

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

**BEFORE SHRI S.RIFAUR RAHMAN, ACCOUNTANT MEMBER
and
SHRI YOGESH KUMAR U.S., ACCOUNTANT MEMBER**

**ITA No.2151/DEL/2022
(Assessment Year: 2018-19)**

Comparex India P. Ltd.,
C-01, Somdutt Chamber – 01,
Africa Avenue, 5 Bhikaji Cama Place,
New Delhi – 110 029.

vs. ITO, Circle 4 (2),
New Delhi.

(PAN : AABCI1421K)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Ajit Jain, AR
REVENUE BY : Shri Rajesh Kumar, CIT DR

Date of Hearing : 12.06.2024
Date of Order : 09.09.2024

ORDER

PER S. RIFAUR RAHMAN, ACCOUNTANT MEMBER :

This appeal has been filed by the assessee against the final assessment order dated 28.07.2022 passed u/s 143(3) r.w.s.144C (13) of the Income Tax Act, 1961 (hereinafter called 'the Act') subsequent to the direction of the Ld. Dispute Resolution Panel (DRP)/TPO vide order dated 03.06.2022 for Assessment Year 2018-19.

2. Brief facts of the case are, assessee filed its return of income for AY 2018-19 declaring total income at Rs.4,53,71,290/-. The case was selected for

complete scrutiny under CASS. Accordingly, notices u/s 143(2) & 142(1) of the Act were issued and served on the assessee through e-filing portal. The case of the assessee was referred to TPO u/s 92CA(1) of the Act and subsequently, an adjustment to international transaction of Rs.2,24,36,553/- was proposed by the TPO vide order u/s 92CA(3) of the Act dated 27.07.2021. Accordingly, a show-cause notice along with draft assessment order was issued and served to the assessee on 25.08.2021 with a proposal to enhance the income by TP adjustments as proposed by the TPO and subsequently, assessee requested for an opportunity to explain the facts in the current case in personal hearing through video conferencing and the same was granted and conducted on 15.01.2021. After providing an opportunity, the draft assessment order was passed by NFAC, Delhi dated 15.09.2021 and the income was assessed with TP adjustments proposed by the TPO.

3. Aggrieved, assessee filed objections before the Id. Dispute Resolution Panel (DRP) and made detailed submissions before the Id. DRP. Id. DRP passed the order dated 03.06.2022 with the directions to Assessing Officer/TPO. Subsequently, final assessment order was passed by the jurisdictional Assessing Officer, Circle 4 (2), Delhi on 28.07.2022 sustaining the adjustments as per draft assessment order after considering the directions of Id. DRP.

4. Aggrieved with the above order, assessee is in appeal before us raising concise grounds of appeal which read as under :-

“Pertaining to Transfer Pricing matters”**General Ground:**

1. *On the facts and in law, the Honourable Dispute Resolution Panel ('Hon'ble DRP'), the Learned Transfer Pricing Officer ('Ld. TPO') and the Ld. AO (hereinafter collectively to be referred as "Revenue") erred in making an adjustment of INR 2,24,36,553/- to the total income of the Appellant on account of the difference in the arm's length price ('AL.P") of its international related party transactions under the provisions of Section 92CA(4) of the Act :-*
 - *Payment of shared service charges, holding fees and payment for the use of ERP (INR 18,552,925) (hereinafter referred to as Intra group charges collectively)*
 - *Provision of back-office support services (INR 1,887,166)*
 - *Payment of sourcing fee, Purchase & sale of software (INR 1,996,462)*

Legal Grounds:

2. *On the facts and in law, the Hon'ble DRP has grossly erred in restoring certain transfer pricing matters to the Ld. TPO and Ld. AO, which is in gross violation of section 144C(8) of the Act and thus, the final assessment order passed dated 28 July 2022 is bad in law and deserves to be quashed.*
3. *On the facts and in law, the Ld. TPO/ Ld. AO erred in not following the directions of Hon'ble DRP and thereby violating the provisions of Section 144C(10) read with Section 144C(13) of the Act, thereby rendering the assessment proceedings bad and invalid in law.*

Specific Grounds on Merits:

- A. **Erroneous adjustment of INR 18,552,925 with respect to international transaction pertaining to Payment of shared service charges, holding fees and ERP fees**
4. *On the facts and in law, the Revenue erred in rejecting the economic analysis and arbitrarily selecting Comparable Uncontrolled Price ('CUP') method. In doing so, the Revenue failed to discharge the statutory onus to establish if any of the conditions specified in clause (a) to (d) of Section 92C(3) of the Act have not been satisfied.*
5. *On the facts and in law, Revenue erred in determining the ALP for shared services charges, holding fees and ERP fees at NIL by applying the CUP method without bringing on record any comparable uncontrolled transaction. Therefore, the revenue has violated section 92C of the Act*

read with Rule 10 of the Income Tax Rules. The TP order dated 27 July 2021 ought to be quashed.

6. *On the facts and in law, the Ld. TPO exceeded its jurisdiction by applying the cost benefit analysis in determining the ALP of intra group charges and also erred in not following the binding precedent laid down by the jurisdictional High Court in the case of CIT v. EKL Appliances [2012] 345 ITR 241 (Delhi)*

B. Erroneous adjustment of INR 1,887,166 with respect to international transaction pertaining to Provision of back-office support services

7. *On the facts and in law, the Revenue erred including selecting companies that are not comparable to the Appellant in terms of functions performed, assets employed, and risks assumed*
8. *On the facts and in law, the Revenue erred in rejecting/ excluding the comparable companies selected by the Appellant forming part of the economic analysis undertaken in the TP documentation.*
9. *On the facts and in law, the Revenue erred in defying the principles of natural justice by not granting any 5 opportunity of being heard to the Appellant while rejecting R Systems International Limited selected by the Appellant in its TP documentation.*
10. *On the facts and in law, the Revenue erred in incorrectly computing the profit level indicator ['PLI'-Net Cost Plus Margin (NCPM)] of the comparable companies.*
11. *On the facts and in law, the Ld. TPO erred in not allowing risk adjustment under Rule 10B(1)(e) of the Rules*

C. Erroneous adjustment of INR 1,996,462 with respect to international transaction pertaining to Payment of sourcing fee, Purchase and Sale of computer software

12. *On the facts and in law, the Revenue erred in including/ selecting companies that are not comparable to the Appellant in terms of functions performed, assets employed, and risks assumed.*
13. *On the facts and in law, the Revenue erred in rejecting/ excluding the comparable companies selected by the Appellant in the economic analysis undertaken in the TP documentation.*
14. *On the facts and in law, the Ld. TPO erred in incorrectly computing the profit level indicator [PLI – Net Profit Margin) of the comparable companies.*

15. *On the facts and in law, the Ld. TPO erred in not allowing a risk adjustment under Rule 10B(1)(e) of the Rules*
16. *On the facts and in law, the Ld.AO/Ld. TPO erred in proposing an adjustment without providing sufficient time to the Appellant and addressing any of the detailed contentions and explanations submitted by the Appellant in response to the show cause notice.*

Pertaining to Corporate Tax Grounds:

1. *On the facts and in law, the Ld. AO has erred while computing the tax liability for the relevant AY by considering credit of tax deducted at source (TDS) of INR 1,66,68,496/- instead of INR 1,69,80,644-*
2. *On the facts and in law, the Ld. AO has erred while computing the tax liability for relevant AY by not allowing deduction on account of Section 80G amounting to INR 15,14,475/- already claimed by the Appellant in its Return of Income.*

Interest and Penalty Grounds:

1. *On the facts and in the circumstances of the case and in law, the Ld. AO has erred in levying interest under sections 234B and 234C of the Act in the final assessment order passed for relevant AY.*
2. *On the facts and in the circumstances of the case and in law, the Ld. AO has erred in initiating penalty proceedings under section 270A of the Act in the final assessment order passed for relevant AY.”*

5. Further, assessee filed following additional grounds of appeal with the application under Rule 11 of the ITAT Rules, 1962:-

“Pertaining to Transfer Pricing matters

16. *On facts and circumstances of the case and in law, the Ld. AO erred by not passing the final assessment order dated 28 July 2022 in conformity with the DRP directions dated 3 June 2022. Thus, the learned AO has violated the mandatory provisions of Section 144C(10) read with Section 144C(13) of the Act, thereby rendering the assessment proceedings bad in law. The Final assessment order thus deserves to be quashed...*

17. *On facts and circumstances of the case and in law, the Ld. AO erred by not passing the final assessment order dated 28 July 2022 in conformity with the order giving effect to DRP directions passed by the Transfer Pricing Officer (TPO) dated 22 July 2022, thereby violating the mandatory provisions of Sec 92CA(4) read with 144C(10) and 144C(13) of the Act. The Final assessment order thus deserves to be quashed.*

18. *On the facts and circumstances of the case and in law, the Assessing Officer (Technical Unit) has erred in referring the case to the TPO u/s 92CA(1) to determine the Arm's Length Price of the international transactions without having any statutory powers under the Act, to refer the case to TPO. Consequently the TP order is without any jurisdiction and deserves to be quashed."*

6. At the time of hearing, assessee submitted that it is a jurisdictional issue which goes to the root of the matter by relying on the decision of Hon'ble Supreme Court in the case of NTPC Limited vs. CIT 229 ITR 383 (SC).

7. After considering the submissions and objections of the ld. DR for the Revenue, the additional grounds are admitted for adjudication.

8. At the time of hearing, ld. AR for the assessee pressed only ground no.3 of the concise grounds and additional ground no.16 of the appeal. The relevant facts relating to these grounds as brought to our notice by the ld. AR for the assessee are TP order and draft assessment order placed at page 878 of the paper book and he also brought to our notice DRP order placed at page 36 of the appeal set and submitted that ld. DRP has proposed following adjustments in its order which is apparent from the order giving effect passed by the TPO. The same is filed along with additional ground of appeal. He brought to our notice page 2 of OGE passed by the TPO and submitted, it clearly shows that ld. DRP has proposed following directions :-

<i>DRP's directions dated 28.06.2022</i>	<i>The proposed adjustment as per the DRP directions : (i) The DRP has upheld the TPO's proposed adjustment on the issue of Intra Group Services.</i>	<i>Rs.1,85,52,925/-</i>
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	<p><i>(ii) The DRP directed to re-verify the filters and allow the working capital adjustment on the issue of Back office support services. Accordingly, the amount of the adjustment is revised.</i></p> <p><i>(iii) The DRP directed to Revenue-verify the filters and allow the working capital adjustment on the issue of payment of sourcing fee/purchase & sale of software. Accordingly, the amount of the adjustment is revised.</i></p>	<p><i>Rs.Nil/- (*Detailed computation given below)</i></p> <p><i>Rs.NIL/- (*Detailed computation given below).</i></p> <p><i>Rs.1,85,52,925/-</i></p>
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Further, he brought to our notice page 6 of OGE of TPO order which shows that the original proposed adjustments of the TPO was Rs.2,24,36,553/- and now after giving effect to the DRP order, the same is reduced to Rs.185,52,925/-. He brought to our notice page 9 of the appeal set i.e. final assessment order passed by the jurisdictional AO dated 28.07.2022 wherein he has sustained the additions as per draft assessment order. Ld. AR for the assessee submitted that the Assessing Officer failed to comply and follow the directions of the ld. DRP which is direct violation of section 144C(13) of the Act. He submitted that it is a clear cut violation, therefore, the whole assessment order is bad in law and should be quashed. In this regard, he relied on the decision of Hon'ble Bombay High Court in the case of Hexaware Technologies Ltd. vs. ACIT in Writ Petition No.1778 of 2023 order dated 03.05.2024.

9. On the other hand, ld. DR for the Revenue brought to our notice page 909 of the paper book which is the original TPO proposed adjustment which consists of (a) intra group services for Rs.1,85,52,925/-, (b) back office support services Rs.18,87,166/-; and (c) payment of sourcing fee/purchase of sale of software Rs.19,96,462/-. The total adjustment proposed by the TPO is for Rs.2,24,36,553/-. He further brought to our notice OGE passed by the TPO and final assessment order passed by the Assessing Officer. He submitted that while passing the final assessment order, the Assessing Officer is of the view that ld. DRP has not proposed any adjustment relating to intra group services, therefore, with the mistaken belief, he has sustained the addition. He submitted that mere mistake of understanding, the assessment cannot be quashed. In this regard, he relied on the following case laws

- (i) Order of the Coordinate Bench of the ITAT in the case of Hitachi Astemo Haryana Private Ltd. vs. DCIT order dated 23.11.2023; and
- (ii) Hon'ble Supreme Court judgment in the case of UOI & ors. vs. Ashsih Aggarwal in Civil Appeal No.3005/2022 dated May 4, 2022.

wherein relevant assessment orders were not quashed rather it was remitted back to Assessing Officer/TPO for proper reassessment.

10. With regard to procedural error or violation, the assessment cannot be quashed. In this regard, ld. DR for the Revenue relied on the decision of Hon'ble Supreme Court in the case of Sugandhi vs. P. Rajkumar in Civil Appeal No.3427 of 2020 dated October 13, 2020. Further, he submitted that with regard to failure on granting cross-examination, Hon'ble Supreme Court in

the case of ITO vs. M. Pirai Choodi (2011) 334 ITR 262 (SC) rejected the view of Hon'ble High Court for quashing of assessment proceedings and they observed that the High Court should not have quashed the assessment proceedings. Further, he submitted that on the issue of the Assessing Officer failed to refer the case of international transaction to TPO. Hon'ble Supreme Court has remitted the issue back to redo the assessment in the case of PCIT vs. M/s. S.G. Asia Holdings (India) Pvt. Ltd. in Civil Appeal No.6144 of 2019 dated August 13, 2018. With regard to reliance to Hexaware Technologies Ltd. (supra) by the ld. AR for the assessee, he brought to our notice page 69 of the decision and submitted that no prejudice caused to assessee by remit the issue back to the Assessing Officer for rectifying the relevant mistake in the final assessment order and finally, he submitted that Assessing Officer had followed the first issue of sustaining the TP adjustments and by mistake, he added item 2 & 3 of the TP adjustment, therefore, he strongly submitted that there is no violation of section 144C of the Act at all and there is no prejudice cause to the assessee..

11. In the rejoinder, ld. AR for the assessee submitted that both sections 144C and sub-sections (11) & (13) of section 114C start with non-substante clause and by not respecting these sections, all the provisions in these sections become otiose. Further, with regard to case of Hitachi Astemo Haryana Pvt. Ltd. (supra) relied by the ld. DR for the Revenue, he submitted that MA is filed by

the assessee and the relevant MA is still pending. Therefore, the above said decision cannot be relied and further he submitted that none of the decisions relied by the ld. DR are not related to sections 144B & 144C of the Act which is being raised in this appeal.

12. Considered the rival submissions and material placed on record.. We observed from the record that TPO passed order proposing TP adjustments in three segments of the international transactions and the same was incorporated in draft assessment order and after giving an opportunity to the assessee, draft assessment was finalized and sent to the assessee. Assessee raised objections before the ld. DRP and ld. DRP sustained the TP adjustments in one of the segments, namely, intra group services of Rs.1,85,52,925/- and deleted the TP adjustments in back office support services and payment of sourcing fees etc. In fact, ld. DRP sustained the TP adjustments relating to intra group services and TPO in his order dated 27.07.2022 following the directions of ld. DRP and restricted the TP adjustment only to the extent of intra group services to the extent of Rs.185,52,925/-. We observed that the final assessment order was passed by jurisdictional AO u/s 143(3) read with section 144C of the Act dated 28.07.2022 not considering the OGE passed by the TPO and directions of ld. DRP. Assessee is in appeal before us raising the relevant grounds and heavily relying on the decision of Hon'ble Bombay High Court in the case of Hexaware Technologies Ltd. (supra). At the same time, we observed that ld. DR for the

Revenue objected to the grounds raised by the assessee and submitted that the order passed by the Assessing Officer is only mistaken belief considering the directions passed by the Id. DRP on intra group services and he heavily relied on the case laws submitted by him to pray that the relevant assessment order be remitted back to Assessing Officer for proper rectification. After considering various case laws relied by the Id. DR, we observed that they are distinguishable to the facts of the case and not relevant for the issues raised by the assessee. At the same time, we observed that in the case of Hexaware Technologies Ltd. (supra), Hon'ble Bombay High Court has dealt with the issue of section 148/148A and section 151A of the Act. Ld. DR for the Revenue relied on the decision of Hon'ble Supreme Court in the case of Ashish Agarwal (supra). The facts involved in this case are issue of reassessment proceeding notices issued by the Revenue approximately 90000 u/s 148 of the Act, so in order to protect the rights of the Revenue as well as respective assesseees and for public exchequer, the same was remitted back to Assessing Officer to pass relevant orders u/s 148A(d) of the Act. Since the issue involved in this case is completely different than the facts on record, we observed from the decision of Hon'ble Bombay High Court in the case of Hexaware Technologies Ltd. (supra). The Hon'ble High Court observed as under :-

“36. With respect to the arguments of the Revenue, i.e., the notification dated 29th March 2022 provides that the Scheme so framed is applicable only ‘to the extent’ provided in Section 144B of the Act and Section 144B of the Act does not refer to issuance of notice under Section 148 of the Act and hence, the notice

cannot be issued by the FAO as per the said Scheme, we express our view as follows:-

Section 151A of the Act itself contemplates formulation of Scheme for both assessment, reassessment or recomputation under Section 147 as well as for issuance of notice under Section 148 of the Act. Therefore, the Scheme framed by the CBDT, which covers both the aforesaid aspect of the provisions of Section 151A of the Act cannot be said to be applicable only for one aspect, i.e., proceedings post the issue of notice under Section 148 of the Act being assessment, reassessment or recomputation under Section 147 of the Act and inapplicable to the issuance of notice under Section 148 of the Act. The Scheme is clearly applicable for issuance of notice under Section 148 of the Act and accordingly, it is only the FAO which can issue the notice under Section 148 of the Act and not the JAO. The argument advanced by respondent would render clause 3(b) of the Scheme otiose and to be ignored or contravened, as according to respondent, even though the Scheme specifically provides for issuance of notice under Section 148 of the Act in a faceless manner, no notice is required to be issued under Section 148 of the Act in a faceless manner. In such a situation, not only clause 3(b) but also the first two lines below clause 3(b) would be otiose, as it deals with the aspect of issuance of notice under Section 148 of the Act. Respondents, being an authority subordinate to the CBDT, cannot argue that the Scheme framed by the CBDT, and which has been laid before both House of Parliament is partly otiose and inapplicable. The argument advanced by respondent expressly makes clause 3(b) otiose and impliedly makes the whole Scheme otiose. If clause 3(b) of the Scheme is not applicable, then only clause 3(a) of the Scheme remains. What is covered in clause 3(a) of the Scheme is already provided in Section 144B(1) of the Act, which Section provides for faceless assessment, and covers assessment, reassessment or recomputation under Section 147 of the Act. Therefore, if Revenue's arguments are to be accepted, there is no purpose of framing a Scheme only for clause 3(a) which is in any event already covered under faceless assessment regime in Section 144B of the Act. The argument of respondent, therefore, renders the whole Scheme redundant. An argument which renders the whole Scheme otiose cannot be accepted as correct interpretation of the Scheme. The phrase "to the extent provided in Section 144B of the Act" in the Scheme is with reference to only making assessment or reassessment or total income or loss of assessee. Therefore, for the purposes of making assessment or reassessment, the provisions of Section 144B of the Act would be applicable as no such manner for reassessment is separately provided in the Scheme. For issuing notice, the term "to the extent provided in Section 144B of the Act" is not relevant. The Scheme provides that the notice under Section 148 of the Act, shall be issued through automated allocation, in accordance with risk management strategy formulated by the Board as referred to in Section 148 of the Act and in a faceless manner. Therefore, "to the extent provided in Section 144B of the Act" does not go with issuance of notice and is applicable only with reference to assessment or reassessment. The phrase "to the extent provided in Section 144B of the Act" would mean that the restriction provided in Section 144B of the Act, such as keeping the International Tax Jurisdiction or Central Circle Jurisdiction out of the ambit of Section 144B of the Act would also apply

under the Scheme. Further the exceptions provided in sub-section (7) and (8) of Section 144B of the Act would also be applicable to the Scheme.

37. *When an authority acts contrary to law, the said act of the Authority is required to be quashed and set aside as invalid and bad in law and the person seeking to quash such an action is not required to establish prejudice from the said Act. An act which is done by an authority contrary to the provisions of the statute, itself causes prejudice to assessee. All assessees are entitled to be assessed as per law and by following the procedure prescribed by law. Therefore, when the Income Tax Authority proposes to take action against an assessee without following the due process of law, the said action itself results in a prejudice to assessee. Therefore, there is no question of petitioner having to prove further prejudice before arguing the invalidity of the notice. 38 With respect to the Office Memorandum dated 20th February 2023, the said Office Memorandum merely contains the comments of the Revenue issued with the approval of Member (L&S) CBDT and the said Office Memorandum is not in the nature of a guideline or instruction issued under Section 119 of the Act so as to have any binding effect on the Revenue. Moreover, the arguments advanced by the Revenue on the said Office Memorandum dated 20th February 2023 is clearly contrary to the provisions of the Act as well as the Scheme dated 29th March 2022 and the same are dealt with as under –*

(i) *It is erroneously stated in paragraph 3 of the Office Memorandum that "The scheme clearly lays down that the issuance of notice under section 148 of the Act has to be through automation in accordance with the risk management strategy referred to in section 148 of the Act." The issuance of notice is not through automation but through "automated allocation". The term "automated allocation" is defined in clause 2(1)(b) of the said Scheme to mean random allocation of cases to Assessing Officers. Therefore, it is clear that the Assessing Officer are randomly selected to handle a case and it is not merely a case where notice is sought to be issued through automation.*

(ii) *It is further erroneously stated in paragraph 3 of the Office Memorandum that "To this end, as provided in the section 148 of the Act, the Directorate of Systems randomly selects a number of cases based on the criteria of Risk Management Strategy." The term 'randomly' is further used at numerous other places in the Office Memorandum with respect to selection of cases for consideration/issuance of notice under Section 148 of the Act. Respondent is clearly incorrect in its understanding of the said Scheme as the reference to random in the said Scheme is reference to selection of Assessing Officer at random and not selection of Section 148 cases as random. If the cases for issuance of notice under Section 148 of the Act are selected based on criteria of the risk management strategy, then, obviously, the same are not randomly selected. The term 'randomly' by definition mean something which is chosen by chance rather than according to a plan. Therefore, if the cases are chosen based on risk management strategy, they certainly cannot be said to be random. The Computer/System cannot select cases on random but selection can be based on certain well defined criteria. Hence, the argument of respondents is clearly unsustainable. If the case of respondent is that the applicability of Section 148 of*

the Act is on random basis, then the provision of Section 148 itself would become contrary to Article 14 of the Constitution of India as being arbitrary and unreasonable. Randomly selecting cases for reopening without there being any basis or criteria would mean that the section is applied by the Revenue in an arbitrary and unreasonable manner. The word 'random' is used in clause 2(1)(b) of the said Scheme in the definition of "automated allocation". "Automated allocation" is defined in the said clause to mean "an algorithm for randomised allocation of cases.....". The term 'random', in our view, has been used in the context of assigning the case to a random Assessing Officer, i.e., an Assessing Officer would be randomly chosen by the system to handle a particular case. The term 'random' is not used for selection of case for issuance of notice under Section 148 as has been alleged by the Revenue in the Office Memorandum. Further, in paragraph 3.2 of the Office Memorandum, with respect to the reassessment proceedings, the reference to 'random allocation' has correctly been made as random allocation of cases to the Assessment Units by the National Faceless Assessment Centre. When random allocation is with reference to officer for reassessment then the same would equally apply for issuance of notice under Section 148 of the Act.

(iii) The conclusion at the bottom of page 2 in paragraph 3 of the Office Memorandum that "Therefore, as provided in the scheme the notice under section 148 of the Act is issued on automated allocation of cases to the Assessing Officer based on the risk management criteria" is also factually incorrect and on the basis of incorrect interpretation of the Scheme. Clause 2(1)(b) of the Scheme defined 'automated allocation' to mean 'an algorithm for randomised allocation of cases by using suitable technological tools, including artificial intelligence and machine learning, with a view to optimise the use of resources'. The said definition does not provide that the automated allocation of case to the Assessing Officer is based on the risk management criteria. The reference to risk management criteria in clause 3 of the Scheme is to the effect that the notice under Section 148 of the Act should be in accordance with the risk management strategy formulated by the board which is in accordance with Explanation 1 to Section 148 of the Act. In our view, the Revenue is misinterpreting the Scheme, perhaps to cover its deficiency of not following the Scheme for issuing notice under Section 148 of the Act.

(iv) In paragraph 3.1 of the Office Memorandum, it is stated that the case is selected prior to issuance of notice are decided on the basis of an algorithm as per risk management strategy and are, therefore, randomly selected. It is further stated that these cases are 'flagged' to the JAO by the Directorate of Systems and the JAO does not have any control over the process. It is further stated that the JAO has no way of predicting or determining beforehand whether the case will be 'flagged' by the system. The contention of the Revenue is that only cases which are 'flagged' by the system as per the risk management strategy formulated by CBDT can be considered by the Assessing Officer for reopening, however, in clause (i) in the Explanation 1 to Section 148 of the Act, the term "flagged" has been deleted by the Finance Act, 2022, with effect from 1st April 2022. In any case, whether only cases which are flagged can be reopened or not is not relevant to decide the scope of the Scheme framed under Section 151A of

the Act, which required the notice under Section 148 of the Act to be issued on the basis of random allocation and in a faceless manner.

(v) *The Revenue has wrongly contended in paragraph 3.1 of the Office Memorandum that "Therefore, whether JAO or NFAC should issue such notice is decided by administration keeping in mind the end result of natural justice to the assesseees as well as completion of required procedure in a reasonable time." In our opinion, there is no such power given to the administration under either Section 151A of the Act or under the said Scheme. The Scheme is clear and categorical that notice under Section 148 of the Act shall be issued through automated allocation and in a faceless manner. Therefore, the argument of the Revenue is clearly contrary to the provisions of the Scheme.*

(vi) *In paragraph 3.3 of the Office Memorandum, it is again erroneously stated that "Here it is pertinent to note that the said notification does not state whether the notices to be issued by the NFAC or the Jurisdictional Assessing Officer ("JAO").....It states that issuance of notice under section 148 of the Act shall be through automated allocation in accordance with the risk management strategy and that the assessment shall be in faceless manner to the extent provided in section 144B of the Act." The Scheme is categoric as stated aforesaid that the notice under Section 148 of the Act shall be issued through automated allocation and in a faceless manner. The Scheme clearly provides that the notice under Section 148 of the Act is required to be issued by NFAC and not the JAO. Further, unlike as canvassed by Revenue that only the assessment shall be in faceless manner, the Scheme is very clear that both the issuance of notice and assessment shall be in faceless manner.*

(vii) *In paragraph 5 of the Office Memorandum, a completely unsustainable and illogical submission has been made that Section 151A of the Act takes into account that procedures may be modified under the Act or laid out taking into account the technological feasibility at the time. Reading the said Scheme along with Section 151A of the Act makes it clear that neither the Section or the Scheme speak about the detailed specifics of the procedure to be followed therein. This argument of the Revenue is clearly contrary to the Scheme as the Scheme is very specific to provide, inter alia, that the issuance of notice under Section 148 of the Act shall be through automated location and in a faceless manner. Therefore, the Scheme is mandatory and provides the specification as to how the notice has to be issued. Further the argument of the Revenue that Section 151A of the Act takes into account that the procedure may be modified under the Act is without appreciating that if the procedure is required to be modified then the same would require modification of the notified Scheme. It is not open to the Revenue to refuse to follow the Scheme as the Scheme is clearly mandatory and is required to be followed by all Assessing Officers.*

(viii) *The argument of the Revenue in paragraph 5.1 of the Office Memorandum that the Section and Scheme have left it to the administration to device and modify procedures with time while remaining confined to the principles laid down in the said Section and Scheme, is without appreciating that one of the main principles laid down in the Scheme is that the notice under*

Section 148 of the Act is required to be issued through automated allocation and in a faceless manner. There is no leeway given on the said aspect and, therefore, there is no question of the administration to device and modify procedures with respect to the issuance of notice.

39. With reference to the decision of the Hon'ble Calcutta High Court in Triton Overseas Private Limited (Supra), the Hon'ble Calcutta High Court has passed the order without considering the Scheme dated 29th March 2022 as the said Scheme is not referred to in the order. Therefore, the said judgment cannot be treated as a precedent or relied upon to decide the jurisdiction of the Assessing Officer to issue notice under Section 148 of the Act. The Hon'ble Calcutta High Court has referred to an Office Memorandum dated 20th February 2023 being F No.370153/7/2023 TPL which has been dealt with above. Therefore, no reliance can be placed on the said Office Memorandum to justify that the JAO has jurisdiction to issue notice under Section 148 of the Act. Further the Hon'ble Telangana High Court in the case of Kankanala Ravindra Reddy vs. Income Tax Officer 14 has held that in view of the provisions of Section 151A of the Act read with the Scheme dated 29th March 2022 the notices issued by the JAOs are invalid and bad in law. We are also of the same view."

13. From the above decision, Hon'ble High Court insisted that when an authority acts contrary to law, the said act of the authority is required to be quashed and set aside as invalid and bad in law and they have also opined that an action is not required to establish prejudice to the assessee. Therefore, in the present case also, while passing the final assessment order, the Assessing Officer (jurisdictional Assessing Officer) has not followed the directions of Id. DRP as per section 144C (13) of the Act and further we observed that the relevant Assessing Officer has not taken any step to pass a rectification order till now. We further observed that the TPO has passed OGE order to give effect TP adjustments after DRP directions and this is consequently part of the assessment records and Assessing Officer no doubt made a mistake which has led to not following of statutory provisions and not followed it up for making it proper which is in line with the provisions of section 144C of the Act. This is gross

violation on the part of the jurisdictional Assessing Officer and ld. DR for the Revenue vehemently argued that it is a mistake. If it is a mistake, the Department should have acted upon to rectify the mistake within reasonable time. In this case, no records were shown to make such efforts taken by the officer. It is clearly violation of law which deserves to be acted upon and the action of the Assessing Officer is contrary to the provisions of the Act and contrary to the law. For the purpose of any subsequent proceedings, what is relevant is the final assessment order for all purposes including the collection of tax. The assessment order so passed by the Assessing Officer deserves to be quashed. Accordingly, ground no.3 and additional ground no.16 raised by the assessee is allowed.

14. Since we have decided the issue on jurisdictional issue, the other grounds raised by the assessee are not adjudicated at this stage.

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

Order pronounced in the open court on this 9th day of September, 2024.

Sd/-

sd/-

**(YOGESH KUMAR U.S.)
JUDICIAL MEMBER**

**(S.RIFAUR RAHMAN)
ACCOUNTANT MEMBER**

Dated: 09.09.2024

TS

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI