

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

**BEFORE SHRI VIKAS AWASTHY, HON'BLE JUDICIAL MEMBER**

**&**

**SHRI S. RIFAUH RAHMAN, HON'BLE ACCOUNTANT MEMBER**

**ITA NO. 1576/MUM/2021 (A.Y: 2016-17)**

Atos India Private Limited Unit No. 1401, 14 <sup>th</sup> Floor Supremus "E" Wing I Think Techno Campus Kanjurmarg (E), Mumbai - 400042  <b>PAN: AAACO2461J</b>	v.	ACIT – 14(1)(1) Rom NO. 481, 4 <sup>th</sup> Floor Aayakar Bhavan M.K. Road, Mumbai - 400020
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee Represented by</b>	<b>:</b>	<b>Ms. Chandni Shah &amp; Ms. Riddi Maru</b>
<b>Department Represented by</b>	<b>:</b>	<b>Shri Vachaspati Tripathi</b>
<b>Date of Conclusion of Hearing</b>	<b>:</b>	<b>11.12.2023</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>05.01.2024</b>

**ORDER**

**PER S. RIFAUH RAHMAN (AM)**

**1.** This appeal is filed by the assessee against the final Assessment Order and directions of the Dispute Resolution Panel of Learned Commissioner of Income Tax (DRP-1), Mumbai-1 [hereinafter in short

"Ld.DRP"] dated 25.03.2021 for the A.Y.2016-17 passed u/s. 144C(5) of Income-tax Act, 1961 (in short "Act").

**2. Assessee has raised following grounds in its appeal: -**

*"1. On the facts and in the circumstances of the case and in law, the Hon'ble Dispute Resolution Panel-1 ('Hon'ble DRP') erred in directing the Deputy Commissioner of Income Tax, Circle - 14(1)(1), Mumbai ('Ld. AO')/ Joint Commissioner of Income Tax, Transfer Pricing - 1(1), Mumbai ('Ld. TPO') to make an adjustment of INR 270,93,00,701 in relation to the international transaction of provision of software development services and that:*

- the Hon'ble DRP erred in upholding the decision of the Ld. AO/TPO in rejecting the TP documentation maintained by the Appellant;*
- the Hon'ble DRP erred in upholding the decision of the Ld. AO/ TPO in concluding that the Appellant is a full- fledged risk bearing service provider instead of a limited risk service provider;*
- the Ld. AO/TPO erred in including companies in the comparability analysis which are different from the Appellant in functions, assets and risks; and*
- the Ld. AO/ TPO erred in excluding companies similar to the Appellant in functions, assets and risks while performing comparability analysis.*
- the Hon'ble DRP erred in upholding the Ld.AO/TPO's approach of treating the foreign exchange gain as non- operating in case of the Appellant as well as in case of the comparable companies and directed the TPO to re- compute the margins, thereby increasing the adjustment by INR 1,49,22,85,387 (base amount of INR 1,20,15,18,025 plus revised arm's length mark-up of 24.20%).*

*The Appellant prays that the aforesaid adjustment be deleted.*

*2. On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in directing the upward adjustment of INR 12,69,78,147 to the income of the Appellant in relation to the international transaction of payment for intra-group services pertaining to Appellant's Non-Associated Enterprise ('AE') segment. The Ld. AO/TPO erred in determining the arm's length price ('ALP') of the aforesaid international transaction at INR 1,80,00,000 instead of INR 14,49,78,147*

*(book value of INR 20,76,06,565 reduced by voluntary adjustment with respect to Non-AE segment INR 6,26,28,418), and while doing so:*

- *ignoring that the Appellant had supported its claims with appropriate evidences;*
- *challenging the commercial rationale and expediency in availing the services from the AEs;*
- *ignoring that the Appellant is not required to establish the benefit arising out of the said services;*
- *ignoring that the intra-group services received are closely interlinked to the Appellant's business operations, and*
- *determining the ALP of the aforesaid international transaction in an arbitrary manner at INR 1,80,00,000.*

*The Appellant prays that the aforesaid adjustment be deleted.*

*3. On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in directing the Ld. AO/TPO to make an upward adjustment of INR 12,85,00,739 to the income of the Appellant in relation to the deemed international transaction of provision of information technology (IT) services to Standard Chartered Bank - India ('SCB India'). In respect of the aforementioned deemed international transactions, the Hon'ble DRP erred in directing the Ld. AO/ TPO to determine the ALP of the international transaction of receipt of project related IT services from Atos Information Technology HK Ltd. at INR 61,46,88,890 instead of INR 74,31,89,629 and while doing so:*

- *rejecting the TP documentation maintained by the Appellant, whereby the Appellant was remunerated at arm's length for the its role in the arrangement (supported by TP benchmarking analysis) as under:*
  - *front-ending the contract in the capacity of a limited risk software distributor: 3% of annual revenue from the contract;*
  - *bearing the credit risk associated with receipt of service fees from SCB India: 0.18% annual revenue from the contract; and*
  - *Performance of post-implementation IT support and maintenance function in the capacity of a limited risk service provider: operating costs plus 13.6% mark-up;*
- *confirming the observation of the Ld. AO/TPO in relation to the Appellant's characterisation and upholding that all the significant*

*business risks associated with the service contract with SCB India (including market risk and service liability risk) are borne by the Appellant instead of the Appellant's aforementioned AE;*

- *erroneously applying the set of uncontrolled comparables engaged in provision of IT services and using Operating Profit/ Operating Revenue as the profit level indicator to determine the revised ALP*
- *Without prejudice to the above, we also place reliance in the contentions mentioned in Ground No. 1.*

*The Appellant prays that the aforesaid adjustment be deleted. On the facts and in the circumstances of the case and in law, the*

4. *Hon'ble DRP erred in confirming the action of Ld. AO of disallowing the claim of INR 2,55.15,475 on account of depreciation on goodwill transferred from Atos IT Solutions and Services Private Limited ('Atos IT'), on the alleged ground that the goodwill recognised in the books of accounts of Atos IT was only an accounting entry and not an asset as per section 32 of the Income-tax Act, 1961 ('the Act').*

*The Appellant prays that the Ld. AO be directed to treat the goodwill as an asset under section 32 of the Act and therefore, eligible for depreciation under section 32 of the Act.*

5. *On the facts and in the circumstances of the case and in law, the Ld. AO has erred in taxing provisions for doubtful debts and advances written back during the year amounting to INR 5,36,79,888 even when the Hon'ble DRP had principally agreed that provisions which were disallowed in the year of creation cannot be brought to tax again in the year when they are written back and the Appellant had provided the practice followed in relation to the provision of doubtful debts.*

*The Appellant prays that the Ld. AO be directed to allow the provisions for doubtful debts written back during the year under consideration.*

6. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in not granting credit of foreign taxes paid amounting to INR 21,04,480.*

*The Appellant prays that Ld. AO be directed to grant credit of foreign taxes amounting to INR 21,04,480.*

7. *On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in denying the additional claim for deduction of Education Cess and Higher and Secondary Education Cess of INR 1,20,79,601 charged on income tax during the year under consideration as business expenditure while computing the total taxable income.*

*The Appellant humbly prays that the Ld. AO be directed to allow the additional claim of deduction of education and higher and secondary education cess while computing the total taxable income.*

8. *On the facts and in the circumstances of the case and in law, without prejudice to the ground no 4, the Hon'ble DRP erred in denying the additional claim of deduction of the foreign taxes paid by the Appellant to the extent of INR 53,11,932 as business expenditure while calculating the total taxable income under the head 'Profits and gains of business and profession as no relief was available with respect to the said taxes under section 90 of the Act.*

*The Appellant humbly prays that the Ld. AO be directed to allow the additional claim of deduction of balance foreign taxes paid while computing the total taxable income.*

9. *On the facts and in the circumstances of the case and in law, the Ld. AO erred in not granting credit of taxes deducted at source amounting to INR 74,539.*

*The Appellant prays that Ld. AO be directed to grant credit of foreign taxes amounting to INR 74,539.*

10. *On the facts and in the circumstances of the case and in law, the Ld. AO has erred in proposing to initiate penalty proceedings under section 271(1)(c) of the Act without appreciating that none of the provisions of section 271(1)(c) of the Act gets attracted in the facts of the Appellant's case."*

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

*"Ground No. 11:*

*On the facts and in the circumstances of the case and in law, the order dated on November 2019 passed by the Transfer Pricing Officer (TPO) under section 92CA of the Act is beyond the time limit prescribed under section 92CA(3A) r.w.s 153 of the Income-tax Act, 1961 ('Act'), thus making the transfer pricing order illegal, bad in law, null and void and liable to be quashed.*

*Ground No. 12:*

*On the facts and in the circumstances of the case and in law, the transfer pricing order being illegal and void on account of being barred by limitation in terms of section 92CA (3A) r.w.s 153 of the Act, the action of the Assistant Commissioner of Income-tax, Circle 14(1)(1), Mumbai (ACIT-14(1)(1)) in passing the draft assessment order dated 27*

*December 2019 by invoking section 144C of the Act is without jurisdiction and thus all proceedings consequent to the draft assessment order are also illegal and bad in law and liable to be quashed.*

*Ground No. 13*

*On the facts and in the circumstances of the case and in law, the transfer pricing order being illegal and void on account of being barred by limitation in terms of section 92CA(3A) r.w.s 153 of the Act, consequently, the final assessment order dated 20 April 2021 is also barred by limitation as prescribed under section 153 of the Act, thus making the final assessment order illegal, bad in law, null and void and liable to be quashed.*

*Without prejudice to Ground No. 13,*

*Ground No. 14:*

*On the facts and in the circumstances of the case and in law, the final assessment order dated 20 April 2021, passed by the National e-Assessment Centre ("NeAC") under section 143(3) read with section 144C(13) of the Act, having been passed beyond the limitation period provided in terms of section 153 of the Act, is void-ab- Initio, illegal and bad in law and is therefore liable to be quashed.*

*Without prejudice to Ground No. 11 to 14.*

*Ground No. 15:*

*On the facts and in the circumstances of the case and in law, the directions issued by the Dispute Resolution Panel ('the DRP) dated 25 March 2021 are not signed by all the members of the DRP and thus invalid and are liable to be quashed.*

*Ground No. 16:*

*On the facts and in the circumstances of the case and in law, the final assessment order dated 20 April 2021 under section 143(3) read with section 144C(13) of the Act passed by NeAC pursuant to invalid directions passed by the DRP, is invalid, thus making the final assessment order bad in law, null and void ab initio and liable to be quashed.*

**4.** At the time of hearing, Ld. AR submitted that assessee presses the Ground Nos. 11, 12 and 13 and the other grounds are not pressed at this stage. In this regard, he brought to our notice that similar grounds which

assessee has raised before the Coordinate Bench in ITA.No.1795/Mum/2017 for the A.Y. 2012-13 and the Coordinate Bench has considered and adjudicated the issue in favour of the assessee. Copy of the order is placed on record.

5. On the other hand, Ld. DR relied on the orders of the lower authorities.

6. Considered the rival submissions and material placed on record, we observe that similar issues were considered and adjudicated by the Coordinate Bench in assessee's own case for the A.Y. 2012-13 and decided the issues in favour of the assessee. While holding so the Coordinate Bench held as under: -

*"22. We have heard the rival submissions on the aforesaid legal issue as raised in additional grounds and we have also perused the judgment of Hon'ble Madras High Court in the case of M/s. Pfizer Healthcare India Private Limited (supra). Here in this case, the reference was made by the AO to the TPO u/s 92CA(1) in August 2014 and TPO had proposed transfer pricing adjustment of more than Rs. 78.88 crores on rendering of software development services and intra group services vide his order 31<sup>st</sup> January 2016. Thereafter draft assessment order was passed on 29.03.2016 wherein aforesaid TP adjustment was also made and further additions were made on corporate tax issues as enumerated above. After the receiving of draft assessment order, assessee filed objection before the DRP and DRP issued direction on 28.12.2016 and accordingly, final assessment order was passed on 31.01.2017.*

*23. Sub-section 3A of section 92CA provides a time limit for passing of the order by the TPO u/s 92CA (3) in the following manner:-*

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

24. *Ergo, the TPO can pass an order u/s 92CA of the Act at any time before 60 days prior to the date on which period of limitation referred to u/s 153 expires. Thus 60 days have to be counted prior to the date of last date of limitation u/s 153.*

25. *Section 153 of the Act as applicable for the AY 2012-13 reads as under:-*

**'153. (i) No order of assessment shall be made under section 143 or section 144 at any time after the expiry of-**

**(a) two years from the end of the assessment year in which the income was first assessable; or**

**(b) one year from the end of the financial year in which a return or a revised return relating to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year, is filed under sub-section (4) or sub-section (5) of section 139, whichever is later..**

**Provided also that in case the assessment year in which the income was first assessable is the assessment year commencing on the 1st day of April, 2009 or any subsequent assessment year and during the course of the proceeding for the assessment of total income, a reference under sub-section (1) of section 92CA is made, the provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words "two years", the words "three years" had been substituted."**

26. *Thus, in case where a reference is made to the TPO u/s 92CA(1), the time limit for completion of assessment is 3 years. Here in this case, in terms of section 153, the time limit for completing the assessee for AY 2012-13 was 31<sup>st</sup> March 2016. If the time limit provided in section 192CA(3A) r.w.s. 153(1) of the Act is juxtaposed, then here in this case, time limit for passing of the TPO order would be on or before 30<sup>th</sup> January 2016, because, if one day prior to the date of limitation u/s 153 is taken, then 60 days have to counted from 30<sup>th</sup> March 2016. The 60 days from 30<sup>th</sup> March would be (30 days of March + 29 days of February being a leap year + 1 day of January).*

27. *Now whether in these circumstances, the TPO order gets time barred or not, has come up for consideration before Hon'ble Madras High Court in the case of M/s. Pfizer Healthcare India Private Limited (supra) by the division bench wherein single bench Judge in Writ Appeal No. 1120 of 2001 and others, the Hon'ble Madras High Court after considering the*

*relevant provision as well as arguments made by both the parties and various judgments had made the following observations:-*

*22. From Section 153, the regular time for passing the assessment order ends on 31.12.2018 and with extension on the matter being referred to TPO, the time limit to pass assessment order would lapse on 31.12.2019. What is not to be forgotten, while interpreting a taxing statute, is the explicit and clear language used by the parliament while enacting the law. If the language employed in any statute is clear and unambiguous from its plain and natural meaning, external aid for interpretation are unnecessary. In the present case, we are called upon to adjudicate the period of limitation applicable to TPO under Section 92CA(3A) and incidentally under Section 153.*

*xxxx*

*26. Further, the general interpretation by resorting to the meaning conveyed under the General Clauses Act cannot be adopted while interpreting 92CA (3A), because, the context and the language employed therein are completely different and it is pertinent to note that the words "from" and "to" have not been used. Even the employment of the General Clauses Act will not aid the Revenue, the reason of which will be disclosed a little later in this judgment. But, right now, it is relevant to consider the scope of the word "to".*

*27. The word "to" is used as a preposition or as an adverb. In popular sense, it is used to express the direction in which a person, thing, or time travels. The flow of direction is to be gauged from the preceding word or words used, like "prior to" or "upto". Keeping the same in mind, if we look at the wording of Section 92CA (3A), we cannot accept the contention of the Revenue that the time to be reckoned is from 31.12.2019 and not 30.12.2019 as has been rightly done by the learned Judge.*

*28. The word "date" in section 92CA(3A) would indicate 31.12.2019. But the preceding words "prior to" would indicate that for the purpose of calculating the 60 days, 31.12.2019 must be excluded. The usage of the word "prior-" is not without significance. It is not open to this court to just consider the word "to" by ignoring "prior". The word "prior" in the present context, not only denotes the flow of direction, but also actual date from which the period of 60 days is to be calculated. It is settled law that while interpreting a statute, it is not for the courts to treat any word(s) as redundant or superfluous and ignore the same. In this connection, it is pertinent to note the judgment of the Apex Court in *Grasim Industries Ltd. v. Collector of Customs*, [(2002) 4*

SCC 297 : 2002 SCC OnLine SC 413], wherein, it was held as follows:

*"10. No words or expressions used in any statute can be said to be redundant or superfluous. In matters of interpretation one should not concentrate too much on one word and pay too little attention to other words. No provision in the statute and no word in any section can be construed in isolation. Every provision and every word must be looked at generally and in the context in which it is used. It is said that every statute is an edict of the legislature. The elementary principle of interpreting any word while considering a statute is to gather the mens or sententia legis of the legislature. Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to take upon itself the task of amending or alternating (sic altering) the statutory provisions. Wherever the language is clear the intention of the legislature is to be gathered from the language used. While doing so, what has been said in the statute as also what has not been said has to be noted. The construction which requires for its support addition or substitution of words or which results in rejection of words has to be avoided. As stated by the Privy Council in Crawford v. Spooner [(1846) 6 Moore PC 1 : 4 MIA 179] "we cannot aid the legislature's defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are left there". In case of an ordinary word there should be no attempt to substitute or paraphrase of general application. Attention should be confined to what is necessary for deciding the particular case. This principle is too well settled and reference to a few decisions of this Court would suffice. (See : Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. v. Custodian of Vested Forests [1990 Supp SCC 785 : AIR 1990 SC 1747], Union of India v. Deoki Nandan Aggarwal [1992 Supp (1) SCC 323 : 1992 SCC (L&S) 248 : (1992) 19 ATC 219 : AIR 1992 SC 96], Institute of Chartered Accountants of India v. Price Waterhouse[(1997) 6 SCC 312] and Harbhajan Singh v. Press Council of India [(2002) 3 SCC 722 : JT (2002) 3 SC 21]*

*29. The language employed is simple. 31.12.2019 is the last date for the assessing officer to pass his order under Section 153. The TPO has to pass order before 60 days prior to the last date. The 60 days is to be calculated excluding the last date because of the use of the words "prior to" and the TPO has to pass order before the 60th day. In the present case, the word "before" used before*

"60 days" would indicate that an order has to be passed before 1/11/2019 i.e on or before 31.10.2019 as rightly held by the Learned Judge.

30. Even considering for the purpose of alternate interpretation, the scope of Section 9 of the General Clauses Act, it is to be noted that an inverted calculation of the period of limitation takes place here. If the last date is taken to be the first date from which the period of 60 days is to be calculated, reading down the provision with the use of the word "from", which denotes the starting point or period of direction in general parlance, would mean that 60 days "from the last date". Even going by Section 9 of the General Clauses Act, when the word "from" is used, then, that date is to be excluded, implying here that 31.12.2019 must be excluded. After excluding 31.12.2019, if the period of 60 days is calculated, the 60th day would fall on 01.11.2019 and the TPO must have passed the order on or before 31.10.2019 as orders are to be passed before the 60th day. Therefore, either way the contention of the Revenue is a fallacy and has no legs to stand.

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

32. Let us now examine the relevant procedures relating to Transfer Pricing. After an international transaction is noticed subject to satisfaction of section 92B, a reference is made to the TPO under sub-Section (1) of Section 92CA of the Act. The TPO after considering the documents submitted by the assessee is to pass an order under Section 92CA (3) of the Act. As per Section 92CA (3A), the order has to be passed before the expiry of 60 days prior to the date on which the period of limitation under Section 153 expires. As per 92CA(4), the assessing officer has to pass an order in conformity with the order of the TPO. After receipt of the order from the TPO determining ALP, the assessing officer is to forward a draft assessment order to the assessee, who has an option either to file his acceptance of the variation of the assessment or file his objection to any such variation with the Dispute Resolution Panel and also the Assessing Officer. Sub-Section (5) of Section 144C of the Act provides that if any objections are raised by the assessee before the Dispute Resolution Panel, the Panel is empowered to issue such direction as it thinks fit for the guidance of the Assessing Officer after considering various details provided in Clauses (A) to (G) thereof Sub-Section (13) of Section 144C of the Act provides that upon receipt of directions issued under sub-section (5) of Section 144C

*of the Act, the Assessing Officer shall in conformity with the directions complete the assessment proceedings. It goes without saying that if no objections are filed by the Assessee either before the DRP or the assessing officer to the determination by the TPO, section 92CA(4) would come into operation. Therefore, it is very clear that once a reference is made, it would have an impact on the assessment unless a decision on merits is taken by DRP rejecting or varying the determination by the TPO.*

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

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

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

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

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

*"The intention of the legislature thus assimilates two aspects: In one aspect it carries the concept of "meaning" i.e. what the words mean and in another aspect, it conveys the concept of "purpose and object" or the "reason and spirit" pervading through the statute. The process of construction, therefore, combines both literal and purposive approaches. In other words the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in*

*the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed.. This formulation later received the approval of the Supreme Court and was called the "cardinal principle of construction".*

*38. In case of assessments involving transfer pricing, fixing of time limits at various stages sets forth that the object of the provisions is to facilitate faster assessment involving such determination. In the present case, as rightly held by the learned Judge in paragraphs 22 to 29 of the order dated 07.09.2020, the order of the TPO or the failure to pass an order before 60 days will have an impact in the order to be passed by the Assessing Officer, for which an outer time limit has been prescribed under Sections 144C and 153 and is hence mandatory. What is also not to be forgotten, considering the scheme of the Act, the inter-relatability and inter-dependency of the provisions to conclude the assessment, is the consequence or the effect that follows, if an order is not passed in time. When an order is passed in time, the procedures under 144C and 92CA(4) are to be followed. When the determination is not in time, it cannot be relied upon by the assessing officer while concluding the assessment proceedings.*

*39. Upon consideration of the judgments and the scheme of the Act, we are of the opinion that the word "may" used therein has to be construed as "shall" and the time period fixed therein has to be scrupulously followed. The word "may" is used there to imply that an order can be passed any day before 60 days and it is not that the order must be made on the day before the 60th day. The impact of the proviso to the sub-section clarifies the mandatory nature of the time schedule. The word "may" cannot be interpreted to say that the legislature never wanted the authority to pass an order within 60 days and it gave a discretion.. Therefore, the learned Judge rightly held the orders impugned in the writ petitions as barred by limitation, as the Board, in the Central Action Plan, has specified 31.10.2019 as the date on which orders are to be passed by the TPO, reiterating the time limit to be mandatory.*

*28. Now if we compare the case of Pfizer Healthcare India Pvt. Ltd. and assessee on the relevant dates then following picture emerges:-*

Sr. No.	Particulars	Relevant Dates	
		Pfizer India (Madras High Court)	Healthcare Pvt.. Ltd. Appellant
A	Assessment Year	2016-17	2012-13
B	Period of limitation for making an order of assessment as per Section 153 of the Act	21 months from the end of Assessment Year	24 months from the end of Assessment Year
C	Extension of period of limitation in case reference is made under section 92CA of the Act	12 months	12 months
D	Proceeding for assessment should be completed on / before this date	31.12.2019	31.3.2016
E	A date prior to the date on which period of limitation expires	30.12.2019	30.3.2016
F	Sixty day period expires on	01.11.2019	31.1.2016
G	Transfer Pricing Officer's order to be passed any time on / before this date	31.10.2019	30.1.2016
H	Date on which Transfer Pricing Officer's order is passed	01.11.2019	31.01.2016
	<b>Note 1. Calculation of break-up of sixty days.</b>	<b>December: 30 days</b> (excluding 31.12.2019) <b>November: 30 days</b>	<b>March: 30 days</b> (excluding 31.03.2016) <b>February: 29 days</b> <b>January: 1 day</b>

29. Thus, if we follow the principle and ratio laid down by the Hon'ble Madras High Court, then the time limit for passing the TPO order in the case of assessee would expire on mid-night of 30<sup>th</sup> January 2016 i.e. (00:00 Hrs of 30<sup>th</sup> January 2016). Here in this case, the order of TPO has been passed on 31<sup>st</sup> January 2016 and accordingly, the TPO order is clearly barred by limitation by one day by virtue of time limit provided under section 92CA(3). The TPO order admittedly has been passed after the limitation has expired and consequently, the same has to be treated as bad in law and is hereby quashed. Thus, in such a situation it has to be reckoned, as if there is no TPO order and consequently, the entire transfer pricing adjustment proposed by the TPO on the international transaction becomes non-est and liable to be quashed.

30. Now another issue which crops up, is, whether, once the TPO order is held to be nullity or quashed on the ground of being barred by limitation, then could AO have passed the draft order treating it to be as 'eligible assessee'. Section 144C was brought on the statute as special scheme of assessment and to provide alternative dispute resolution scheme to certain categories of 'eligible assessee'. Section 144C provides that the AO has to pass and forward a draft assessment order in the case of 'eligible assessee' if he proposes to make any variation which is prejudicial to the interest of such assessee, Sub-section 15 has defined

'eligible assessee' for the purpose of section 144C. The relevant provisions of section 144C(1) and sub section 15 reads as under:-

*144C. (1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation which is prejudicial to the interest of such assessee.*

*(15) For the purposes of this section,—*

*(a) "Dispute Resolution Panel" means...*

*(b) "eligible assessee" means,—*

*(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."*

*31. The aforesaid section envisages that, AO in the first instance has to forward a draft of the proposed order of assessment to the "eligible assessee", if he proposes to make any variation which is prejudicial to the interest of such assessee. The draft assessment order is to be forwarded to an "eligible assessee", which means that, for this section to apply a person has to be an "eligible assessee" Here, the draft assessment order is to be forwarded only to an "eligible assessee" and not to every assessee under the Act.*

*32. Thus, under the aforesaid provision, the expression "eligible assessee" is followed by an expression "means" and there are two categories referred therein (i) any person in whose case the variation arises as a consequence of TPO's order and (ii) any NR or Foreign company. The use of the word "means" indicates that the definition "eligible assessee" for the purposes of Section 144C(15)(b) is a hard and fast definition and can only be applicable in the above two categories. Ostensibly, the expression 'eligible assessee' has a restrictive meaning as it covers only the two types of persons mentioned above.*

*33. Further, considering the express language employed in defining the term 'eligible assessee' under section 144C(15)(b) and section 144C(1) in forwarding a draft assessment order to such an 'eligible assessee' only, is plain, clean and unambiguous; the said statute must be interpreted strictly without there being any role of 'equity or intendment' in such interpretation.*

34. In the present case, the assessee is an Indian company and, thus, a resident in India under section 6 of the Act. Thus, the second condition under section 144C (15)(b)(ii) of the Act for qualifying as an 'eligible assessee' is not applicable. As regards the first condition under section 144C(15)(b)(i) of the Act, the same applies where there is a transfer pricing variation arising as a consequence of the order of the Ld. TPO under section 92CA(3) of the Act. In the instant case, it will be apparent that there is no transfer pricing variation arising as a consequence of the order of the Ld. TPO once the said transfer pricing order is held to be time-barred, non-est and void-ab-initio from the very date of its existence and inception. The entire premise to adopt the special procedure under section 144C of the Act and treat the appellant an 'eligible assessee' rests on the fact that the order passed under section 92CA(3) of the Act has resulted in transfer pricing variations prejudicial to the interest of the appellant. However, once the transfer pricing order under section 92CA(3) of the Act, per-se, becomes a nullity, there remains no transfer pricing variation arising/ resulting or remaining as a consequence thereto. The effect of passing a null and void transfer pricing order here is that it has to be considered as non-est, meaning thereby, that it entails all the consequences of not having been passed at all and is ignored for all practical purposes. Thus, in absence of any transfer pricing order being passed at all and any variations arising there from, the entailing consequence in instant case is that the appellant cannot be said to be an 'eligible assessee' under section 144C(15)(b)(ii) of the Act.

35. Accordingly, once the assessee becomes an 'ineligible assessee', the very foundation for proceeding to pass the draft assessment order does not survive, meaning thereby, that the draft assessment order passed in the instant case becomes legally invalid and hence, all consequential proceedings on the basis of the said order fail. In the instant case, a reference was made by the Ld. AO to the Ld. TPO as per the provisions of section 92CA(1) of the Act and accordingly the timelines prescribed u/s 153 of the Act remain extended by a year in view of the 3rd proviso of section 153 of the Act. Accordingly, the time limit to complete assessment proceedings u/s 143(3) of the Act in the instant case expired on 31 March 2016. As on the date of passing draft assessment order u/s 144C(1) of the Act i.e. on 29 March 2016, the Ld. AO had already received the order passed by the Ld. TPO dated 31 January 2016, which as discussed above, is time barred, illegal and void ab initio, thereby making the Appellant not an eligible assessee u/s 144C(15) of the Act. In view of the same, the Ld. AO was ostensibly required to pass the final assessment order u/s 143(3) of the Act on that day. Having said that, the draft assessment order passed by the Ld. AO under the provisions of law is also illegal and void ab initio which deserves to be quashed.

36. It is a well-settled proposition now that a draft order passed in case of an 'ineligible assessee' vitiates the entire exercise of assessment and

*all subsequent proceedings are liable to be quashed has been held in the following cases:*

*(i) Honda Cars India Ltd. v. Dy. CIT [2016] 67 taxmann.com 29/240 Taxman 707/382 ITR 88 (Delhi);*

*(ii) Pankaj Extrusion Ltd. v. Asstt. CIT [2011] 10 taxmann.com17/198 Taxman 6 (Guj.)*

*(iii) FedEx Express Transportation and Supply Chain Services (India) (P.) Ltd. v. DCIT [2019] 108 taxmann.com 542 (Mumbai - Trib.)*

*In case of FedEx Express, the relevant portion of which has been reproduced in the foregoing paras, wherein the Tribunal has expressed the provision and finally deleted the corporate grounds also. We accordingly follow the same reasoning here in this case also.*

*37. Similarly, in a reverse case scenario, i.e., where a draft assessment order was required to be passed on an 'eligible assessee' as per section 144C(1) of the Act but the same was not so passed, in the following decisions as well, the entire assessment proceedings have been held to be invalid and liable to be quashed:*

*(i) Vijay Television (P.) Ltd. v. DRP [2014] 46 taxmann.com 100/225 Taxman 35/369 ITR 113 (Madras) affirmed by the Division Bench of the Hon'ble Madras HC in [2018] 95 taxmann.com 101 (Madras);*

*(ii) International Air Transport Association v. Dy. CIT [2016] 68 taxmann.com 246 (Bombay);*

*(iii) Zuari Cements Ltd. v. ACIT [Writ Petition No. 5557 of 2012, dated 21-2-2013] (Andhra Pradesh)- Revenue's SLP dismissed by the Hon'ble Apex Court in CC No. 16694/2013 on 27th September 2013*

*38. What culminates from the aforesaid two sets of parallel decisions is that the provisions of section 144C of the Act are specific and provides for a special code which must be strictly followed since it impacts the rights of an assessee substantively, i.e., the ability to accept or object a draft order proposition, file objections before the Dispute Resolution Panel and ensure a speedy disposal thereof. Any lapse in treating an assessee as 'eligible assessee' where it is otherwise not one and vice-versa results in fatality, since it becomes a jurisdictional defect and goes on to the roots in deciding the validity of the entire assessment proceedings against the revenue. In this context, on the issue of passing a correct assessment order in first instance (either a draft or a final one), the findings of the Hon'ble Madras High Court in case of ACIT v. Vijay*

*Television (P.) Ltd [2018] 95 taxmann.com 101 (Madras) are extremely critical which reads as follows:*

*"47. The necessity for the Parliament to incorporate Section 144-C is not only to safeguard the Revenue, but also the assessee and any mistake committed by any one of them, the said party is supposed to face the consequences and cannot put the hands of the clock back and start afresh."*

*39. Further, in case of Zuari Cements Ltd. v. ACIT [Writ Petition No. 5557 of 2012, dated 21-2-2013] (Andhra Pradesh), the Division Bench (DB) of the Andhra Pradesh High Court categorically held that the failure to pass a draft assessment order under Section 144C (1) of the Act would result in rendering the final assessment order "without jurisdiction, null and void and unenforceable." In that case, the consequent demand notice was also set aside. The decision of the Andhra Pradesh High Court was affirmed by the Supreme Court by the dismissal of the Revenue's SLP (C) [CC No. 16694/2013] on 27th September, 2013.*

*40. The various judgments which have been cited before us that 144C(1) will not apply and there is no variation in the return of income which cannot be disputed. Thus in our view, Ld. AO to acquire a legal and valid jurisdiction for the purpose of forwarding a draft assessment order at the first instance under section 144C(1) of the Act, it is necessary that the assessee must be an 'eligible assessee' within the restrictive and strict four corners of how the said expression has been defined under section 144C(15)(b) of the Act. Here, once it is held that there is no legal or valid transfer pricing order under section 92CA(3) of the Act, there remains no variation arising as a consequence thereto and the case of the assessee, being an Indian company, falls outside the definition of 'eligible assessee' as defined under section 144C(15)(b) of the Act. Thus, the Ld. AO cannot be said to acquire a legal or a valid' jurisdiction under section 144C(1) r.w.s. 144C(15)(b) of the Act to pass or forward a draft assessment order to the appellant who is otherwise an 'ineligible assessee'. The action of the Ld. AO in passing the impugned draft assessment order in instant case results in non-compliance of section 144C of the Act which vitiates the entire assessment exercise.*

*41. The issue being fairly settled and the intent of legislature in strictly interpreting the provision of section 144C of the Act being repeatedly held so, the act of the Ld. AO in proceeding to pass a draft assessment order on the basis of an order by the Ld. TPO which is barred by limitation and thus bad in law/ non-est, results in an incurable illegality which is liable to be held as null and void, and thus, consequentially holding the final assessment order to be bad in law as well.*

42. Thus, despite the fact that the reference made to the Ld. TPO is valid, in absence of a legally valid transfer pricing order and a valid draft assessment order, the Ld. AO cannot assume jurisdiction to proceed with the assessment under Section 144C of the Act and pass the consequential final assessment order. The decisions of the Hon'ble jurisdictional High Court in case of *International Air Transport Association (supra)* and *Dimension Data Asia Pacific PTE Ltd. (supra)* forties appellant's contentions and the irresistible conclusion that the draft assessment order imbibes a jurisdictional power in terms of Sec. 144C(1) of the Act and creates/ envisages special rights upon the 'eligible assessee'. If such an order is passed on an assessee who is not an 'eligible assessee' as defined in section 144C(15)(b)(i) of the Act, then it would render the entire proceedings pursuant to such order null and void.

43. We find that section 153(1) of the Act, as it stood applicable for the AY 2012-13, provided a time limit of 3 years from the end of AY 2012-13 for completion of assessment under section 143(3) of the Act, i.e., on or before 31 March 2016.

44. In such a case if the Ld. AO invokes the provisions of section 144C of the Act and passes the final assessment order after 31 January 2016 i.e. beyond the period of limitation as stated above, such final assessment order u/s 143(3) r.w.s 144C of the Act is liable to be quashed as being barred by limitation.

45. In a recent decision of the Hon'ble Madras High Court in case of *Virtusa Consulting Services Put. Ltd [TS-474-HC- 2022(MAD)]* dated 9 June 2022, it has been held in context of period of limitation under section 153 of the Act as under:

"17. Further, it is to be noted that the different timelines to be adhered by the TPO, Assessing Officer to pass a draft order, assessee to file their objections, DRP to issue directions and the assessing officer to pass final order, would commence only on a reference to the TPO and not otherwise. At this juncture, it is not to be forgotten that the period of 33 months is to pass the final order of assessment after the directions from the DRP. In this case, we find from the undisputed dates and events that not only was the reference to the TPO made after the period of expiry of the period of limitation to pass assessment orders, but also that the assessing officer has failed to pass final assessment orders in time. The time to pass the original assessment would end on 31.12.2008 being 21 months from the end of the

*assessment year 2006-07 i.e., 31.03.2007. Then the last date for the assessing officer to pass the final assessment order would end on 31.12.2009, even considering the extension by twelve months. In the present case, the order of the DRP itself is only 24.09.2010 much beyond the permissible period."*

46. *Thus taking into the provisions of law and the judgment referred to above, we hold that the final assessment order passed on 31 January 2017 is beyond the prescribed period of limitation under section 153 of the Act expiring on 31 March 2016, thus, barred by limitation and is hereby quashed.*

47. *In the result, the appeal filed by the assessee stands allowed on the additional grounds."*

**7.** Since the issues are exactly similar and grounds as well as the facts are also identical, respectfully following the above decision in assessee's own case for the A.Y. 2012-13, we allow the additional grounds raised by the assessee. The other grounds raised by the assessee are kept open at this stage.

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

Order pronounced in the open court on 05<sup>th</sup> January, 2024

**Sd/-**  
**(VIKAS AWASTHY)**  
**JUDICIAL MEMBER**  
Mumbai / Dated 05.01.2024  
Giridhar, Sr.PS

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

**Copy of the Order forwarded to:**

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

//True Copy//

BY ORDER

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