

IN THE INCOME TAX APPELLATE TRIBUNAL “H” BENCH, MUMBAI
BEFORE MS. KAVITHA RAJAGOPAL, JM AND SHRI GAGAN GOYAL, AM

ITA No. 725/Mum/2022
(Assessment Year: 2016-17)

Siemens Technology and Services Private Limited Plot No. 2, Sector 2, Kharghar, Node, Navi Mumbai- 410 210	Vs.	Dy. CIT 8(2)(1) Mumbai
PAN/GIR No. AAACS 9788 E		
(Assessee)	:	(Respondent)
Assessee by	:	Shri Jeet Kamdar
Respondent by	:	Shri Asif Karmali
Date of Hearing	:	23.04.2024
Date of Pronouncement	:	30.04.2024

ORDER

Per Kavitha Rajagopal, J M:

The captioned appeal has been filed by the assessee, challenging the assessment order dated 27.03.2021 passed in pursuance of the direction of Hon’ble Dispute Resolution Panel (‘Hon’ble DRP’ for short) on various corporate grounds and the transfer pricing grounds.

2. The assessee has also raised additional grounds, challenging the validity of the draft assessment order and the final assessment order as being bad-in-law on the grounds of limitation and another additional ground on the limitation based on the decision of the Hon’ble Madras High Court in the case of *M/s. Roca Bathroom Products Pvt. Ltd.* (in Writ Appeal Nos. 1517, 1519, 1609, 1610 and 1854 of 2021 and CMP. Nos.9656, 9658,

10022, 10023 and 11720 of 2021 vide order dated 09.06.2022), pertaining to the Assessment Year 2016-17.

3. Briefly stated the assessee is engaged in the business of provision of information technology services (IT), provision of IT enabled service (ITES) and provision of business support services (BSS) precisely to state that it is engaged in the business of providing software development services to its associated enterprises (AEs) in its IT segment by both onsite and offshore software process acting as system integrated and total solution provider and providing software development services in the area like health care, telecommunication, manufacturing, utilities public sector and the government sectors. The assessee company also offers solutions and services along with the Consult – Design – Build – Operate and Maintain service chain. The assessee had filed its return of income declaring total income at Rs.138,58,33,060/- and had filed a revised return of income dated 09.12.2016 and 26.03.2018, with no change in the total income. The assessee's case was then selected for scrutiny and notice u/s. 143(2) and 142(1) of the Act were duly issued and served upon the assessee.

4. The Id. Assessing Officer ('Id.A.O.' for short) during the assessment proceeding made a reference to the Id. Transfer Pricing Officer ('TPO' for short) u/s. 92CA(1) of the Act for the international transaction entered into by the assessee with its AE duly reported in Form No. 3CEB declaring international transaction to the extent of Rs.694.73 crores for computation of arm's length price (ALP for short). The Id. TPO vide order dated 01.11.2019 passed u/s. 92CA(3) of the Act proposed an adjustment of Rs.53,75,51,805/- to the total income of the assessee. The Id. AO then passed a draft assessment order u/s.

143(3) of the Act rws 144C(1) of the Act dated 26.12.2019 for which the assessee raised its objection before the Hon'ble DRP-2, Mumbai. The assesses's objections were considered and duly disposed of by the Hon'ble DRP vide its order dated 03.12.2020 u/s.144C(5) of the Act which was intimated to the Id. A.O. by the Id. TPO vide letter dated 21.12.2020 for giving effect as per the section 144C(13) of the Act. The Id. A.O. then passed the final assessment order dated 27.03.2021 determining the total income at Rs.196,69,70,880/- after making addition on transfer pricing adjustment and other addition/disallowances.

5. Aggrieved, the assessee is in appeal before us.

6. It is observed that the assessee has raised various grounds on corporate tax grounds along with transfer pricing grounds and it is pertinent that the assessee has also by way of additional ground nos. 5, 6 & 7 raised legal grounds which is now taken up for consideration by us before getting into the merits of the case. As the legal ground raised by the assessee challenging the validity of the assessment order goes to the very root of the case, we deem it fit to admit the said ground after hearing the rival submissions and convincing ourself on the fact that the said grounds do not require any further verification and by also relying on the decision of Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. vs. CIT [1998] 229 ITR 383 (SC). The additional ground nos. 5 to 7 are hereby admitted for adjudication.

7. The Id. Authorised Representation ('Id.AR' for short) for the assessee contended that the order of the Id. TPO dated 01.11.2019 passed u/s. 92CA(3) of the Act is null and void for the reason that it was passed beyond the time limit prescribed u/s. 92CA(3A)

r.w.s. 153 of the Act. The Id. AR further stated that the subsequent draft assessment order and the final assessment order is also barred by limitation as per section 144C and 153 of the Act respectively. The Id. AR relied on the decision of the Hon'ble Madras High Court in the case of *Pfizer Healthcare India (P.) Ltd. Vs. Jt. CIT* [2021] 124 taxmann.com 536 (Madras) and also the decision of *Dy. CIT vs. Saint Gobain India (P) Ltd.* [2022] 137 taxmann.com 215 (Madras) and the tribunal's decision in assessee's own for A.Y. 2015-16 whereon identical facts it was held that the Id. TPO's order passed beyond the time limit prescribed under the relevant provision is barred by limitation and the same is held to be null and void.

8. The Id. Departmental Representation (Id. DR for short), on the other hand, controverted the said contention and stated that the time limit specified in the provision is not mandatory and only discretion and relied on the orders of the lower authorities.

9. Having heard the rival submissions and perused the materials available on record. The moot question here to be decided is the validity of the Id. TPO's order and the subsequent draft assessment order and the final assessment order passed in pursuance of the impugned order. It is relevant to tabulate the time line for passing of the order u/s. 92CA(3) of the Act for the purpose of reckoning the time period for completion of the assessment:

Sr. no.	Particulars	Relevant
1	Assessment Year involved	2016-17
2	Period of limitation for making an order of assessment as per section 153(1) of the Income tax Act, 1961 ["the Act"]	31.12.2018 (i.e., 21 months from the end of the assessment year)
3	Extension of period of limitation in case reference is made u/s. 92CA	12 months
4	Therefore, assessment proceedings should be	31.12.2019

	<i>completed on/or before</i>	
5	<i>Date prior to the date on which period of limitation expired (stated in Sr.No. 4 above)</i>	<i>30.12.209</i>
6	<i>Sixty days period expired on [December = 30 days (excluding 31.12.2019) November=30 days]</i>	<i>01.11.2019</i>
7	<i>Transfer Pricing Order u/s. 92CA(3) of the Act should have been passed on/or before</i>	<i>31.10.2019</i>
8	<i>Transfer pricing order u/s. 92CA(3) actually passed on</i>	<i>01.11.2019</i>
9	<i>Draft Assessment order passed on</i>	<i>26.12.2019</i>
10	<i>DRP directions issued on</i>	<i>03.12.2020</i>
11	<i>Final assessment order passed on</i>	<i>27.03.2021</i>

10. On the above factual matrix, it is evident that upon reference made by the Id. A.O. u/s. 92CA(1) of the Act for determination of ALP pertaining to the international transactions, notice u/s. 92CA(2) of the Act was issued by the Id. TPO on 19.11.2018 seeking for details and documents for the determination of the ALP. In response to the said notice, the assessee has made submissions on various dates and the same was duly considered and the impugned order dated 01.11.2019 was passed by the Id. TPO u/s. 92CA(3) of the Act which the assessee claims it to be time barred or barred by limitation. It is trite to refer the said provision hereunder for ease of ready reference:

92CA. [Reference to Transfer Pricing Officer. [Inserted by Act 20 of 2002, Section 42 (w.e.f. 1.6.2002).]

(3) *On the date specified in the notice under sub-section (2), or as soon thereafter as may be, after hearing such evidence as the assessee may produce, including any information or documents referred to in sub-section (3) of section 92D and after considering such evidence as the Transfer Pricing Officer may require on any specified points and after taking into account all relevant materials which he has gathered, the Transfer Pricing Officer shall, by order in writing, determine the arm's length price in relation to the international transaction or specified domestic transaction in accordance with sub-section (3) of section 92C and send a copy of his order to the Assessing Officer and to the assessee.*

(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: Provided that in the circumstances referred to in clause (ii) or clause (x) of Explanation 1 to section 153, if the period of limitation available to the Transfer Pricing Officer*

for making an order is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to have been extended accordingly.

11. The above said provision has categorically specified that the order under sub section (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 for passing of the assessment order has expired. It is also relevant to reproduce section 153 of the Act for ease of ready reference:

153. Time limit for completion of assessment, reassessment and recomputation.

(1) No order of assessment shall be made under section 143 or section 144 at any time after the expiry of twenty-one months from the end of the assessment year in which the income was first assessable: Provided that in respect of an order of assessment relating to the assessment year commencing on the 1st day of April, 2018, the provisions of this sub-section shall have effect, as if for the words "twenty-one months", the words "eighteen months" had been substituted:

[Provided further that in respect of an order of assessment relating to the assessment year commencing on the—

(i) 1st day of April, 2019, the provisions of this sub-section shall have effect, as if for the words "twenty-one months", the words "twelve months" had been substituted;

(ii) 1st day of April, 2020, the provisions of this sub-section shall have effect, as if for the words "twenty-one months", the words "eighteen months" had been substituted:]

[Provided also that in respect of an order of assessment relating to the assessment year commencing on or after the 1st day of April, 2021, the provisions of this sub-section shall have effect, as if for the words "twenty-one months", the words "nine months" had been substituted.]

[(1A) Notwithstanding anything contained in sub-section (1), where a return under sub-section (8A) of section 139 is furnished, an order of assessment under section 143 or section 144 may be made at any time before the expiry of nine months from the end of the financial year in which such return was furnished.]

(2)

(3) Notwithstanding anything contained in sub-sections (1) and (2), an order of fresh assessment [or fresh order under section 92CA, as the case may be,] in pursuance of an order under section 254 or section 263 or section 264, setting aside or cancelling an assessment, [or an order under section 92CA, as the case may be], may be made at any time before the expiry of nine months from the end of the financial year in which the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Commissioner or Commissioner: Provided that where the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Commissioner or Commissioner on or after the 1st day of April, 2019, the provisions of this sub-section shall have effect, as if for the words "nine months", the words "twelve months" had been substituted.

(4) Notwithstanding anything contained in sub-sections (1), (2) and (3), where a reference under sub-section (1) of section 92CA is made during the course of the proceeding for the assessment or reassessment, the period available for completion of assessment or reassessment, as the case may be, under the said sub-sections (1), (2) and (3) shall be extended by twelve months.

12. On perusal of the above provision, it is evident that the Id. TPO ought to have passed the order under sub section 3A of section 92CA within any time before 60 days which falls prior to the date on which the limitation u/s. 153 of the Act for completion of assessment expires, i.e., prior to 31.12.2019 for the year under consideration. In reckoning the said period, the Id. TPO ought to have passed the order before 01.11.2019, i.e., on or before 31.10.2019 and not beyond that. In the present case in hand, the impugned order of the TPO is dated 01.11.2019 being delayed by one day. The assessee contended that the period of limitation prescribed u/s. 92CA(3A) is mandatory which cannot be eschewed by the authorities below. The Revenue, on the other hand, has not controverted the factual aspects of the period specified by the assessee and it is also observed that the assessee has by way of objection no. 4 has raised this issue before the Hon'ble DRP which has been disposed off on the ground that the assessee has placed reliance on the decision of the Hon'ble Madras High Court in the case of *Pfizer Healthcare India (P.) Ltd.* (supra) which judgment was not before the Hon'ble DRP to consider the ratio of the Judgment and the complete facts and reasoning placed before it and, hence, the Hon'ble DRP rejected the objection raised by the assessee. Even before us, the assessee has relied on the said decision of the Hon'ble High Court of Madras which has held that the time period prescribed under the said provision is mandatory and not discretionary though the word used in the statute is "may". The assessee has also placed reliance on the decision of the Hon'ble Madras High Court in the case of *Saint Gobain India (P) Ltd.* (supra) which has again reiterated that on identical facts, the Id. TPO should have passed the order on or before 31.10.2019 and any order passed beyond this would be barred by limitation, holding the Id.TPO's order to be nonest in the eyes of

law, consequently the draft assessment order is also held to be invalid. In the case of an invalid transfer pricing order and the draft assessment order, the Id. A.O. has no jurisdiction to assess u/s. 144C of the Act holding the assessee to be not an 'eligible assessee' as per section 144C(15)(b)(i) of the Act. On the above observation, where this issue has been dealt with extensively by the Hon'ble High Court, we are inclined to hold the Id. TPO's order dated 01.11.2019, draft assessment order and the final assessment order dated 27.03.2021 is barred by limitation as per the provision of section 92CA(3) of the Act and, hence, the subsequent draft assessment order and the final assessment order is, therefore, liable to be quashed on this ground. Hence, the additional ground nos. 5, 6 & 7 raised by the assessee are hereby allowed.

13. As the entire assessment proceeding is quashed, the grounds raised by the assessee on the merits require no further adjudication. The additional ground no. 4 raised by the assessee also requires no adjudication and pertinent it is to mention that the said ground was not taken up for admission and, therefore, no arguments were also raised on the said grounds. Therefore, the other grounds of appeal are rendered to be academic and infructuous.

14. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 30.04.2024.

Sd/-

(Gagan Goyal)
Accountant Member

Mumbai; Dated : 30.04.2024
Roshani, Sr. PS

Sd/-

(Kavitha Rajagopal)
Judicial Member

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT - concerned
4. DR, ITAT, Mumbai
5. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai