

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

**Before Shri Saktijit Dey, Vice President
Dr. B. R. R. Kumar, Accountant Member**

**ITA No. 243/Del/2022
A.Y. : 2016-17**

Mobase India Pvt. Ltd., 1C, Front Part of Front Building, Udyog Vihar, Ecotech-II, Greater Noida 201306, UP	Vs	The ACIT, National e-Assessment Centre, New Delhi.
(APPELLANT)		(RESPONDENT)
PAN No. AAECD 8832 G		

**Assessee by : Sh. Rajesh Dua, CA
Revenue by : Sh. Rajesh Kumar, CIT(DR)**

Date of Hearing: 06.12.2023	Date of Pronouncement: 27.02.2024
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ORDER

Per Dr. B. R. R. Kumar:-

The present appeal has been filed by the assessee against the order of Assessing Officer dated 30.03.2021 for the A.Y. 2016-17.

2. The assessee has raised the following grounds:

A. General Grounds of Appeal

1. *That the Transfer Pricing Order ["TP Order"] dated 26/09/2019 passed by the Transfer Pricing Officer u/s 92AC["the TPO"]/Draft Assessment Order passed by the Assessing Officer ["the AO"] u/s 144C dated 25/11/2019, the order passed by the Dispute Resolution Panel, New Delhi-1 ["DRP-1"] dated 27/02/2020 and the order passed by the National e-Assessment Center [NeAC] dated 30/03/2021, to the extent prejudicial to the interest of the appellant, are bad in law and deserve to be quashed to that extent.*
2. *That the grounds of appeal hereto are without prejudice to each other.*
3. *That on the facts and in the circumstances of the case and in law, the Assessing Officer/ NeAC vide his order dated 30/03/2021 has assessed the*

income of the appellant at a loss of Rs 4,91,40,907/- against the returned loss of Rs 5,23,09,629/- in most arbitrary, palpably erroneous and totally unlawful manner which are liable to, and must be quashed.

B - Legal Grounds challenging the validity of the addition made in the final order dated 30/03/2021 passed by the AO/NeAC

4 The Assessing officer / TPO erred in fact and in the law

4.1 by proposing to make adjustment to the returned loss of the appellant in the final order under section 143(3) r.w.s 144C(13) and 144C(13) read with sections 143(3A) & 143(3B) of the Income-tax Act dated 30/03/2021 without first proposing such adjustment in the draft order passed u/s 144 dated 25/11/2019

4.2 as his action of not proposing the adjustments in the draft order u/s 144C has prevented the Appellant from filing the objection before the Dispute Resolution Panel.

4.3 thus the AO/ TPO have exceeded his jurisdiction by making adjustment in the final order dated 30/03/2021 without allowing the assessee the opportunity to file his reply, thus bad in law.

4.4 The action of the AO/ TPO is against the principal of natural justice, thus not sustainable in the eyes of the law.

C-Grounds challenging on merit the addition made in the final order dated 30/03/2021 passed by the AO/NeAC.

5. Without prejudice to our stand that the adjustment proposed by the AO in his final order are not sustainable legally, The Assessing Officer erred in disallowing the payment of Provident Fund and ESI

5.1 amounting to total Rs 19,93,460/- under section 36(1)(va) and treating the same income of the assessee under section 2 (24)(x) of the Income Tax Act, 1961, without considering that the provisions of section 43B are applicable to such payment as the payment has been deposited before filing of Income Tax Return as per section 139(1) of the Act.

5.2 The Assessing Officer erred in disallowing the payment of Provident Fund and ESI without considering that out of the total amount of Rs 19,93,460/- A sum of Rs 11,22,959 was employer's contribution and Rs 8,70,501 was received from the employee's for their share of contribution.

6. The Assessing Officer erred in disallowing the expenditure incurred by the assessee amounting to Rs 4,08,267/- towards increase in capital.

7. The Assessing Officer erred in treating Rs 7,66,993 being the profit on sale of fixed assets as income from other source under section 56 of the Act. The Assessing Officer ignored the fact that the assets sold being the depreciable assets, the sale proceeds of the assets is required to be reduced from the WDV of the assets as per the provisions of section 43(6)

of the Act, which the assessee has duly done following the provisions of section 43(6).

D- Other Grounds

8. *Levy of Interest U/s 234B, 234C and 234D of the Income Tax Act 1961 The AO/DRP/National e-Assessment Center New Delhi erred in charging of interest under the provision of section 234B, 234C & 234D of the Income Tax Act in their order.*
9. *The Assessing officer erred in proposing to initiate the penalty proceedings under section 271(1)(c) of the Income Tax Act 1961.*

3. The assessee filed its return of income for assessment year 2016-17 on 16/10/2016, declaring a loss of Rs. 5,23,09,629/-. Since the assessee had International Transactions with its Associated Enterprise, the Assessing Officer referred the case to the Transfer Pricing Officer u/s 92CA (1) of the Act. The Transfer Pricing Officer passed an Order dated 26/09/2019 u/s 92CA (3) proposing a total adjustment of Rs. 2,16,12,356/- to the international transactions of the assessee with its AE, consequently the AO passed draft Assessment Order.

4. Aggrieved with the Draft Assessment Order u/s 144C(5), the assessee preferred to file objections before the Dispute Resolution Panel, New Delhi-1. The DRP-1 issued directions to the TPO/ AO vide order dated 27/02/2020 providing the complete relief to the assessee on the proposed addition made by the AO in Draft Assessment Order u/s 144C(5) of the Act.

5. The AO/ National e-Assessment Centre after the DRP's Order passed an order u/s 143(3) r.w.s 144C (5) and 144C (13) r.w.s. 143(3) (A) and 143(3) (B) of the Act on 30/03/2021. In this order, the AO/[NeAC] made following disallowances to the returned loss of the assessee and reduced the returned loss to Rs. 4,91,40,907 against the returned loss of Rs. 5,23,09,629.

6. The above timelines are summarized below:

Sr.No.	Description	Date of Order	Remarks
1.	Draft Assessment Order u/s. 144C	25/11/2019	Proposed adjustment of Rs. 2,16,12,356.
2.	The AO/[NeAC] after the DRP's Order	30/03/2021	Made disallowance of Rs. 31,68,722. On account of
			ESI & PF 19,93,460
			ROC fees 4,08,267
			Profit on sale of fixed assets 7,66,993

7. The assessee submitted that the final order passed by the AO/NeAC suffers from jurisdictional validity as the AO/NeAC has exceeded his jurisdiction by proposing to make addition in the final order dated 30/03/2021 without first proposing the additions in the Draft Assessment Order u/s 144C. It was argued that this action of AO/NeAC have effectively prevented the assessee from filing an objection before the Dispute Resolution Panel.

8. The Finance (No. 2) Act 2009 inserted the provisions of section 144C in the statute book the scheme of reference to DRP in the case of an eligible assessee. Section 144C (1) obligates an AO/NeAC to forward a draft of the proposed Assessment Order to such eligible assessee if he proposes to make any variation prejudicial to the interest of the eligible assessee. Sec 144C(1) provides that on receipt of such Draft Assessment Order the eligible assessee within 30 day's of receipt of the draft order shall either accept the variation proposed by the AO/NeAC or file his objection to such variation with the Dispute Resolution Panel. The relevant extract of section 144C is reproduced here

"Reference to dispute resolution panel.

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.

(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".

9. Further, section 144C(5) provide that in cases where the assessee has opted for filing an objection with the DRP, the DRP shall issue such directions for the guidance of the AO/NeAC to complete the assessment. Section 144C(6) provides that DRP shall issue the direction as per sub section 5 after considering the Draft Assessment Order, objections filed by the assessee, evidences furnished by the assessee or any other relevant record/evidence/enquiry. The DRP is also empowered to make further enquiry from the eligible assessee on the objection filed before issuing the direction and may confirm, reduce or enhance the variation proposed in the Draft Assessment Order. The relevant extract of section 144C is reproduced here under:

"(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."

10. Further, a careful examination of the above scheme of reference to the Dispute Resolution Panel clearly demonstrates that the AO/NeAC while passing his Draft Assessment Order has to propose all the variations to the income of the assessee, be it arising out of Transfer Pricing matters or regular Corporate Taxation matters. Section 144C(1) states that the Assessing Officer has to forward a Draft Assessment Order in case of eligible assessee if he proposes "any variation which is prejudicial to the interest" of the eligible assessee. The use of words any variation which is prejudicial to the interest of eligible assessee in the subsection (1) of section 144C clearly demonstrate that the variation proposed are not limited to Transfer Pricing related variations only but every variation which is prejudicial to the interest of eligible assessee. The word "any" is of wide connotation and would include all the variations which are prejudicial to the interest of eligible assessee.

11. Thus, the AO/NeAC should have, in first the place, forwarded a Draft Assessment Order containing all the proposed variations which are prejudicial to the interest of the assessee.

12. The action of the AO/NeAC not proposing all the variation in the Draft Assessment Order has denied the assessee of its legal right of filing objections before the DRP.

13. The assessee fulfils the first condition of being an eligible assessee in whose case variations has been proposed by the TPO u/s 92CA(3), the AO/NeAC was under obligation to follow the procedure laid down in the scheme of section 144C which is as following:

- a. The AO/NeAC to forward a Draft Assessment Order to the eligible assessee containing all the variation proposed.
- b. On receipt of such an order, the assessee is either to accept the variations or file objection with the DRP.
- c. The AO/NeAC shall complete assessment on the basis of acceptance received from eligible assessee or no objection received within 30 days.
- d. The Dispute Resolution Panel, on receipt of objection, shall issue direction to the AO for completion of assessment.
- e. The DRP shall issue directions after considering the Draft Assessment Order and other relevant evidences, reports and objections filed by the assessee.
- f. The DRP, before issuing directions, may make further enquiries before issuing directions.
- g. Every direction issued by DRP shall be binding on the AO/NeAC.
- h. No direction shall be issued without granting an opportunity of being heard to the assessee or AO/NeAC.
- i. No direction shall be issued after 9 months in which Draft Assessment Order is forwarded to eligible assessee.
- j. Upon receipt of direction of DRP, the AO/NeAC is to complete the assessment in conformity with the directions of DRP.

14. The AO did not complete the assessment in conformity with the directions of DRP which did not contained any variations on account of addition of PF & ESI, Fees paid for Authorised Capital increase and Profit on sale of fixed assets.

- In the draft Assessment Order passed by the Assessing Officer has only proposed adjustment on account of the Transfer Pricing Order of Rs. 216,12,356/- to the total loss as per ITR of Rs. 523,09,629/-.
- The Id. DRP deleted the addition proposed on account of Transfer Pricing determining adjustment on account of ALP at NIL.
- Then the AO passed an order making addition on account of PF & ESI, ROC Fess and profit on sale of fixed assets. These three items were either two were not part of the draft Assessment Order. Hence, in view of the provisions of Section 144C(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.]*, the AO was not empowered to make any other addition which was not proposed in the draft Assessment Order an hence the order of the cannot be sustained.

15. In the result, the appeal of the assessee is allowed

Order Pronounced in the Open Court on 27/02/2024.

Sd/-
(Saktijit Dey)
Vice President

Sd/-
(Dr. B. R. R. Kumar)
Accountant Member

Dated: 27/02/2024

NV, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, DELHI