

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

**BEFORE SHRI AMARJIT SINGH, ACCOUNTANT MEMBER  
AND SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No.988/Mum/2021  
Assessment Year: 2016-17**

|   |     |                        |
|---|-----|------------------------|
| Thermo Fisher Scientific India<br>Private Limited<br><br>403-404, B Wing, Delphi,<br>Hiranandani Business Park,<br>Mumbai-400076.<br><br><b>PAN: AABCT 3207 A</b> | Vs. | ITO - 15(3)(1), Mumbai |
| (Appellant)   |     | (Respondent)           |

**Present for:**

Assessee by : Shri Dhanesh Bafna  
Revenue by : Shri Dhivya Ruth J, Sr. DR

Date of Hearing : 10.06.2024  
Date of Pronouncement : 28.08.2024

**ORDER**

**PER AMARJIT SINGH, ACCOUNTANT MEMBER:**

This appeal of the assessee for the assessment year 2016-17 is directed against the order dated 26.02.2021 passed by the Id. CIT (DRP-2), Mumbai-2. The assessee has raised the following grounds before us:

|  |              |
|--|--------------|
| 1. General   | Nil          |
| 2. Depreciation on contracts - Acquisition from Glaxosmithkline Pharmaceuticals Ltd in AY 2008-09  | 76,90,736    |
| 3. Depreciation on contracts - Acquisition from Chemito Technologies Private Limited in AY 2009-10 | 3,00,736     |
| 4. Allowance of brought forward unabsorbed depreciation of AY 2008-09                              | 14,33,95,675 |
| 5. Allowance of brought forward unabsorbed depreciation of AY 2009-10                              | 13,29,53,828 |
| 6. Allowance of brought forward unabsorbed depreciation of AY 2010-11                              | 12,43,95,142 |
| 7. Allowance of brought forward unabsorbed depreciation of AY 2011-12                              | 11,08,38,823 |
| 8. Allowance of brought forward unabsorbed depreciation of AY 2012-13                              | 8,94,67,868  |

|  |              |
|--|--------------|
| 9. Allowance of brought forward unabsorbed depreciation of AY 2013-14                          | 5,66,34,149  |
| 10. Allowance of brought forward unabsorbed depreciation of AY 2014-15                         | 76,90,736    |
| 11. Transfer pricing (TP) TP adjustment in respect of import of analyzers (Assembling segment) | 1,68,03,223  |
| 12. Excess amount paid for acquisition of Alfa Aesar Division                                  | 17,23,21,782 |
| 13. Allowance of brought forward business loss of Rs 2,44,31,931                               | 84,55,403    |
| 14. Failure to grant partial credit of Tax Deducted at Source (TDS)                            | 5,87,938     |
| 15. Initiation of penalty proceedings  | Nil          |
| Total Tax Effect   | 91,92,96,590 |

**Additional Grounds**

16. Challenging the period of limitation for passing transfer pricing order by the Transfer Pricing Officer (TPO) Nil

17. Entire proceedings initiated by the Assessing Officer (AO) under section 144C of the Act is bad in law in the absence of a valid TP order. Nil

18. In absence of valid TPO's order the AO is required to complete the assessment within the due date as prescribed under section 153 of the Act since the order is not passed within the time limit as prescribed the assessment order is barred by limitation." Nil

2. Fact in brief is that return of income declaring total income of Rs. Nil after set off of brought forward losses/depreciation of Rs. 12,64,93,185/- was filed on 30.11.2016. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued and duly served on the assessee company. The assessee company is engaged in the business of manufacturing, installation and sale (including trading) of scientific/medical laboratories equipments and chemicals. During the course of assessment, the assessing officer noticed that assessee company has entered into international transaction with associated enterprises amounting to Rs. 501,73,08,760/-. The Transfer Pricing Officer (TPO), DCIT, (TP) 4(2)(1),

Mumbai vide order dated 01.11.2019 has made adjustment to the international transaction amounting to Rs. 33,83,31,881/-. Accordingly, the assessing officer has made an adjustment of the above amount and added to the total income of the assessee. The assessing officer also noticed that assessee has claimed depreciation on manufacturing/supply contracts and maintenance contracts of Rs. 2,30,91,400/-. The assessing officer has disallowed the claim of depreciation on the basis of similar disallowance made in the earlier years. After making aforesaid additions, the assessing officer has passed draft assessment order u/s 144C of the Act on 23.12.2019.

3. The assessee has filed objections before the Dispute Resolution Panel (DRP) against the additions proposed by the assessing officer in the draft assessment order. The DRP issued direction vide order u/s 144C(5) of the Act dated 26.02.2021. In accordance with the direction of the DRP, the assessing officer has revised the adjustment to the amount of Rs. 14,05,00,568/- as against of Rs. 33,83,31,881/- recommended by the TPO as referred above in this order. Following the direction of the DRP the AO has also disallowed the claim of Rs. 2,30,91,400/- in the final assessment order. The final assessment order was passed by the assessing officer on 30.03.2021 and total income of the assessee was assessed at Rs. 30,02,91,672/-. The assessee has also filed the following additional ground of appeal:

*“1. Challenging the period of limitation for passing the transfer pricing order by the Transfer Pricing Officer (TPO).*

*2. Entire proceedings initiated by the Assessing Officer (AO) under section 144C of the Act is bad in law in the absence of a valid TP order.*

*3. In absence of valid TPO's order the AO is required to complete the assessment within the due date as prescribed under section 153 of the Act*

*since the order is not passed within the time limit as prescribed the assessment order is barred by limitation.”*

4. During the course of appellate proceedings, at the outset, the ld. Counsel contested the additional ground of appeal filed by the assessee that Transfer Pricing Officer order passed u/s 92CA(3A) of the Act on 01.11.2019 was time barred. In this regard, the ld. Counsel has placed reliance in the case of Pfizer Healthcare India Private Limited vs JCIT 433 ITR 028 (Madras) and various decisions of ITAT, Mumbai on the similar issue as under:

- i. Atos India Pvt. Ltd. vs DCIT (Mum Trib) (ITA No. 1795/Mum/2017)-AY 2012-13*
- ii. M/s. Mondelez India Food Private Limited vs ACIT (ITA No. 1492/Mum/2015) –AY 2010-11.*
- iii. Colgate Palmolive (India) Limited vs ACIT (ITA No. 3488/Mum/2016)-AY 2011-12*
- iv. Bristol-Myers Squibb India Private Limited vs ACIT (Mum Trib) (ITA No. 967/Mum/2021)-AY 2016-17*
- v. Accenture Solutions Private Limited vs ACIT (ITA No. 1255/Mum/2021) AY 2016-17*
- vi. Jhonson & Jhonson Private Limited vs DCIT (Mum Trib) (ITA No. 1740/Mum/2021) AY 2016-17*
- vii. M/s Jaguar Land Rover India Limited vs ACIT (Mum Trib) (ITA No. 1222/Mum/2021) AY 2016-17*
- viii. World Sport Group Private Limited vs ACIT (Mum Trib) (ITA No. 5240/Mum/2017) AY 2010-11*
- ix. Frost & Sullivan (India) Private Limited vs DCIT (Mum Trib) (ITA No. 1148 & 1259/Mum/2015) AY 2010-11 etc.”*

5. On the other hand, ld. DR submitted that 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 ld. DR also submitted that section 92CA(3A) used word only and the same cannot be construed as shall and equated to limited especially when further proceedings are contemplated under this Act such as passing the draft assessment order and for the remedy before the dispute resolution panel and final assessment order.

6. Heard both the sides and perused the material on record with regard to the limited issue of validity of order passed by the TPO u/s 92CA(3A) of the Act and subsequent proceedings arises therefrom. During the course of appellate proceedings before us, the ld. Counsel has filed computation period of limitation along with the comparable data in the case of Pfizer Healthcare India Private Limited adjudicated by (Hon'ble Madras High Court) as under:

| Sl. No. | Particulars  | Relevant Dates  |   |
|---------|--|---|---|
|         |  | Pfizer Healthcare India Private Limited (Madras High Court)   | Appellant   |
| A       | Assessment Year  | 2016-17   | 2016-17   |
| B       | Period of limitation for making an order of assessment as per section 153 of the Act | 21 months from the end of the assessment year i.e. 31.12.2018 | 21 months from the end of the assessment year i.e. 31.12.2018 |
| C       | Extension of period of limitation in case reference is made u/s 92CA of the Act      | 12 months i.e. 31.12.2019                                     | 12 months i.e. 31.12.2019                                     |
| D       | Proceeding for assessment should be completed on/before this date                    | 31.12.2019  | 31.12.2019  |
| E       | A date prior to the date on which period of limitation expires (stated in Sr. No. C) | 30.12.2019  | 30.12.2019  |
| F       | Sixty-day period expires   | 01.11.2019  | 01.11.2019  |
| G       | TPO order to be passed any time on/before this date                                  | 31.10.2019  | 31.10.2019  |
| H       | Date on which TPO order is passed  | 01.11.2019  | 01.11.2019  |
| I       | Date of draft assessment order u/s 143(3) r.w.s. 144C(1) of the Act                  |   | 23.12.2019  |
| J       | Date of DRP Directions u/s 144C(5) of the Act  |   | 26.02.2021  |
| K       | Date of final assessment order u/s 143(3) r.w.s, 144C(13) of the Act                 |   | 30.03.2021  |
|         | Note 1: Calculation of break-up of sixty days  | December: 30 days (excluding 31.12.2019)<br>November: 30      | December 30 days (excluding 31.12.2019)<br>November: 30       |

7. The relevant provisions of Sec. 92CA(3A) is reproduced as under:

**Section 92CA (3A)**

*“(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:”*

**Section 153(1)**

*“Time limit for completion of assessment and reassessments- (1) 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 xxxxxxxxxxxx*

*Provided further xxxxxxxxxxxx*

*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.”*

As per provision of Sec. 92CA(3A) the TPO is required to pass an order u/s 92CA(3) of the Act at any time before 60 days prior to the date on which the period of limitation referred to in Sec. 153 for making the assessment order on assessment or reassessment or re-computation or fresh assessment as the case may be expires. The decision of single

bench of Hon'ble High Court of Madras in the case of Pfizer Healthcare Ltd Vs. JCIT as supra is reproduced as under:

8. Further the decision of division bench of the Hon'ble Madras High Court in the case of DCIT Vs. Saint Gobain India P. Ltd. as referred supra by the ld. Counsel is reproduced as under:

*"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 taxmann.com 1803, 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 1-11-2019 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.*

#### *Mandatory or Directory*

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 7-9-2020, 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 subsection 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.”*

After taking into consideration the material placed on record it is undisputed fact that transfer pricing officer has passed order u/s 92CA(3) on 01.11.2019 whereas the limitation for passing the said order u/s 92CA(3) expires on 31.10.2019 Therefore, taking into consideration the provision of the Act and decision of Hon'ble Madras High Court in the cases referred supra the order u/s 92CA(3) of the Act is time barred by 1 day. Further the ld. Counsel has mentioned the provisions of Sec. 144C(15) of the Act pertaining to the eligible assessee the same is reproduced as under:

*“(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) (ii) any non-resident not being a company, or any foreign company.”*

After referring the aforesaid provisions the ld. Counsel contended that since the order of the TPO was barred by limitation, therefore, there was no eligible assessee in the case of the assessee in terms of provisions of subsection (15) to Sec. 144C of the Act.

9. In this regard, we find that coordinate bench of the ITAT on the similar issue on identical facts in the cases i.e (i) Strides Shasum Limited Vs. DCIT, Circle 15(3)(2) vide ITA No. 2877/Mum/2014 dated 28.02.2023 (ii) M/s Mondelez India Foods Private Limited Vs. Ad. CIT, Range 5(1) vide ITA Nos. 1492, 1576 & 2340/Mum/2015 dated 14.11.2022 and (iii) M/s Tubacex Prakash India Pvt. Ltd. Vs. The ACIT/JCIT/DCIT/ACIT-national E-assessment Centre, Delhi and DCIT,

circle 14(1)(2), dated 24.03.2023 held that the order of the TPO and draft assessment order are barred by limitation, therefore, resulting in assessee not being a eligible assessee u/s 144C(15)(b)(i) of the Act. Consequently, the final assessment was also bad in law. Therefore, since the issue on hand being squarely covered on similar fact and circumstances, therefore, we find merit in the submission of the assessee and allow the additional ground raised by the assessee. No argument was made by the ld. Counsel for the assessee in respect of the original ground of appeal, other than additional ground of appeal therefore they are left open for adjudication if the need arises.

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

Order pronounced in the open court on 28.08.2024.

**Sd/-**  
**(RAHUL CHAUDHARY)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(AMARJIT SINGH)**  
**ACCOUNTANT MEMBER**

Mumbai, Dated: 28.08.2024  
Biswajit, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent:
3. The CIT,
4. The DR

//True Copy//

By Order

Assistant Registrar  
ITAT, Mumbai Benches, Mumbai