified and the same may be deleted.

2. The Ld. A.O./ DRP failed to appreciate that the Appellant has not transferred any right, title, interest or license on sale of software. Hence, the Ld. A.O. / DRP is unjustified in taxing the consideration received on sale of software as 'Fees for Technical Services' in India. Therefore, the addition of Rs.3,91,30,966/- made by the Ld. A.O./DRP is unjustified and the same may be deleted.

3. The Ld. A.O./DRP, further, failed to appreciate that the Appellant is a Non-Resident company and not having any business operations in India. Thus, the amount received on sale of software to the Indian entities is not taxable in India. The said amount has duly been disclosed by the Appellant while filing the return in Finland and the taxes have been paid on the same. Hence, taxing a sum of Rs.3,91,30,966/- again in the hands of the Appellant would amount to double taxation and the same is not justified.

4. The Ld. A.O. / DRP, further, failed to appreciate that the amount received by the appellant from the Indian companies on sale of software is not a fee for technical services and the same does not attract TDS provisions as per section 195 of the Act. Thus, the said payment cannot be treated as income taxable in India merely because the Indian Companies have deducted and paid TDS out of abundant caution on such payment and the appellant has claimed refund of the same. Therefore, the Ld. A.O./ DRP is not justified in making addition of Rs.3,64,86,608/- in the hands of the appellant and the same may be deleted.

5. The Appellant craves leave to add, alter, amend, delete or rescind any of the grounds mentioned hereinabove."

3. The brief facts of the case are: The assessee is a non-resident company and is a tax resident of Finland. For the year under consideration, the assessee filed its return of income on 07/02/2019, declaring total income at Rs.Nil. The return of income filed by the assessee was selected for scrutiny assessment through CASS and statutory notices under section 143(2) as well as under section 142(1) of the Act were issued and served on the assessee. During the year under consideration, the assessee received an amount Rs.3,91,30,966,

from the sale of software to its clients who are Indian companies. On the said payment, tax amounting to Rs.40,70,007, was withheld by the Indian companies while making the payment to the assessee. The assessee did not offer the above receipt for tax in its return of income and claimed a refund of the tax withheld by its clients. Accordingly, during the assessment proceedings, the assessee was asked to show cause as to why its receipts from the sale of software may not be treated as Royalty or Fees for Technical Services under the provisions of the Act and the relevant Articles of India–Finland Double Taxation Avoidance Agreement (DTAA).

4. The Assessing Officer (A.O.), vide draft assessment order dated 26/02/2021, did not agree to the submissions of the assessee and held that the revenue earned by the assessee is in the nature of Fees for Technical Services under the Act as well as the India–Finland DTAA.

5. The assessee filed detailed objections before the learned DRP on 23/03/2021, against the findings of the A.O. in the draft assessment order. While the objections filed by the assessee before the learned DRP were pending for adjudication, the A.O. passed the order dated 15/04/2021 under section 143(3) r/w section 144C(3) of the Act computing the total income of the assessee at Rs.3,91,30,966, by considering the income received from Indian companies by the assessee as Fees for Technical Services under section 9(1)(vii) of the Act and Article–12(3) of the India–Finland DTAA.

6. Subsequently, the learned DRP, vide its directions dated 29/11/2021, issued under section 144C(5) of the Act, rejected the objections filed by the assessee and held that the payment made by the companies in India to the

assessee is in the nature of Fees for Technical Services and is liable to be taxed in India under the provisions of the Act as well as under Article–12(3) of India–Finland DTAA. In conformity with the directions issued by the learned DRP, the A.O. passed the impugned final assessment order dated 27/12/2021, under section 143(3) r/w section 144C(13) of the Act. Being aggrieved, the assessee is in appeal before us.

7. At the time of the hearing of the appeal, which was concluded on 18/07/2023, the learned Authorised Representative (*"learned A.R."*) made submissions regarding the non–taxability of the amount received by the assessee from the supply of software and services to the Indian entities. The learned A.R., by referring to the application seeking condonation of delay filed along with the present appeal explained the circumstances in which the present appeal was filed after the delay of 363 days. Subsequently, vide order sheet dated 13/10/2023, the present appeal was directed to be listed for clarification regarding certain factual aspects pertaining to the claim of the assessee regarding non–taxability of income in India in view of the provisions of the India–Finland DTAA. During the hearing on 10/11/2023, the learned A.R. seeks to raise additional grounds of appeal challenging the legality and validity of the impugned final assessment order dated 27/12/2021, passed under section 143(3) r/s section 144C(13) of the Act in the light of the decision of the Hon'ble Jurisdictional High Court in Undercarriage and Tractor Parts Pvt. Ltd. v/s Dispute Resolution Panel–3 (WZ), (2023) 156 taxmann.com 79 (Bom.) dated 12/09/2023. The learned A.R. submitted that in the aforesaid decision, the Hon'ble Jurisdictional High Court held that the learned DRP can give directions only in pending assessment proceedings, and once the

assessment order is passed, the learned DRP would have no power to pass any directions as contemplated under section 144C(5) of the Act. Accordingly, it was submitted that since in the present case, the A.O. had already passed the final assessment order under section 143(3) r/w section 144C(3) of the Act on 15/04/2021, the directions issued by the learned DRP on 29/11/2021 and the consequent final impugned assessment order dated 27/12/2021, are void *ab initio*. The learned A.R. also placed reliance upon the decision of the Hon'ble Supreme Court in National Thermal Power Co. Ltd. v/s CIT, [1998] 229 ITR 383 (SC) in support of the admission of additional grounds of appeal.

8. On the other hand, the learned Departmental Representative (*"learned D.R."*) vehemently objected to the admission of the additional grounds raised by the assessee and submitted that in the initial round of hearing concluded on 18/07/2023, the assessee did not raise any ground challenging the legality and validity of the impugned final assessment order. The learned D.R. further submitted that two final assessment orders are passed in the present case as the assessee did not file any intimation before the A.O. regarding the filing of objections before the learned DRP on 23/03/2021. The learned D.R. submitted that the learned DRP after considering all the subsequent events rightly issued directions resulting in the impugned final assessment order.

9. We have considered the submissions of both sides and perused the material available on record. Vide its application dated 10/11/2023, the assessee has sought admission of the following additional grounds of appeal:–

> *"1. The Ld. DRP fell error in law in passing the order dated 29th November 2021 under section 144C(5) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act"] without appreciating that the Ld. A.O. has already passed the*

final assessment order dated 15th April 2021 under section 144C(5) of the Act. Hence, the impugned assessment order dated 27th December 2021 passed under section 143(3) read with section 144C(13), in pursuant to the above directions of the Ld. DRP, is void-ab-initio and the same may be quashed.

2. The Ld. DRP failed to appreciate that it can issue directions only in pending assessments. Therefore, after the final assessment order is passed the Ld. DRP has no jurisdictions to issue any directions as per the provisions of section 144C(5) of the Act. Thus, the directions issued by the Ld. DRP is without jurisdiction. Hence, the impugned order dated 27th December 2021 passed under section 143(3) r.w.s. 144C(13) of the Act, in pursuance to the directions of the Ld. DRP, is void-ab-initio. The Appellant, therefore, prays that the impugned order is illegal, against the settled provisions of law and the same may be quashed.

3. The Appellant craves leave to add, alter or amend any of the above grounds of appeal."

10. In the present case, the Revenue has objected to the admission of the additional grounds of appeal on the basis that such a challenge has been raised vide application dated 10/11/2023, for the first time and thus there is a delay in raising the additional grounds of appeal before the Tribunal.

11. On the contrary, the assessee in its application submitted that the additional grounds raised by it are purely legal grounds and the same goes to the root of the matter. It is further submitted that the facts pertaining to the adjudication of the issue are already available on record and failure to raise the same at the time of filing of the present appeal was neither deliberate nor contemptuous, but is arising out of the legal position which has come to the notice of the assessee subsequently. In support of its submissions, the assessee has, inter–alia, placed reliance upon the decision of the Hon'ble Supreme Court in National Thermal Power Co. Ltd. (supra). We find that in the aforesaid decision, the Hon'ble Supreme Court held that the legal issue can be raised for the first time before the Tribunal so long as the relevant facts are on record in the assessment proceedings for that issue. Since all the relevant

orders form part of the record for adjudication of the additional grounds of appeal raised by the assessee, therefore, we are of the considered view that investigation into fresh facts is not required in the present case. Further, the Hon'ble Jurisdictional High Court in Inventors Industrial Corporation Ltd. v/s CIT, [1992] 194 ITR 548 (Bom.) held that the ground by which the jurisdiction to make the assessment itself is challenged can be urged before any authority for the first time, even in the second round of proceedings. Therefore, in view of the above, since the issue raised by the assessee by way of additional grounds of appeal is a legal issue, which can be decided on the basis of facts available on record, we find no merits in the submissions of the Revenue and accordingly we admit the additional grounds of appeal filed by the assessee.

12. The grievance of the assessee is that the directions dated 29/12/2021 issued by the learned DRP, and consequently the impugned final assessment order dated 27/12/2021, passed under section 143(3) r/w section 144C(13) of the Act is void *ab initio* as the A.O. had already completed the assessment proceedings and passed the final assessment order under section 143(3) r/w section 144C(3) of the Act on 15/04/2021. From the record, it is evident that in the present case, the A.O. passed the draft assessment order under section 143(3) r/w section 144C(1) of the Act on 26/02/2021. Further, on receipt of the draft assessment order, the assessee filed its objections before the learned DRP on 23/03/2021, within the time prescribed under the provisions of section 144C(2) of the Act. While the objections filed by the assessee were pending consideration before the learned DRP, the A.O., vide order dated 15/04/2021, passed under section 143(3) r/w section 144C(3) of the Act concluded the assessment and computed the total income of the assessee at Rs.3,91,30,966.

From the perusal of the copy of the aforesaid order, furnished during the hearing, we find that the A.O. proceeded to pass the final assessment order on 15/04/2021, on the basis that the draft assessment order was passed on 26/02/2021 and in response to the same, the assessee has not filed any reply/submissions and accordingly the income assessed in the draft order is finalised. During the hearing, the learned A.R. furnished a copy of the letter dated 17/03/2021, filed before the A.O. raising objections against the findings rendered in the draft assessment order. From the perusal of the aforesaid letter, we find that there is no mention/submission by the assessee that it is in the process of filing objections before the learned DRP. Further, apart from the aforesaid letter, no other material was placed on record to show that the assessee after filing the objections before the learned DRP intimated the A.O. regarding the same.

13. Be that as it may, when all these developments were pointed out by the assessee, the learned DRP vide its directions dated 29/11/2021, issued under section 144C(5) of the Act, held that once draft assessment order has been passed in the case of eligible assessee and the assessee files its objections before the learned DRP, then the learned DRP is duty bound to issue directions under section 144C(5) of the Act. It was further held that every direction issued by the learned DRP is binding on the A.O. as per the provisions of section 144C(10) of the Act. Thus, it was held that once the draft assessment order has been passed by the A.O. and the objections are filed before the learned DRP within the permitted time, the A.O. has a very limited role i.e., to pass the final order as per the directions issued by the learned DRP. The

relevant findings of the learned DRP, in this regard, are reproduced hereunder:–

> *"5.1 We have gone through the written submissions of the assessee, oral arguments made during the course of the hearing and the material available before us. Before we proceed to address the objections made, it is necessary to apply our mind to one of the peculiar fact of the case. It has been submitted that the draft order was passed by the AO on 26.02.2021 and the assessee filed its objections before the DRP on 23.03.2021 which is within the time permitted u/s 144C(2) of the Income Tax Act. However, final order u/s 143(3) has been passed by the AO, even while objections of the assessee were pending before the DRP for issue of directions u/s 144C(5), on 15.04.2021. The assessee has filed an appeal before CIT(A) on 29.04.2021.*
>
> *5.2 The Panel notes that section 144C provides for a separate assessment mechanism for eligible assessee, as defined u/s 144C(15)(b), whose income are subject to transfer pricing variation or who are non-residents or foreign companies. Section 144C starts with a non-obstante clause and thus the provisions contained u/s 144C require its compliance irrespective of the other provisions that may be contained in the IT Act. The scheme of section 144C contemplates issue of a 'draft order' u/s 144C1) following which the assessee can choose to file objections before the DRP u/s144C(2). If the assessee chooses to file objections before the DRP, then as per provisions of section 144C(5) the Dispute Resolution Panel shall, issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment. Once such directions are issued, section 144C(13) provides that the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 or section 153B, the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.*
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> *5.3 From the above it is evident that once draft assessment order has been issued in the case of eligible assessee and the assessee files objections before the DRP, then the DRP is duty bound to issue directions u/s 144C) (5) after following the guidelines/ procedure laid down in this regard under various subsections of section 144C. Not only this, the assessing officer, yields his jurisdiction to the DRP and has to pass final order as per directions issued by the DRP. It is also noted that, as per provisions of section 144C(10), the directions issued by the DRP are binding upon the AO. Thus, once draft order has been passed by the AO and objections are filed before the DRP within permitted time, the AO has a very limited role i.e. to pass final order as per directions issued by the DRP.*
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> *5.4 Hence, in the opinion of the Panel, issue of final order by the AO, while the objections filed by the assessee are still pending before the DRP is without any jurisdiction. This view is supported by the rulings of Hon'ble ITAT and High Courts in several cases. Hon'ble Delhi High Court in the case of SRF Ltd. v. National Faceless Assessment Centre, Delhi [2021] 129 taxmann.com 174 (Delhi) has held that where objections to draft assessment order filed by assessee were pending disposal with DRP, impugned final assessment order under section 143(3) read with section 144C(3) being passed by Assessing*

Officer against assessee was without jurisdiction. Hon'ble Delhi High Court in the case of Anand Nvh Products (P.) Ltd. v. National e-Assessment Centre Delhi [2021] 130 taxmann.com 257 (Delhi) has held that final assessment order passed by Assessing Officer without waiting for decision of DRP upon such objections raised by assessee was unjustified and same was to be set aside. Hon'ble ITAT, Kolkata Bench in the case of Century Plyboards (India) v.

ACIT in ITA No. 278/Kol/2020 has held that when DRP is in seisn of the case of assessee and till the DRP gives direction as per section 144C(5) of the Act, the AO does not enjoy jurisdiction over the assessee's case.

5.5 In view of above, the Panel is of the considered view that irrespective of the fact that AO has passed an order u/s 143(3) even while objections of the assessee. were pending before the DRP, the DRP is duty bound to assume jurisdiction and issue directions u/s 144C(5) on the basis of draft order issued by the AO."

14. Accordingly, the learned DRP assumed the jurisdiction and issued the directions dated 29/11/2021 under section 144C(5) of the Act rejecting the objections raised by the assessee on merits. In conformity with the directions issued by the learned DRP, the A.O. passed the impugned final assessment order dated 27/12/2021.

15. In its application seeking condonation of delay in filing the present appeal, the assessee after placing on record the aforesaid facts submitted that it has filed the appeal before the learned CIT(A) against the first assessment order passed on 15/04/2021, which is currently pending for final disposal. It is further submitted that since vide impugned final assessment order, the A.O. computed the same income as was determined in the first final assessment order dated 15/04/2021, the assessee was under *bona fide* belief that the impugned final assessment order passed on 27/12/2021, is not required to be challenged before the Tribunal as its appeal against the first assessment order dated 15/04/2021, is pending before the learned CIT(A). However, it is submitted that during the preparation of the appeal for the subsequent year,

upon the advice of the tax consultant, the assessee challenged the impugned final assessment order dated 27/12/2021. Therefore, the assessee submitted that the delay in filing the present appeal is not because of any *mala fide* intention, but due to the circumstances beyond its control. Accordingly, the assessee prayed for condonation of delay of 363 days in filing the present appeal.

16. We find that the reasons stated by the assessee for seeking condonation of delay fall within the parameters for grant of condonation laid down by the Hon'ble Supreme Court in the case of Collector Land Acquisition, Anantnag Vs. MST Katiji and others: 1987 SCR (2) 387. It is well established that rules of procedure are handmaid of justice. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred. In the present case, the assessee did not stand to benefit from the late filing of the appeal. In view of the above and having perused the application, we are of the considered view that there exists sufficient cause for not filing the present appeal within the limitation period and therefore, we condone the delay in filing the appeal by the assessee.

17. Coming back to the issue raised by the assessee vide the aforesaid additional grounds of appeal, we find that the Hon'ble Jurisdictional High Court in Undercarriage and Tractor Parts Pvt. Ltd. (supra) while deciding the Writ Petition filed by the taxpayer challenging the directions issued by the learned DRP and the consequent final assessment order held that the learned DRP can only give directions in pending assessment proceedings and once the assessment order is passed, rightly or wrongly, the assessment proceedings

came to an end. Accordingly, in the facts of the case, since the A.O. had already passed the final assessment order prior to the directions issued by the learned DRP, the Hon'ble Jurisdictional High Court held that the learned DRP has no power to pass any directions as contemplated under section 144C(5) of the Act. As a result, the Hon'ble Jurisdictional High Court set aside the directions issued by the learned DRP and the consequent final assessment order challenged by the taxpayer. The relevant findings of the Hon'ble Jurisdictional High Court, in the aforesaid decision, are reproduced as under:–

> *"9. Section 144C of the Act reads as under:*
>
> *144C. Reference to dispute resolution panel. -*
>
> *(1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation which is prejudicial to the interest of such assessee.*
>
> *(2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order, -*
>
> *(a) file his acceptance of the variations to the Assessing Officer; or*
>
> *(b) file his objections, if any, to such variation with,-*
>
> *(i) the Dispute Resolution Panel; and*
>
> *(ii) the Assessing Officer.*
>
> *(3) The Assessing Officer shall complete the assessment on the basis of the draft order, if-*
>
> *(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or*
>
> *(b) no objections are received within the period specified in sub- section (2).*
>
> *(4) The Assessing Officer shall, notwithstanding anything contained in section 153[or section 153B], pass the assessment order under sub-section (3) within one month from the end of the month in which, -*
>
> *(a) the acceptance is received; or*
>
> *(b) the period of filing of objections under sub-section (2) expires.*

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

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

(a) draft order;

(b) objections filed by the assessee;

(c) evidence furnished by the assessee;

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

(e) records relating to the draft order;

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

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

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

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

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

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

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

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

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

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

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

(13) Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in section 153 [or Section 153B], the

assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.

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(15) For the purposes of this section, -

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

(b) "eligible assessee" means, -

(i) any person in whose case the variation referred to in sub- section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and

[(ii) any non-resident not being a company, or any foreign company.]

10 Section 144C(5) of the Act provides "the DRP shall, in a case where any objection is received under sub-section 2, issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment". Therefore, it is quite obvious, when it says to enable him to complete the assessment", it presupposes pending assessment proceedings.

Sub-section 6 of Section 144C of the Act provides "the DRP shall issue the directions referred to in sub-section 5, after considering the following The directions referred to in sub-section 5 are those directions for the guidance of the Assessing Officer to enable him to complete the assessment. Therefore, this also presupposes pending assessment proceedings.

Sub-section 7 of Section 144C of the Act provides "the DRP may, before issuing any directions referred to in sub-section 5 .....". These directions are for the guidance of the Assessing Officer to enable him to complete the assessment, which also presupposes pending assessment proceedings.

Sub-section 8 of Section 144C of the Act provides "the DRP may confirm, reduce or enhance the variations proposed in the draft orde .....” which means the assessment proceedings are still pending.

Sub-section 11 of Section 144C of the Act provides "no direction under sub-section 5 shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively which also presupposes pending assessment proceedings.

Similarly under sub-section 12 of Section 144C of the Act which says "no direction under sub-section 5 shall be issued after nine months from the end of the month in which the draft order is forwarded to the eligible assessee"; and

Under sub-section 13 of Section 144C of the Act which says "upon receipt of the directions issued under sub-section 5, the Assessing Officer shall, in conformity with the directions, complete, ... the assessment .....”.

Therefore, the DRP could give directions only in pending assessment proceedings. Once assessment order is passed, rightly or wrongly, the assessment proceedings come to an end. Therefore, the DRP would have no power to pass any directions contemplated under sub- section 5 of Section 144C of the Act.

11 While concluding, Mr. Suresh Kumar submitted that in view of what is stated in the affidavit in reply where respondents have admitted that the assessment order dated 24th December 2018 could not have been passed, the appeal pending before the CIT (A) will naturally get allowed/the assessment order would get set aside. That would result in the Revenue not able to pass assessment order under Section 143(3) of the Act or even under Section 147 of the Act.

The Rajasthan High Court in Sudesh Taneja V/s. ITO' held that (a) taxing statute must be interpreted strictly. Equity has no place in taxation. Nor while interpreting taxing statute intendment would have any place. (b) There is nothing unjust in the tax payer escaping if the letter of the law fails to catch him on account of the legislature's failure to express itself clearly. (c) It is axiomatic that taxation statute has to be interpreted strictly because the State cannot at their whims and fancies burden the citizens without authority of law. (d) In the matter of interpretation of charging section of a taxation statute, strict Rule of interpretation is mandatory and if there are two views possible in the matter of interpretation of a charging section, the one favourable to the assessee need to be applied. Paragraph 31 (i) of Sudesh Taneja (Supra) reads as under:

> *31. We may now attempt to answer these questions ourselves with the aid of statutory provisions and law laid down in various decisions cited before us we may summarise certain principles applicable in the field of taxation and which principles would be invoked in the course of the judgment :-*
>
> *(1) A taxing statute must be interpreted strictly. Equity has no place in taxation nor while interpreting taxing statute intendment would have any place. In case of State of W.B. Vs. Kesoram Industries Ltd. And Ors., (2004) 10 SCC 201, referring to Article 265 of the Constitution which provides that no tax shall be levied or collected except by authority of law, it was observed that in interpreting a taxing statute, equitable considerations are entirely out of place. Taxing statutes cannot be interpreted by any presumption or assumption. A taxing statute has to be interpreted in light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statute so as to supply any deficiency. Before taxing any person it must be shown that he falls within the ambit of charging section by clear words used in the section and if the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject. There is nothing unjust in the tax payer escaping if the letter of the law fails to catch him on account of the legislature's failure to express itself clearly*
>
> *A Constitution Bench in the case of Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar And Company And Ors., (2018) 9 SCC 1, had reiterated these principles. It was a case where on a reference to the Larger Bench the Supreme Court was considering a question whether an ambiguity in a tax exemption provision or notification, the same must be interpreted so as to favour the assessee. Making a clear distinction between a charging provision of a taxing statute and exemption notification which waives a tax or a levy normally imposed, the Supreme Court observed as under :-*

> *14. We may, here itself notice that the distinction in interpreting a taxing provision (charging provision) and in the matter of interpretation of exemption (98 of 113) [CW-969/2022] notification is too obvious to require any elaboration. Nonetheless, in a nutshell, we may mention that, as observed in Surendra Cotton Oil Mills Case, in the matter of interpretation of charging Section of a taxation statute, strict Rule of interpretation is mandatory and if there are two views possible in the matter of interpretation of a, charging section, the one favourable to the Assessee need to be applied. There is, however, confusion in the matter of interpretation of exemption notification published under taxation statutes and in this area also, the decisions are galore.*
>
> *24. In construing penal statutes and taxation statutes, the Court has to apply strict Rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocent might become victims of discretionary decision making. Insofar as taxation statutes are concerned, Article 265 of the Constitution prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because the State cannot at their whims and fancies burden the citizens without authority of law. In other words, when the competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the legislature.*

12 We should also note that factually, as recorded in its directions dated 16th September 2019, the DRP has stated as under:

> *"During the course of proceedings before the DRP, the assessee has filed a letter dated 26.08.2019 intimating that the AO after passing draft order on 03.12.2018 has passed final order on 24.12.2018, which was served on the assessee by email on 29.12.2018. Meanwhile, the assessee had already filed application before the DRP on 28.12.2018 which were in time. The assessee has also intimated that the assessee has already filed appeal before the CIT(A) against the aforesaid final order of the AO. The assessee has requested that in view of the final order already passed by the AO, the application before the DRP has been infructuous and therefore, it wishes to withdraw the application filled before the DRP We have considered the above letter dated 26.08.2019 filed by the assessee. Since, the objections filed by the assessee are in time as prescribed under the Act and AO's draft order is as per the Act, we, therefore proceed to issue directions to the AO/TPO as per the Act. Discussion and Direction of the DRP are as under."*

Notwithstanding this, the DRP has proceeded to issue the directions which it should not have done.

13 In the circumstances, we hereby quash and set aside the directions issued by DRP on 16th September 2019 and the consequent assessment order dated 31 October 2019."

18. In the present case, it is undisputed that the A.O. had already passed the final assessment order on 15/04/2021, i.e., prior to the issuance of directions by the learned DRP under section 144C(5) of the Act on

29/11/2021. We find that the learned DRP while assuming the jurisdiction to issue the directions under section 144C(5) of the Act had placed reliance upon the decision of the Hon'ble Delhi High Court as well as Co–ordinate Benches of the Tribunal, however, since the decision in Undercarriage and Tractor Parts Pvt. Ltd. (supra) has been rendered by the Hon'ble Jurisdictional High Court, therefore, the same is binding on us. Accordingly, respectfully following the aforesaid decision rendered by the Hon'ble Jurisdictional High Court in Undercarriage and Tractor Parts Pvt. Ltd. (supra), the impugned final assessment order dated 27/12/2021, passed under section 143(3) r/w 144C(13) of the Act pursuant to directions issued by the learned DRP under section 144C(5) of the Act is hereby set aside. As a result, additional grounds of appeal raised by the assessee are allowed.

19. As the relief has been granted to the assessee on this short issue, the grounds of appeal raised by the assessee on merits, in the present appeal, are rendered academic and, therefore, are kept open. Before concluding we clarify that since assessee's appeal against the first final assessment order dated 15/04/2021 is still pending before the learned CIT(A), and the said order is not the subject matter of the present appeal, we have not expressed any findings on legally and validity of the said order.

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

Order pronounced in the open Court on 29/12/2023

Sd/-	**Sd/-**
AMARJIT SINGH	**SANDEEP SINGH KARHAIL**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 29/12/2023

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The PCIT / CIT (Judicial);

(4) The DR, ITAT, Mumbai; and

(5) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

Assistant Registrar
ITAT, Mumbai