

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

**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

ITA No. 3373/MUM/2023
(Assessment Year: 2014-15)

ITA No. 3372/MUM/2023
(Assessment Year: 2015-16)

**Deputy Commissioner of Income Tax
Circle 2(3)(1) Mumbai**

Room No. 552, 5th floor, Aayakar Bhavan
M.K. Road, Mumbai-400020.

..... **Appellant**

Vs

HDFC Bank Limited,

HDFC Bank House, Senapati Bapat Marg,
Delisle Road, S.O. Mumbai - 400013
[PAN: AAACH2702H]

..... **Respondent**

C.O No. 26/MUM/2024
IN ITA No. 3373/MUM/2023
(Assessment Year: 2014-15)

C.O.No. 27/MUM/2024
IN ITA No. 3372/MUM/2023
(Assessment Year: 2015-16)

HDFC Bank Limited,

HDFC Bank House, Senapati Bapat Marg,
Delisle Road, S.O. Mumbai-400013.
[PAN: AAACH2702H]

..... **Appellant**

Vs

**Deputy Commissioner of Income Tax
Circle 2(3)(1) - Mumbai**

Room No. 552, 5th floor, Aayakar Bhavan
M.K. Road, Mumbai-400020.

..... **Respondent**

Appearance

For the Appellant/Assessee : Shri Yogesh Thar a/w Chaitanya
For the Respondent/Department : Shri Biswanath Das

Date

Conclusion of hearing : 19.08.2024
Pronouncement of order : 30.09.2024

ORDER

Per Bench:

1. These are two sets of appeals and cross objections pertaining to Assessment Years 2014-15 and 2015-16. Since the appeals/cross

objections arose from identical set of facts and involved identical issues the same were heard together and are being disposed off by way of a common order. We would first take up appeal/cross-objection for the Assessment Year 2014-15.

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2. By way of the present appeal the Revenue has challenged the order, dated 27/03/2023, passed by the National Faceless Appeal Centre (NFAC), Delhi, [hereinafter referred to as the '**CIT(A)**'] whereby the Ld. CIT(A) had allowed the appeal preferred by the Assessee against the Assessment Order, dated 15/02/2019, passed under Section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as '**the Act**']. In the aforesaid appeal, the Assessee has filed cross objections.

- 2.1. The Revenue has raised following grounds of appeal:-

- "1. *Whether on the facts and in the circumstances of the case and in the law, the Ld. CIT(A) erred on finding period of limitation was 31/12/2017 whereas revised period of limitation was 31/12/2018 after TPO reference made from the Ld. A.O.*
2. *Whether on the facts and in the circumstances of the case and in the law, the Ld. CIT(A) has not appreciated the extension of the period of limitation under the provision under section 153 of the I. T. Act after making the TPO reference by Ld. A.O.*
3. *Whether on the facts and in the circumstances of the case and in the law, the Ld. CIT(A) erred in quashing the order passed under Section.143(3) of the IT Act placing reliance on Hon'ble Supreme Court in the case of VLS Finance Ltd. Vs. CIT, considering that the facts and circumstances of the present case are distinguishable from the facts and circumstances of the VLS Finance Ltd. vs. CIT decision."*

- 2.2. The Cross Objections raised by the Assessee read as under:

"Cross Objection 1: appeal filed by the Department is barred by limitation:-

- 1.1. *On the facts and in the circumstances of the case and in law, the appeal file by the department is barred by limitation and therefore the same need not be entertained.*
- 1.2. *The Cross Objector prays that the appeal filed by the department be dismissed, the same being barred by limitation.*

Without prejudice to the above:

"Cross Objection 2: Adjudication of the Grounds on merits in the event department's appeal is allowed:-

- 2.1. *In case the appeal of the Department is allowed on the jurisdictional grounds, in that event the grounds on merits, taken by the Cross Objector before the Ld. CIT(A) be adjudicated. The grounds on merits are as under:-*
 - 2.1.1. *The Ld. AO erred in invoking provisions of Rule 8D of the Income Tax Rules, 1962 ("the Rules" for the purpose of disallowance under section 14A of the Act.*
 - 2.1.2. *The Ld. Assessing Officer erred in disallowing broken period interest paid on securities classified under the category of 'Held to maturity' (HTM) on the alleged ground that the same is in the nature of capital expenditure without considering the fact that the securities purchased forms part of Bank's stock-in-trade.*
 - 2.1.3. *The Ld. Assessing Officer erred in making disallowance of provision in respect of reward points."*

"Cross Objection 3: Claim for deduction of employee stock option plan ('ESOP') Expenses – Rs.556,89,74,883/-:-

- 3.1. *On the facts and in circumstances of the case and in law, the Ld. Assessing Officer be directed to allow the ESOP expenses*

under Section. 37(1) of the Act.

3.2. The Cross Objector prays before Your Honour that the claim of ESOP expenses be allowed.

3. The relevant facts in brief are that the Assessee filed return of income for the Assessment Year 2014-15 on 30/11/2024. The case of the Assessee was selected for scrutiny. The Assessing Officer was of the view that the Assessee had undertaken Specified Domestic Transactions with its Associated Enterprises and therefore, a reference was made to the Transfer Pricing Officer on 29/12/2016. The Assessee filed writ petition before the Hon'ble Bombay High Court seeking quashing of the order making reference to Transfer Pricing Officer. Vide order dated 26/06/2017, passed in Writ Petition 462 of 2017, the Hon'ble Bombay High Court stayed the assessment proceedings since the Transfer Pricing Officer was directed not to pass final order. Thereafter, vide final order dated 20/12/2018 passed in the aforesaid writ petition [reported in (2019) 410 ITR 247], the Hon'ble Bombay High Court quashed the reference to the TPO. The Assessing Officer, thereafter, completed the assessment and passed Assessment Order on 15/02/2019.
4. The Assessee preferred appeal before the CIT(A) against the above Assessment Order contending, inter alia, that the Assessment Order was bad in law having been passed after the expiry of prescribed period specified in Section 153(1) of the Act. However, the CIT(A) accepted the aforesaid contention and allowed the appeal vide order, dated 27/03/2023.
5. Being aggrieved, the Revenue has preferred the present appeal challenging the order passed by the CIT(A) on the grounds reproduced in paragraph 2.1 above, while the Assessee has raised cross objection contending that the assessment order is barred by

limitation. Further, by way of Cross Objection No. 3.1 & 3.2 the Assessee has also raised additional/fresh claim for the first time before the Tribunal in relation to employee stock option expenses.

6. We would first take up the issue of validity of assessment order.
7. It is the contention of the Revenue that the CIT(A) failed to appreciate the facts and fell into error by holding that the assessment order was barred by limitation by relying upon a judgment of the Hon'ble Supreme Court which was not applicable to the facts of the present case. The Learned Departmental Representative appearing before us submitted that the moment reference was made to the TPO, the period of limitation for passing the order of assessment for the Assessment Year 2014-15 as specified in Section 153(1) of the Act stood extended by 12 months in terms of Section 153(4) of the Act. It is admitted position that in the present case the assessment proceedings were stayed since the Hon'ble Bombay High Court had, vide order dated 26/06/2016, directed that TPO shall not pass final order and as a result the Assessing Officer was also precluded from passing the assessment order. Explanation 1 (ii) to Section 153 of the Act provides that for the purpose of computing the period of limitation the period during which the assessment proceeding were stayed by an order or injunction of any court shall be excluded. On exclusion of the period of stay the time left with the Assessing Officer for passing the Assessment Order was less than 60 days and therefore, in view of the provisions contained in proviso to Explanation 1 to Section 153 of the Act, the Assessing Officer had 60 days to pass the assessment order. Thus, in case the period of stay is excluded, the assessment order passed is within the period prescribed in Section 153(1) read with Section 153(4) and Proviso to Explanation 1 to Section 153 of the Act. It was also submitted

that the CIT(A) had incorrectly placed reliance upon the judgment of Hon'ble Supreme Court in the case of VLS Finance Ltd vs. CIT : 384 ITR 1 which has not application in the facts of the present case as it pertained to a case where special audit was ordered under Section 142A of the Act.

8. In response, the Learned Authorised Representative took us through the orders passed by the Hon'ble Bombay High Court in the writ petition preferred by the Assessee and submitted that the period of limitation for passing order of assessment under Section 143 of the Act for the Assessment Year 2014-15 as specified in Section 153(1) of the Act expired on 31/12/2017. Since the reference to the TPO was quashed by the Hon'ble Bombay High Court, the extended period of limitation available in case of a reference made to TPO in terms of Section 153(4) of the Act was not available to the Assessing Officer. Therefore, the Assessment Order passed on 15/02/2019 is barred by limitation. The CIT(A) had appreciated the facts correctly while holding that the Assessment Order is barred by limitation.

9. We have given thoughtful consideration to the rival submissions and perused the material on record. There is no dispute as to facts. The dates/events relevant for adjudication of the issue are as under:

SNo.	Date	Event
1	29/12/2016	Reference to TPO under Section 92CA of the Act
2	31/12/2016	Time limit for passing order as per Section 153(1) of the Act
3	23/02/2017	Writ Petition filed by the Assessee seeking quashing of reference to TPO
4	26/06/2017	Interim stay granted by the Hon'ble

Bombay High Court directing TPO not to pass final order

5	31/12/2017	Extended time limit for passing assessment order available under Section 153(4) of the Act on making reference to TPO expired during the operation of above stay
6	20/12/2018	Final Order passed by the Hon'ble Bombay High Court quashing the reference to TPO
7	15/02/2019	Assessment Order passed by the Assessing Officer within period of 60 days from the final order, dated 20/12/2018, passed by the Hon'ble Bombay High Court

9.1. The issue that arises for consideration is whether in the facts and circumstances of the present case the extended period of limitation available to an assessing officer on a reference being made to TPO under Section 92CA of the Act as specified in Section 153(4) of the Act would be available to the Assessing Officer even in a case where the aforesaid reference to TPO is quashed by the Hon'ble Bombay High Court.

9.2. In the present case the assessee had challenged the very jurisdiction of the TPO to enter into reference by preferring writ petition before the Hon'ble Bombay High Court seeking, inter alia, quashing of the reference made under Section 92CA of the Act. A challenge to jurisdiction has to distinguished from a case of challenge to incorrect exercise of jurisdiction. Once the prayer of the Assessee is accepted that the reference made to TPO under Section 92CA of the Act is quashed by the Hon'ble Bombay High Court, the reference made under Section 92CA of the Act becomes a nullity in the eyes of law taking away the jurisdiction of the TPO

to enter into reference. That being the case, the Revenue cannot seek benefit of extended time period of 12 months specified under Section 153(4) of the Act for passing the assessment order. On perusal of the order, dated 20/12/2018, passed by the Hon'ble Bombay High Court we find that neither any liberty/time was sought nor was any liberty/time granted to the Revenue for pass the assessment order. In our view, accepting the contention of the Revenue would amount to violation of the binding order passed by the Hon'ble Bombay High Court. That being the case, the limitation to pass the assessment order available to the Assessing Officer as per Section 153(1) of the Act expired on 31/12/2016. The interim order, dated 26/06/2017, granting stay of proceedings was passed by the Hon'ble Bombay High Court was granted after the expiry of the period of limitation and therefore, the question of exclusion of period during which stay operated for the purpose of computing limitation does not arise. Accordingly, concurring with the CIT(A) we hold that the Assessment Order, dated 15/02/2019, was nullity in eyes of law having been passed after the expiry of limitation.

- 9.3. Once the Assessment Order is nullity in eyes of law, the cross objections raised by the Assessee pertaining to merits of addition/disallowances become infructuous.
- 9.4. During the course of hearing, it was submitted by the Learned Authorised Representative for the Assessee that a cross objection was to be treated as an independent appeal and therefore, the fresh claim raised by the Assessee for the first time before the Tribunal ought to be considered. We do not find any merit in the aforesaid submission for the reasons that once the assessment order is struck down as being barred by limitation, there arises no occasion for the appellate authority to examine the

claims/contentions raised by the Revenue or the Assessee in appellate jurisdiction unless otherwise specifically provided by the provisions contained in the Act. In our view, the judgment in the case of Hari Shankar Rastogi Vs. Sham Manohar & Ors: [(2005) 2 SCR 950] on which reliance was placed by the Learned Authorised Representative have no application to the facts of the present case for the reason that the same does not pertain to income tax proceedings. In that case regular second appeal was filed by a party to dispute and the opposite party filed a cross-objection. The Hon'ble Supreme Court held that cross-objections have trappings of an appeal and even if appeal of withdrawn the cross-objection can be entertained. There is no dispute to the general preposition that an act of a party to dispute cannot take away the statutory right of an opposite party. However, in the present case, the Assessee had itself contended that the assessment order is barred by limitation. On acceptance of the contention the assessment order ceased to exist in the eyes of law and therefore, the question of judicial review of the issues adjudicated therein in appellate proceedings does not arise. Once the assessment order is truck down, the position as existing before passing of the aforesaid assessment order gets restored and the jurisdiction of the appellate authority to examine any further contention/claim gets ousted. In the present case, returned income filed by the assessee would be deemed to have been accepted putting an end to the proceedings. In our view, except as otherwise specifically provided by the provision contained in the Act, say in case of re-assessment/search proceeding or by way of filing a revised return, neither Revenue nor the Assessee is permitted to raise fresh issues/claims in such concluded proceedings.

- 9.5. In view of the above (a) all the grounds raised by the Revenue are dismissed, (b) Cross Objection 1 (1.1 to 1.2) raised by the

Assessee are allowed, (c) Cross Objections No. 2 (2.1.1 to 2.1.3) raised by the Assessee are dismissed as being infructuous, and (d) Cross Objections No. 3 (3.1 to 3.2.) raised by the Assessee are rejected.

ITA No. 3372/MUM/2023 & C.O No. 27/MUM/2024

10. We would now take up appeal and cross-objection for the Assessment Year 2015-16.
11. By way of the this appeal the Revenue has challenged the order, dated 27/03/2023, passed by the National Faceless Appeal Centre (NFAC), Delhi, [hereinafter referred to as the '**CIT(A)**'] whereby the Ld. CIT(A) had allowed the appeal preferred by the Assessee against the Assessment Order, dated 15/02/2019, passed under Section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as '**the Act**']. In the aforesaid appeal, the Assessee has filed cross objections.
12. Both the sides agreed that the facts and circumstances prevailing for the Assessment Year 2015-16 were identical to Assessment Year 2014-15. For the Assessment Year 2015-16, the reference made to the TPO under Section 92CA of the Act was quashed vide order, dated 20/12/2018, passed by the Hon'ble Bombay High Court in Writ Petition No. 670 of 2018. The period of limitation for passing order of assessment specified in Section 153(1) of the Act expired in 31/12/2017 whereas the Assessment Order was passed on 15/02/2019. In appeal preferred by the assessee, the CIT(A) held that the assessment order was barred by limitation. Hence the present appeal by the Revenue and Cross-Objection by the Assessee raising grounds/objections identical to those raised for the Assessment Year 2014-15. Therefore, adopting the reasoning given while adjudicating appeal/cross-objection for the

Assessment Year 2014-15, we find no infirmity in the order passed by the CIT(A) allowing the appeal preferred by the Assessee holding that the assessment order was barred by limitation. Accordingly, (a) all the grounds raised by the Revenue are dismissed, (b) Cross Objection 1 (1.1 to 1.2) raised by the Assessee are allowed, (c) Cross Objections No. 2 (2.1.1 to 2.1.3) raised by the Assessee are dismissed as being infructuous, and (d) Cross Objections No. 3 (3.1 to 3.2.) raised by the Assessee are rejected.

13. In result, appeals preferred by the Revenue for the Assessment Years 2014-15 and 2015-16 are dismissed; and the Cross Objections filed by the Assessee for the Assessment Years 2014-15 and 2015-16 are partly allowed.

Order pronounced on 30.09.2024.

Sd/-
(Prashant Maharishi)
Accountant Member

Sd/-
(Rahul Chaudhary)
Judicial Member

मुंबई Mumbai; दिनांक Dated : 30.09.2024
Y.S.Patil, Sr.P.S.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त/ The CIT
4. प्रधान आयकर आयुक्त / Pr.CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai