

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'H' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

**ITA No.1335/Mum/2021
(Assessment Year :2016-17)**

India Medtronic Private Limited 1261, Solitaire Corporate Park Building No.12, 6 th Floor Andheri-Ghatkopar Link Road Andheri (E) Mumbai- 400 093	Vs.	Additional/ Joint/Deputy / Asst. Commissioner of Income Tax / Income Tax-Officer, National e-Assessment Centre, Delhi
PAN/GIR No.AAACI4227Q		
(Appellant)	..	(Respondent)

Assessee by	Shri Rajan Vora a/w. Nikhil Tiwari
Revenue by	Ms. Divya Ruth J
Date of Hearing	22/02/2024
Date of Pronouncement	13/03/2024

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against final assessment order dated 25/05/2021, passed u/s.143(3) r.w.s. 144C(13) for the A.Y. 2016-17, passed in pursuance of direction given by the DRP dated 23/03/2021 u/s.144C(5) of the Act.

2. Before us several grounds have been taken on merits as well as additional ground challenging the validity of transfer pricing order and assessment order being barred by limitation.

3. The brief background and the facts qua the legal issue raised that transfer pricing order u/s 92CA (3) and final assessment order are barred by limitation are discussed succinctly herein after. Assessee Company is engaged in the business of distribution of medical devices. It has filed its return of income for AY 2016-17 on 30 November 2016 declaring a total income under the normal provisions of the Income-tax Act, 1961 ('the Act) of Rs. 47,44,45,300/- and book profit of Rs. 36,31,30,030/- under provision of section 115JB of the Act. Further, since tax payable under the normal provisions of the Act was higher than tax payable under provisions of section 115JB of the Act, the assessee paid tax as per normal provisions of the Act.

4. The assessee's case was selected for scrutiny assessment proceedings under section 143(3) of the Act and simultaneously, transfer pricing proceedings were initiated by the learned Transfer Pricing Officer (learned TPO) under Section 92CA(2) of the Act. The learned TPO proposed the following transfer pricing (TP) adjustments vide its order dated, 1 November 2019 :-

Particulars of TP Adjustment	Amount (in INR)
1 Adjustment on account of alleged Advertising, Marketing and Promotion (AMP) expenses	1,08,99,66,623
2. Adjustment on account of reimbursement of expenses	6,26,48,940

3. Adjustment on account of IT management and related support services	1,14,44,925
4. Adjustment on account of import of finished goods	15,35,87,893
5. Alternate adjustment on account of AMP expenses (convention expenses)	44,62,88,562

5. Subsequently, the draft assessment order dated 17 December 2019 was passed by the Deputy Commissioner of Income-10(1)(1), (learned AO) proposing certain additions/disallowances in addition to the above-mentioned transfer pricing adjustment as mentioned in point 5.

Particulars	Amount (in INR)
Transfer pricing adjustments	
1 Adjustment on account of alleged AMP expenses	1,08,99,66,623
2. Adjustment on account of reimbursement of expenses	6,26,48,940
3. Adjustment on account of IT management and related support services	1,14,44,925
4. Adjustment on account of import of finished goods	15,35,87,893
5. Alternate adjustment on account of AMP expenses (convention expenses)	44,62,88,562

Transfer pricing adjustment Total (A)	1,31,76,48,381
6. Disallowance of convention expenses	48,57,29,824
7. Disallowance of depreciation on building	61,468
CT adjustment Total (B)	48,57,91,292

6. The assessee filed objections before the ld. DRP against the said draft order which consists of transfer pricing and non-transfer pricing adjustment / additions/disallowances. The ld. DRP has disposed off the objections, vide directions dated 23 March 2021 wherein certain relief was granted/ enhancement were made and certain adjustments were confirmed by the ld. DRP.

7. Based on the directions of the ld. DRP, the ld. AO issued the final assessment order dated 25 May 2021 under section 143(3) read with section 144C(13) of the Act, making the following adjustments/ additions/ disallowances:-

Particulars	Amount of adjustment as per draft AO Order [in INR]	Amount of adjustment as per final AO order (in INR)	Remarks
1. Adjustment on account of alleged Advertising, Marketing and Promotion ('AMP') expenses	1,08,99,66,623	1,08,99,66,623	The ld. DRP relied on its earlier year directions and held that AMP expenses are to be disallowed.

2. Adjustment on account of reimbursement of expenses.	6,26,48,940	3,38,07,378	The ld. DRP upon receiving remand report from the Ld. TPO reduced the adjustment on reimbursement of expenses by INR 3,92,74,566 and disallowed the balance reimbursement of expenses.
3. Adjustment on account of IT management and related support services	1,14,44,925	Nil	The ld. DRP directed the Ld. TPO to examine the correctness of the margins of 3 comparables. Upon verification and correcting the operating margins of such comparable companies, the margin earned by the assessee was within the revised arm's length range of comparable companies hence, the adjustment was deleted.
4. Alternate adjustment on account of import of finished goods*	15,35,87,893	14,13,63,999	The ld. DRP directed the Ld. TPO to consider alleged excessive AMP expenses as non-operating while computing margin for import of finished goods. Further, the ld. DRP directed the Ld. TPO to examine the

			<p>correctness of margins of;</p> <ul style="list-style-type: none"> • Sataytej Commercial Company Ltd • Hospimax Healthcare Pvt. Ltd. • Confident Sales India Pvt. Ltd. <p>After considering the above, the revised operating margin of the assessee is 17.60% on operating revenue (considering the alleged AMP expenses as non-operating) is higher than the range of the margins of the comparable companies considered.</p> <p>The Id AO/ TPO inadvertently did not follow the Hon'ble DRP directions to consider the adjustment as alternate adjustment and not to include the amount in the computation of total income.</p>
5. Alternate adjustment on account of AMP expenses (convention expenses)	-	-	<p>Alternate transfer pricing adjustment on account of convention expenses of INR 44,62,88,562 was reduced to INR - 41,00,49,931 (after partial relief granted</p>

			based on the ld.DRP directions wherein the ld. DRP reduced 8.12% of the expenses incurred by third party)
--	--	--	---

Particulars	Amount of adjustment as per draft AO Order (in INR)	Amount of adjustment as per final AO order (in INR)	Remarks
Transfer pricing adjustment Total (A)	1,31,76,48,381	1,26,51,38,000	
CT adjustment			
1. Disallowance of convention expenses	48,57,29,824	41,00,49,931	Ld.DRP relied on its earlier year directions and held that the convention expenses incurred are in violation of MCI regulations. AO reduced convention expenses by 8.92% while passing the final order.
2. Disallowance of depreciation on building	61,468	61,468	Ld. DRP relying on its earlier year directions, dismissed the objection raised by the assessee.
CT adjustment Total (B)	48,57,91,292	41,01,11,399	

8. On the issue of time barring of the assessment order, it has been contended by the Ld. Counsel before us that the ld. TPO

has passed an order on 01/11/2019 which is beyond the time limit provided in Section 92CA(3A) of the Act which requires the transfer pricing order to be passed "at any time before sixty days prior to the timeline for the assessment order". Thus, it is implied that such order must precede 31 December 2019 by not less than sixty days, and accordingly, the order passed by learned TPO is time barred and bad in law and needs to be quashed. In support reliance was placed on the judgment of Hon'ble Madras High Court in the case of **Pfizer Healthcare India (P) Ltd., reported in 433 ITR 28(Madras)** wherein heavy reliance was placed on the following paragraph:-

"30. Now, coming to the question of how the 60 day period is to be computed, the critical question would be whether the period of 60 days would be computed including the 31st of December or excluding it. Section 153 states that no order of assessment shall be made at any time after the expiry of 21 months from the end of the assessment year in which the income was first assessable. The submission of the revenue is to the effect that limitation expires only on 12 a m of 1-1-2020. However, this would mean that an order of assessment can be passed at 12 am on 1-1-2020, whereas in my view, such an order would be held to be barred by limitation as proceedings for assessment should be completed before 11:59:59 of 31-12-2019. The period of 21 months therefore, expires on 31-12-2019 that must stand excluded since section 92CA(3A) states before 60 days prior to the date on which the period of limitation referred to section 153 expires. Excluding 31-12-2019, the period of 60 days would expire on 1-11-2019 and the transfer pricing orders thus ought to have been passed on 31-10. 2019 or any date prior thereto, Incidentally, the Board, in the Central Action Plan also indicates the date by which the Transfer Pricing orders are to be passed as 31-10-2019. The impugned orders are thus, held to be barred by limitation.

9. To draw the parallel between the dates and the passing of the order in the case of Pfizer Healthcare India (P) Ltd. as well as in the case of the assessee following summary of events and timelines was given:-

Particulars	Dates in Pfizer	Dates in IMPL
Financial Year	2015-16	2015-16
Assessment year	2016-17	2016-17
End of Assessment year	31 March 20 17	31 March 2017
Due date for completion of assessment under section 153(1) i.e. 21 months from the end of A.Y. (plus 12 months extension considering TP reference has been made)	31 December 201 9	31 December 2019
Date on which limitation expires u/s 153 ie 31 December	1 day	1 day
Less. Remaining days of December	30 days	30 days
Less: Remaining days of November	30 days	30 days
Due date for passing the TP Order u/s 92CA(3) i.e. 61 st day from 31 December	31 October 2019	31 October 2019
Date TP order u/s. 92CA (3)	1 November 201 9	1 November 201 9

10. Accordingly, it was submitted that the time limit for passing transfer pricing order u/s.92CA (3A) of the Act was on or before 31/10/2019 and therefore, the order dated 01/11/2019 passed by ld. TPO is barred by limitation. Further, he submitted that this Tribunal in various judgments following the decision of Pfizer Healthcare India (P) Ltd. supra have quashed the orders passed u/s.92CA(3) of the Act. For the sake of ready reference following decisions were referred:-

- Diageo India Pvt Ltd vs DCIT (ITA No. 1233/Mum/2021) dated 1 December 2023.
- Johnson & Johnson Private Limited vs DCIT (ITA No. 3015/MUM/2015) dated 13 June 2023
- Louis Dreyfus Commodities India Pvt Ltd vs. DCIT (ITA No 2381/Del/2014) dated 11 March 2021
- DCIT vs. Tata Power Solar Systems Ltd (IT(TP)A No. 699/Bang/2016) dated 30 March 2022
- Swiss Re Global Business Solution India Pvt. Ltd Vs DCIT (IT(TP)A No. 290/Bang/2015) dated 30 December 2021
- DCIT vs. Unisys India Private Limited (ITA No 2025/Bang/2017 and ITA No.2096/Bang/2017) dated 16 June 2022

11. In another additional ground 2A, it has been contended that once the order of the ld. TPO is time barred, not only no adjustment on account of transfer pricing stands invalid but also the draft assessment order passed by the ld. AO is also invalid, because then there was no requirement to pass the draft assessment order and final assessment order should have passed within the time limit provided and here, in this case final

assessment order dated 25/05/2021 is barred by limitation. It has been submitted that as per section 144C(1) of the Act, inter alia, the ld. AO shall forward a draft assessment order to the eligible assessee if he propose to make any variation which is prejudicial to the interest of the assessee Further as per section 144C(15)(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 section 92CA(3); or ii) any non-resident not being a company or any foreign company. Thus here in this case, it is neither a foreign company or a person in whose case variation is proposed as per TP order as the order passed by learned TPO in case of the assessee is time barred, which needs to be quashed. Accordingly, the assessee is not an eligible assessee and a final assessment order is required to be passed instead of draft assessment order However, the learned AO passed a draft assessment order and thus, the entire draft and final assessment order is bad and invalid in law and required to be quashed.

12. In support, the following decisions have been referred and relied upon:-

- *DCIT vs Saint Gobain India Private Limited (WA no 1120 of 2021) dated 31 March 2022.*
- *Mondelez India Foods Private Limited (ITA No 1492/Mum/2015) dated 14 November 2022.*
- *Atos India (P) Ltd v DCIT (ITA No. 1795/Mum/2017) dated 23 February 2023*

- *Siemens Ltd v DCIT (ITA No 881 and 882/Mum/2022) dated 7 August 2023*
- *Mahindra and Mahindra Ltd v NeAC (ITA No 1058/Mum/2021) dated 20 July 2023*
- *Teleperformance Global Services (P) Ltd V NEAC (ITA No 1100/Mum/2021) dated 24 March 2023*
- *DHL Logistics (P) Ltd v NaFAC (ITA No 1240/Mum/2021) dated 22 July 2023 (Refer pages 1342 to 1353 of the legal PB)*
- *Colgate-Palmolive (India) Limited v. ACIT (ITA No. 040/Mum/2021) dated 27 April 2023*
- *Johnson & Johnson Private Limited vs DCIT (ITA No 3016/MUM/2016) dated 13 June 2023*

13. On the other hand ld. DR has filed written submissions, which for the sake of ready reference is reproduced hereunder:-

The assessee, relying on the decision of Hon'ble Madras High Court in the case of Pfizer Healthcare India Pvt. Ltd. and Ors. Vs JCIT, raised the following ground:

On the facts and in the circumstances of the case and in law, the AO / Addl Commissioner of Income Tax (Transfer Pricing)-2(3)/Hon'ble DRP, in fact and in law erred in passing the order on 1 November 2019, given that Section 92CA(3A) of the Act requires the transfer pricing order to be passed at any time before sixty days prior to the timeline for the assessment order, it is implied that such order must precede 31st December by not less than sixty days, and accordingly, the order passed by learned The is time barred and bad in law and needs to be quashed;

3. The relevant portion of the decision of the Hon'ble Madras High Court in the case of Pfizer Healthcare India Pvt. Ltd (supra) is reproduced as under.

"Now, coming to the question of how the 60 day period is to be computed, the critical question would be whether the period of 60 days would be computed including the 31st of December or excluding it. Section 153 states that no order of assessment shall be made at any time after the expiry of 21 months from the end of the assessment year in which the Income was first assessable. The submission of the revenue is to the effect that limitation expires only on 12 a m of 01.01.2020. However, this would mean that an order of assessment can be passed at 12 a m on 01.01.2020 whereas, in my view, such an order would be held to be barred by limitation as proceedings for assessment should be completed before 11.59.59 of 31 12 2019. The period of 21 months therefore, expires on 31.12.2019 that must stand excluded since Section 92CA(3A) states 'before 60 days prior to the date on which the period of limitation referred to Section 153 expires'. Excluding 31.12.2019, the period of 60 days would expire on 01.11.2019 and the transfer pricing orders thus ought to have been passed on 31.10.2019 or any date prior thereto. Incidentally, the Board, in the Central Action Plan also indicates the date by which the Transfer Pricing orders are to be passed as 31.10.2019. The impugned orders are thus, held to be barred by limitation".

4. The plea taken by the assessee placing reliance on the decision in the case of Pfizer Healthcare (supra) may not to be admitted on following grounds:

i. It is pertinent to mention that SLP has been filed and it is admitted vide SLP (Civil) Diary No(s)-29289/2022" in the case of M/s Pfizer Healthcare Industries Pvt. Ltd, against the decision of Single Judge of Hon'ble Madras High Court. Hence, the issue has not reached finality. Therefore, it is requested not to admit the additional grounds of appeal

Further, the judgment of the Hon'ble Madras High Court in the case of M/s Pfizer healthcare India Pvt. Ltd. and Ors. Vs DCIT,

passed on 07,09.2020 in Writ petition No. 32699 of 2019 confirmed by the division bench of the Hon'ble Madras High Court in WA No. 1120 of 2021 and Ors. (dated-31.03.2022) was not accepted by the Department and to keep the issue alive department has filed SLP in Hon'ble Supreme Court with SLP No. SLP(C) No. 023780/2022 registered on 16.12.2022 (Diary No. 33154/2022).

ii. It is submitted that the Interpretation by the Hon'ble Court regarding the time limit in Sec.92CA (3A) is against the Provisions of the General Clauses Act and the settled principles of Interpretation of Laws.

iii. It is submitted that the legislature uses different words such as "from", "to", "before" after", "prior", "within", "not later than", "not thereafter", "not less than", "at least" for computation of days. The principle of excluding the date of starting day and the Inclusion of ending day are provided in Sec. 12 of the limitation Act and in Sec, 9 of the General Clauses Act and a provision cannot be interpreted ignoring the same.

iv. As per Sec. 9 of the General Clauses Act, in computation of the time limit, the day referred to as "from" has to be excluded and the day referred to as "to" has to be Included. In the case on hand, the date of the order dated 01.11.2019 was taken as starting point of limitation and 60 days was computed from 01.11.2019 and rightly the same has to be excluded and the last day 31.12.2019 has to be included and thus the order dated 01.11.2019 is rightly passed as per Sec.91CA(3A).

v. When the period is marked by terminus a quo and terminus ad quern, the canon of interpretation envisaged and Section 9 of the General Clauses Act, 1897 require to exclude the first day and to include the last day,

vi. The Hon'ble Court erred in excluding both the date of order as well as the last day which is against the express provisions of Sec. 92CA(3A), the settled laws of interpretation and General Clauses Act with regard to the computation of time

limit: Such an interpretation of the Hon'ble High Court will cut down the actual period of limitation given by the legislature.

vii. Sec 92CA (3A) expressly provides for counting the last day ie. 31.12.2019 and therefore for counting the 60 days the last day has to be taken into account and thus the order passed by the TPO dated 01.11.2019 is well within the time.

viii. When the word "to" is specifically incorporated in Sec 92CA(3A), any other interpretation excluding the last day would be against the plain language of the statute and the intent of the legislature.

ix. The period of limitation computed by the assessee in the additional ground is not as per the letter and spirit contained in the Act. The Section 92CA(3A) states that "an order u/s.92CA(3) may be made at any time before 60 days prior to the date on which the period of limitation referred to in Section 153 expires. The Section refers that an order may be made at any time before 60 days and these 60 days have to be prior to date on which 'Sec. 153 limitation expires. It needs to be noted that the word used regarding limitation in Section 153 is expires that implies that the date on that particular time ceases to exist, that is not alive and it has expired. The last day expires on 00.00 am. It is only after the expiry of this date that an order may not be passed. Therefore, while computing the 60 days period, the last day of December 2019 has to be counted for computing the time limitation. If the same is counted, then working reverse the period of limitation for passing of a TP Order expires on 01.11.2019 and since the order is passed on this date, therefore the order is not barred by time limitation.

x. Sec. 92CA (3A) uses the word may only and the same cannot be construed as shall and equated to limitation especially when further proceedings are contemplated under the Act such as passing draft assessment order, remedy before Dispute Resolution Panel and final assessment order.

xi. There is no necessity or occasion to read the word "may" as "shall". Sub-sections 3A and 4 were introduced in Sec. 92CA

by the very same Finance Act, 2007 and the Legislature has consciously used the word "may" in Sec. 92CA (3A) while using, the word "shall" in Sec. 92CA (4). Hence, in view of the context and background of the provisions, the word "may" should not and cannot be read as "shall".

5. In view of the foregoing facts, the judgement of Hon'ble Madras High Court in the case of Pfizer Healthcare Pvt Ltd (supra) is not acceptable and the reliance placed on said judgement by the assessee is not in order. Hence, contention of the assessee deserves to be rejected.

13. We have heard both the parties and also perused the relevant dates of the passing of the order and the judgments referred and relied upon by the assessee. For the sake of ready reference, chronologies of dates to adjudicate this issue are as under:-

Particulars	Dates
Financial year	2015-16
Assessment year	2016-17
End of Assessment year	31 March 2017
Due date for completion of assessment under section 153(1) i.e. 21 months from the end of A.Y. (plus 12 months extension considering TP reference has been made)	31 December 2019
Date on which limitation expires u/s 153, i.e., 31 December	1 day

Less: Remaining days of December	30 days
Less: Remaining days of November	30 days
Due date for passing the TP Order u/s 92CA(3) i.e., 61 st day from 31 December	31 October 201 9
Date TP order u/s. 92CA (3)	1 November 201 9

14. 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:"

15. Ergo, the ld. 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.

16. Section 153 of the Act as applicable for the AY 2016-17 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;

(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."

17. Thus, the date for passing of ld. TPO's order was on or before 31/10/3019, because the completion of assessment u/s.153(1), i.e., 21 months from the end of the assessment year plus 12 months extension considering TP reference has been made was 31/12/2019. Thus, the final assessment order is clearly barred by limitation in view of the decision of the Hon'ble Madras High Court in the case of Pfizer Healthcare India (P) Ltd (supra). Accordingly, we hold that the ld. TPO order is invalid and accordingly, is quashed. If there is no TPO order consequently, the entire transfer pricing adjustment proposed by the ld. TPO and the international transaction becomes non-est which is also liable to be quashed.

18. Now, coming to the issue is that once the ld. TPO order is held to be nullity of or 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."

19. 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.

20. Thus, under the aforesaid provision, the expression "eligible assessee" is followed by an expression "means and there are two categories referred therein (1) any person in whose case the variation arises as a consequence of ld. TPO's order and (i) 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. 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 unambiguous, the said statute must be interpreted strictly without there being any role of equity or intendment in such interpretation.

21. 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 1d 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 1d. TPO once the said transfer pricing order is held to be time-barred, non-est and void ab-inito 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 assessee 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 assessee. 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 assessee cannot be said to be an 'eligible assessee under section 144C(15)(b)(ii) of the Act

22. 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. Accordingly, the time limit to complete the assessment u/s. 143(3) expired on 31/12/2019 and accordingly, the whole assessment order is void ab initio being barred by limitation. This issue has been discussed in details in the case of **Atos India Pvt. Ltd. vs. DCIT reported in (2023)103 ITR (T) 296** and also other judgments referred and relied upon by the ld. Counsel. Accordingly, the whole addition which has been made in the final assessment order consequently gets quashed being barred by limitation. Accordingly, the appeal of the assessee is allowed on legal ground.

23. In the result, appeal of the assessee is allowed on legal ground.

Order pronounced on 13th March, 2024.

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Mumbai; Dated 13/03/2024
KARUNA, sr.ps

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai