THE INCOME TAX APPELLATE TRIBUNAL
"K" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Pavankumar Gadale (JM)

I.T.A. No. 899/Mum/2018 (Assessment Year 2013-14)

M/s. ECL Finance Limited Edelweiss House 4th Floor Off CST Road, Kalina Mumbai-400 098. PAN : AABCE4916D	Vs.	ACIT-3(1)(2) Room No. 607 Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

Assessee by	Shri Madhur Agrawal
Department by	Shri Sunil Deshpande
Date of Hearing	28.06.2021
Date of Pronouncement	22.09.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the direction of learned CIT(A) under section 144C(5) of the I.T. Act dated 29.9.2017 pertaining to assessment year (A.Y.) 2013-14.

2. Grounds of appeal read as under :

"Each of the following grounds are independent of, and without prejudice to one another:

The learned Assistant Commissioner of Income-tax-3(1)(2), Mumbai (hereinafter referred to as 'the AO') while passing the order dated 28.11.2017 under section 143(3) r.w.s. 144C(13) of the Income Tax Act, (hereinafter referred to as 'the Act') in pursuance of directions of Hon'ble Dispute Resolution Panel (WZ), Mumbai (hereinafter referred to as 'the DRP') erred in assessing the total income of the assessee at Rs.2,52,39,54,290 as against Rs. 1,94,95,27,610 declared by the assessee in its revised return of income filed dated 31.03.2015.

Ground No.1 - Transfer Pricing Adjustments

a. Based on the facts and circumstances of the case and in law, the learned Transfer Pricing Officer (hereinafter referred to as 'TPO') and the learned AO, under the directions issued by the Hon'ble DRP, erred in making a

disallowance of Rs. 45,35,45,982 to the Appellant's total income based on the provisions of Chapter X of the Act.

b. Based on the facts and circumstances of the case and in law, the TPO erred and the Hon'ble DRP further erred in not considering the observation of the Hon'ble Supreme Court in the case of CIT v Glaxo SmithKline Asia (P) Ltd. (236 CTR 113) and the rationale, as provided in the Memorandum to the Finance Act 2012, behind bringing the specified domestic transaction within the ambit of transfer pricing regulations i.e. to curb tax arbitrage opportunities to taxpayers by shifting of income to nil or low tax paying entities such as over invoicing in a tax holiday undertaking or an undertaking having carry forward losses of past years.

a. Based on the facts and circumstances of the case and in law, the TPO erred and the Hon'ble DRP further erred in upholding/confirming the action of the TPO in not demonstrating that the motive of the Appellant was to evade taxes by manipulating the prices in its specified domestic transactions as rating support fees and interest on structured loans have already been offered to tax by the respective Associated Enterprises (hereinafter referred to as 'AEs') and that both the Appellant and AEs are subjected to and assessable at the same rate of tax.

b. Based on the facts and circumstances of the case and in law, the TPO erred and the Hon'ble DRP further erred in challenging the commercial expediency of the Appellant while availing the rating support services & support services from the AEs.

c. Based on the facts and circumstances of the case and in law, the learned AO/TPO erred and the Hon'ble DRP further erred in not recording any reasons to show that conditions mentioned in clause (a) to (d) of section 92C(3) of the Act were satisfied before disreganingllic arm's length price computed by the Appellant.

d. Based on Ike facts and circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in upholding / confirming the action of the TPO in disregarding the approach adopted by the learned AO in respect of subject transactions in the assessment proceedings for AY 2012-13 and prior years, although the facts were the same in AY 2012-13 and prior years, thereby disregarding the principles of

<u>Ground No.2 - Adjustment in respect of Purchase of Bonds</u> <u>Purchase of 9.15% Axis Bank Limited Bond</u>

1) On the facts and in the circumstances of the case and in law, the TPO erred and the Hon'ble DRP further erred in determining the arm's length price for the purchase of 170 units of 9.15% Axis Bond (maturity date 31 December 2022) on 27 February 2013 from an AE at Rs. 17,12,05,640 instead of the transaction price of Rs 17,21,96,280 thereby making an arbitrary adjustment of Rs. 9,90,640.

2) On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in upholding/confirming the action of the learned TPO in disregarding the benchmarking analysis conducted by the Appellant considering the data obtained from Bloomberg database ~~without~~ providing cogent reason.

3) On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in upholding/confirming the action of the learned TPO in disregarding the corroborative benchmarking analysis submitted by Appellant wherein these same bonds were sold by the Appellant on the same day to unrelated parties.

4) On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in upholding/confirming the action of the learned TPO of selecting AE's purchase from unrelated parties on a different date as comparable transactions for the purpose of benchmarking without appreciating differences in prices on account of various factors such as the timing of the trade, interest rate movements, etc.

5) Without prejudice, the learned AO/TPO erred in not considering the mean of consolidated comparables uncontrolled transaction i.e. comparables considered by the Appellant and the TPO.

6) On the facts and in the circumstances of the case and in law, the TPO erred and the Hon'ble DRP further erred in denying the benefit of 3 percent variation as per the proviso to the Section 92C(2) of the Act.

Ground No.3 - Adjustment in respect of interest paid on Structured Loan Interest on Structured Loan

7) On the facts and in the circumstances of the case and in law, the TPO erred and the Hon'ble DRP further erred in determining the arm's length price for the interest paid on structured loans to AE at Rs. 8,41,44,658 as against the transaction of Rs. 35,00,00,000 thereby making an adjustment of Rs. 26,58,55,342

8) On the facts and in the circumstances of the case and in law, the TPO erred and the Hon'ble DRP further erred in comprehending structured loans, a form of a derivative transaction and erroneously adopted average annualized interest rate in respect of Nifty linked debentures, as arm's length price in respect of interest paid on structure loans.

9) On the facts and in the circumstances of the case and in law, the TPO erred and the Hon'ble DRP further erred in the undertaking an incorrect benchmarking despite acknowledging that the said transaction was in the nature of a derivative activity for which payment of interest is dependent upon happening or non-happening of an event, whereas in respect of Nifty linked debentures interest payment was certain but merely linked to the performance of underlying nifty index.

10) On the facts and in the circumstances of the case and in law, the Hon'ble DRP erred in ignoring that the Appellant's contention that it has recovered the interest cost paid on structured loans by back to back hedging the funds raised through structured loans.

11) On the facts and in the circumstances of the case and in law, the TPO erred and the Hon'ble DRP further erred in challenging and disregarding the business prudence and commercial expediency of the Appellant in entering into structure loan transaction.

Ground No.4 - Adjustment on account of Rating Support Fees

a. Based on the facts and circumstances of the case and in law, the TPO erred in determining the arm's length price for the rating support services availed from the AE at Rs.NIL and the Hon'ble DRP erred in determining the arm's length price for the rating support services availed from the AE at Rs.12,86,00,000 out of the total compensation of Rs.31,53,00,000 thereby making an adjustment of Rs. 18,67,00,000.

b. Based on the facts and circumstances of the case and in law, the TPO erred in rejecting the detailed functional, asset and risk analysis carried out by the Appellant in respect of rating support services availed from the AE.

c. Based on the facts and circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in upholding/confirming the action of the TPO of arbitrarily disregarding the evidence furnished to demonstrate the role played/information provided by the AE (which is not available in public domain) to the credit rating agencies.

d. Based on the facts and circumstances of the case and in law, the TPO erred and the Hon'ble DRP further erred in not appreciating the explicit support provided by the AE in respect of rating support services transaction and drawing erroneous analogy from the OECD - guidelines/Base Erosion and Profit Shifting ('BEPS') Action Plan.

e. Based on the facts and circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in rejecting the credit rating of the Appellant on a standalone basis certified by an Independent Government Certified Valuer without pointing out any deficiency or insufficiency in the same.

f. Based on the facts and circumstances of the case and in law, the learned TPO erred and the Hon'ble DRP further erred in not appreciating/ overlooking the benefit which got accrued to the Appellant on account of rating support services availed from the AE.

g. Based on the facts and circumstances of the case and in law, the Hon'ble DRP erred in restricting the arm's length compensation for the rating support fee only in the instances wherein corporate guarantee was given by the AE.

h. Based on the facts and circumstances of the case and in law, the Hon'ble DRP erred in holding the arm's length compensation on the adhoc basis of 0.50 per cent of the guaranteed amount.

i. The Appellant submits that it has made the payment of rating support fees to its AE and the same is at arm's length and accordingly, the learned AO shall be directed to delete the adjustment made.

Ground No.5 - Disallowance of Mark to Market loss

a. The learned AO erred in disallowing Rs.5,25,65,533 being provision for Mark to Market Loss on trading in derivative instruments by treating it as notional loss.

The Appellant submits that it has claimed provision for mark to market loss arising on trading in derivative instruments as ascertained loss due to movement in prices of derivative securities between contract date and Balance Sheet date. Accordingly, the same shall be allowed as deductible business loss. Hence, the Appellant submits that the disallowance shall be deleted.

Ground No.6 - Disallowance under Sec 14A r.w. Rule 8D

a. The AO erred in making the disallowance of Rs. 73,953,997 u/s 14A of the Act r.w. Rule 8D of the Income Tax Rules, 1962 (hereinafter referred to as 'the Rules') against Rs.4,85,961 suo motto disallowed by your appellant in the return of income filed.

Your Appellant submits that it has not incurred any expenditure in excess of Rs.4,85,961/- towards earning exempt income; hence, AO shall be directed to restrict the disallowance to Rs. 4,85,961/-.

b. The AO erred in invoking rule 8D of the Rules without recording his dissatisfaction with respect to accounts of the Appellant.

c. In alternative and without prejudice to the above, the AO erred in not considering the net interest for calculating disallowance as per Rule 8D(2)(ii) of the I.T. Rules.

d. In the alternative and without prejudice to the above, disallowance u/s 14A of the Act is excessive and unreasonable.

Ground No.8 - Short credit of TDS

a. Based on the facts and circumstances of the case and in law, the AO erred in allowing TDS credit of Rs.47,62,88,676 as against TDS claim of Rs.54,67,28,068 as per revised tax return filed by the Appellant, resulting into short TDS credit of Rs.7,04,39,392.

b. Consequentially, the AO also erred in charging interest u/s 234B and u/s 234C of the Art.

The AO erred in initiating the penalty proceedings u/s 271(l)(c) of the I.T. Act. The Appellant prays that the adjustment in relation to the corporate tax and transfer pricing matters made by the learned AO/ TPO and upheld by the Hon'ble DRP be deleted.

The Appellants pray that the AO be directed suitably in the matter.

The Appellants crave leave to add to, alter, amend, vary, omit or substitute the aforesaid grounds of appeal or add a new ground or grounds of appeal at any time before or at the time of hearing of the appeal as they may be advised."

3. Assessee has filed following additional grounds :-

"1. The Appellant submits that the Transfer Pricing Order dated 01/11/2016 passed u/s 92CA(3A) of the Act is barred by limitation as per section 153 r.w.s. 92CA(3A) of the Act. Hence, the same deserves to be quashed.

2. The Appellant submits that section 92BA (i) of the Income Tax Act, 1961 (Act) has been omitted by Finance Act 2017. w.e.f 01.04.2017 without a saving clause, thereby implying that such law never existed in the statute book. Hence, the transaction of payments made by the Appellant to persons referred to in section 40A (2) (b) is not a "specified domestic transaction" under section 92BA of the Act and, hence, the transfer pricing adjustment made in this behalf is liable to be quashed.

3. The Assistant Commissioner of Income Tax, Circle 3(1)(2), Mumbai (AO) and DRP ought to have allowed the deduction of Education Cess while computing business income of the Appellant."

4. Furthermore the assessee has filed another additional ground which is related to jurisdictional challenge regarding time limit to pass the order. The ground raised is that the order passed under section 92CA(3) of the I.T. Act is barred by limitation as per section 153 of the Act.

5. It has been pleaded that this additional ground needs to be admitted as it goes to the root of the matter and it is a legal issue. In this regard the assessee has relied upon various case laws including that from National Thermal Power Corporation Vs. CIT (229 ITR 383) for admission of additional ground. In this connection learned Counsel of the assessee has furnished a chart stating various limitations as per section 153 of the Act alongwith the facts of the present case.

Sr. No	Dates	Particulars
1	29/11/2013	Return of income filed u/s 139(1) of the Act
2	5/9/2014	Notice u/s 143(2) of the Act issued
3	31/3/2015	Revised return of income filed u/s 139(4) of the Act
4	19/1/2016	Reference u/s 92CA(1) of the Act made to Transfer Pricing Officer (TPO)
5	31/12/ 2015	Time Limit u/s 153(1) of the Act for passing order expires (if no reference made to TPO) [21 Months from the end of assessment year in which income was first assessable i.e. 9 months in 2014 + 12 months in 2015]
6	31/10/2016	Time limit for passing order u/s 92CA(3) expires as per section 92CA(3A) of the Act [i.e. 60 days prior to the date on which period of limitation stated in section 153 expires -i.e. 31.12.2016] Excluding 31.12.2016, 60 days expires on 1.11.2016 [i.e. 60 days = 30 days of December, 2016 and 30 days of November, 2016]. Thus, last date of passing order is 31/10/2016
7	1/11/ 2016	TPO passed order u/s 92CA(3) of the Act
8	30/12/2016	Draft order passed by AO
9	31/12/2016	Time Limit u/s 153(4) of the Act for passing order expires [if reference made u/s 92CA(1) of the Act to TPO] [21 Months from the end of assessment year in which income was first assessable [section 153(1)] + 12 Months [section 153(4) i.e. 9 months in 2014 + 12 months in 2015 + 12 months of 20 16]
10	29/9/2017	DRP passed direction u/s 144C(5) of the Act
11	30/9/2017	Time limit for passing order u/s 144C(5) of the Act [i.e. nine months from the end of the month in which draft order is forwarded to assessee i.e. 30.12.2016]
12	28/11/2017	Order u/s 143(3) r.w.s 144C of the Act passed
13	30/11/2017	Time limit for passing order u/s 143(3) r.w.s. 144C of the Act expires [i.e. one month from the end of the month in which order of DRP is received by the AO - it is presumed that DRP order is received by AO in October, 2017]

6. Furthermore in support of the aforesaid provision of additional ground learned Counsel of the assessee placed reliance on the following case laws :

- Pfizer Healthcare India (P) Ltd. Ors. Vs. JCIT & Anr. (320 CTR 812)(Mad)
- M/s. Louis Dreyfus Commodities India Pvt. Ltd. Vs. DCIT (ITA No. 2381/Del/2014)

7. Furthermore learned Counsel of the assessee has also filed written submission on merits of the grounds relating to transfer pricing disputed before the ITAT, which read as under :

"Grounds of appeal No 4: Adjustment on account of Rating Support Fees:

This issue has been discussed by the TPO and DRP at page 3 to 22 and 42 to 44 of their order respectively. Assessee has entered into a Memorandum of Understanding (MOU) dated 16/04/2012 with its holding company namely Edelweiss Financial Services Limited (EFSL). It has been agreed that assessee will avail the benefit of financial strength of consolidated financial statement of EFSL in obtaining credit rating from various credit rating agencies which will help the assessee to borrow the funds from banking and non-banking sources at cheaper interest rate as compared to borrowing on the basis of its standalone financial statement. The amount for which rating support is to be availed by the assessee has been mutually decided at Rs. 4,204 Crores. It was also decided that the assessee shall pay a fees @ 0.75% on Rs. 4,204 Crores being the amount for which rating support is to be availed by the assessee. Thus, the assessee paid Rs. 31.53 Crores as rating support fees to EFSL. The Arm's Length Price (ALP) of the above transactions has been bench marked using any other method as Most Appropriate Method (MAM) in transfer pricing study report.

The Transfer Pricing Officer (TPO) vide his order dated 1/11/2016 passed u/s 92CA(3) of the Act has computed the ALP at Rs. Nil and made the adjustment of Rs. 31.53 Crores being entire rating support fees paid. The adjustment has been made on the ground that the benefit of improved/higher credit rating of the assessee because of financial strength of EFSL's consolidated financial statement is an incidental benefit attributable solely its part of large concern and no function has been performed by EFSL. Being aggrieved, the assessee filed objection before Dispute Resolution Panel (DRP). DRP accepted the contention of the assessee that it has received the benefit of consolidated financial statement of EFSL; however, it allowed relief to the assessee to extent of 0.5% on Rs. 2,572 Crores being the amount of loan from Banks for which explicit corporate guarantee was given by EFSL. Being aggrieved, the assessee has filed present appeal before Your Honours.

Submissions of the assessee are as under:

- The rating of the assessee on the basis of its standalone financial statement is Caa-C whereas its rating based on consolidated financial statement of EFSL is A1+ for short term and AA-/Stable for long term.

There is a difference between corporate guarantee and rating support. Corporate guarantee assures the banks/financial institutions that in case of

default by the borrower, the guarantor will repay the money whereas in case of rating support, the borrower get the money at considerable cheaper rate which is additional benefit in case of rating support fees; hence, the person giving the rating support needs to be compensated more. Thus, rating support fees paid @ 0.75% may be allowed.

Bank guarantee is required for obtaining loan from banks whereas the credit rating is used for various other ways of borrowing also i.e. issuing commercial papers, debentures, financial instruments, structured products etc.

For example, in order to issue commercial paper, the credit rating of issuer should be A2 as stipulated by Reserve Bank of India (RBI) which was possible for the assessee only on the basis of obtaining the credit rating on the basis of consolidated financial statements of EFSL. The assessee has raised Rs. 2,072 Crores by commercial papers which were not possible without consolidated financial statements of EFSL. Your Honour will appreciate that the interest rate quoted by Banks on assessee's stand alone financial statements was 13.50% whereas the said loan has been given to the assessee @ 11.50% using the credit rating on the basis of consolidated financial statements of EFSL [refer page 361 of paper book]. The assessee has received benefit in the range of 2.25% to 2.74% on entire borrowing from the banks, on issue of commercial papers, on issue of debentures and on issue of various other structured products. Therefore, payment of credit rating support @ 0.75% may be allowed. - Furthermore, the assessee has borrowed Rs. 5,217 Crores whereas the rating support fees is paid on Rs. 4,204 Crores as agreed in MOU.

In the alternative and without prejudice to the above, the assessee submits that if at all Your Honour come to conclusion that rating support fees is to be allowed @ 0.50% only, then the assessee request your honors to apply the said rate on entire borrowing of Rs. 5,217 Crores as the assessee could borrow to such extent with cheaper rate solely on the basis of consolidated financial statements of EFSL.

<u>Grounds of appeal no 3; adjustment on account of interest paid on structured loan:</u>

This issue has been discussed by the TPO and DRP at page 62 to 67 and 52 to 56 of their order respectively. The assessee issued Nifty Linked Debentures to its two Associate Enterprises namely EFSL and M/s. Edelweiss Commodities Services Limited (ECSL). On such NLD, the assessee has paid the interest of Rs. 35 Crores (i.e. Rs. 20 Crores to EFSL and Rs. 15 Crores to ECSL) on the basis of fluctuation in NIFTY. In the Transfer Pricing Study Report, said transaction has been benchmarked using other method wherein fluctuation on NIFTY itself has been considered as comparable. TPO restricted the interest claim to Rs. 8.41 Crores being determined at average annualized rate of 16.06% on NLD issued or redeemed by the assessee. The adjustment has been made on the ground that assessee has paid the interest @ 43.36% which on annualized basis works out to be 16.06%. Debenture has been issued for short period and also there is no comparable uncontrolled transaction. The action of the TPO has been upheld by the DRP.

Submissions of the assessee are as under:

The debentures issued in present case are linked to NIFTY.

The interest has been paid on the basis of fluctuation in NIFTY which itself is a comparable uncontrollable price.

Such products issued by the assessee are governed by Circular dated bearing No Cir IMD/DF/17/2011.

The assessee submits that such products are derivative product and does not offer assured interest and thus rate and tenure of each product is agreed keeping in mind the probability of paying, fair pricing model and policy, risk reward relationship etc. Therefore, the interest paid on the basis of fluctuation in NIFTY is a comparable and adjustment made by the TPO and confirmed by the DRP may be deleted.

Your Honour would appreciate that similar issue came up for consideration in case of J.P. Morgan Securities India Pvt. Ltd. vs. Addl. CIT [ITA 1759/Mum/2019]. In said case, the assessee issued nifty linked debentures. On balance sheet date, on the basis of increase in nifty, the assessee made the provision of interest which has been disallowed by the AO and confirmed by the DRP. Hon'ble ITAT allowed the claim of the assessee.

Copy of decision is enclosed herewith for your honours ready reference. The assessee's case is similar to the J.P. Morgan (supra).

In view of the above, the assessee submits that adjustment made by the TPO shall be deleted.

Grounds of appeal number 2: Adjustment in respect of purchase of Bonds:

This issue has been discussed by the TPO and DRP at page 60 to 62 and 42 to 44 of their order respectively. The assessee bought 9.15% Axis Bank Limited 31.12.2022 Bond from its AE, M/s. Edelweiss Finance & Investment Limited (EFIL). Allegedly, the same bond was bought by EFIL from Kotak Mahindra Bank on same day. The difference in price at which bonds were bought by assessee from EFIL and EFIL bought from Kotak Mahindra Bank has been added to the returned income of the assessee. Transaction is tabulated as under:

Sr. No	No of bonds	Price at which assessee bought from EFIL	Price at which EFIL bought from Kotak	Adjustments
27/02/2013	80 Bonds	9,12,44,520	9,06,38,280	6,06,240
27/02/2013	90 Bonds	8,09,51,760	8,05,67,360	3,84,400
Total adjustment made				9,90,640

Adjustment has been upheld by the DRP.

Submission of the assessee is as under:

The bonds have been purchased by the EFIL from Kotak Mahindra Bank on 26//2/2013 and not on 27/02/2013 as assumed by the TPO/DRP. Therefore, comparing the price of 26/2/2013 with the price of 27/2/2013 is not proper and not justified to make the adjustments.

- Also, the closing trading price of bonds on 27/2/2013 is also enclosed herewith for your Honours ready reference. The last traded price and the price at which assessee bought the bonds are tabulated below:

No of Bonds	Last traded price	Price at which assessee bought
80	8,11,57,040	8,09,51,760
90	9,13,01,670	9,12,44,520

Your Honour will appreciate that the price at which assessee bought bonds is lesser than the last traded price; hence, the adjustment made by the TPO may be deleted.

The assessee also submits that the difference in the price could be for the reason of timing of trade, market outlook, interest rate movement, negotiation between parties etc

The said bonds have been sold on same day to two unrelated parties. The average sale price of 5 transaction is coming to Rs. 10,11,564/-. Therefore, such sale sell price should be taken as ALP under CUP as it is the price of the Bond received from Non AE and that too on same day. If the above average price is taken as ALP then the difference in ALP and actual price is calculated as follows:

Deal Date	Qty	Rate per unit	Total Purchase amount	Average ALP	Difference in ALP and Actual price	% of difference As compared to actual price
27 Feb 13	80	10,11,897	8,09,51,760	10,11,564	333	0.033
27 Feb 13	90	10,13,828	9,12,44,520	10,11,564	2,264	0.223

From the above, it can be seen that difference is not even 1% of actual price. Therefore, the adjustment made may be deleted considering section 92C(2) of the Act as the variation does not exceed 3%.

8. We have heard both the parties and perused the records. Brief facts of the case are that ECL Finance Limited (ECL Finance) is registered with the Reserve Bank of India (RBI) as a Non-banking financial company and primarily engaged in the business of financing and corporate lending against security of shares, stock, bonds, debenture or other similar instrument on short, medium and long term basis. Besides, the Company also trades in securities. During the Assessment Year 2013-14 ('AY 2013-14'), ECLF had entered into the following international transaction and specified domestic transactions with its AEs.

Sr. No.	Nature of Transaction	Amount	Method
Specified Domestic Transactions			
1	Interest on Demand Loans Paid	34,90,79,216	CUP
2	Commission and Brokerage paid, clearing charges for trading in shares	5,92,272/-	CUP
3	Referral Fees Paid	12,26,65,575/-	CUP
4	Rating Fees Paid	31,53,00,000/-	Other
5	Purchase of Securities (Stock in Trade)	8,73,57,06,654/-	CUP
6	Interest paid on Listed Nifty Linked Debentures issued by ECLF	12,36,68,675/-	Other
7	Interest paid on NLD	35,00,00,000/-	Other
8	Remuneration to Directors	2,67,79,802/-	Other
9	Shared Electricity Cost	34,74,870/-	Other
10	Rent Expenses	1,92,34,424/-	Other
11	Shared Staff Cost	5,14,80,000/-	Other
12	Reimbursement of Expenses	32,051/-	Other

9. The TPO passed an order on 01.11.2016, u/s. 92CA (3) of the Act, and made a Transfer Pricing adjustment of Rs. 62,07,55,982/-.Thereafter, the AO incorporated the TPO's order and issued the draft order u/s. 143(3) r.w.s.

144C (1) of the Act on 30.12.2016 which was duly served on 01.01.2017. The assessee filed its objections in Form No. 35A on 30th January, 2017.

10. Upon assessee's objection DRP passed its direction vide order dated 29.9.2017 granted part relief. The Assessing Officer passed a consequential order vide order dated 28.11.2017. In its grievance against the aforesaid order the assessee first raised the issue that order passed under section 92CA(3) is time barred. Since it is a legal issue and goes to the root of the matter, we admit the same on the touchstone of Hon'ble Apex Court decision in the case of National Thermal Power Company Ltd. Vs. CIT (229 ITR 383). We may firstly gainfully refer again to chart pertaining to this issue submitted by the assessee herein above.

Sr. No	Dates	Particulars
1	29/11/2013	Return of income filed u/s 139(1) of the Act
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3	31/3/2015	Revised return of income filed u/s 139(4) of the Act
4	19/1/2016	Reference u/s 92CA(1) of the Act made to Transfer Pricing Officer (TPO)
5	31/12/ 2015	Time Limit u/s 153(1) of the Act for passing order expires (if no reference made to TPO) [21 Months from the end of assessment year in which income was first assessable i.e. 9 months in 2014 + 12 months in 2015]
6	31/10/2016	Time limit for passing order u/s 92CA(3) expires as per section 92CA(3A) of the Act [i.e. 60 days prior to the date on which period of limitation stated in section 153 expires -i.e. 31.12.2016] Excluding 31.12.2016, 60 days expires on 1.11.2016 [i.e. 60 days = 30 days of December, 2016 and 30 days of November, 2016]. Thus, last date of passing order is 31/10/2016
7	1/11/ 2016	TPO passed order u/s 92CA(3) of the Act
8	30/12/2016	Draft order passed by AO

9	31/12/2016	Time Limit u/s 153(4) of the Act for passing order expires [if reference made u/s 92CA(1) of the Act to TPO] [21 Months from the end of assessment year in which income was first assessable {section 153(1)} + 12 Months [section 153(4) i.e. 9 months in 2014 + 12 months in 2015 + 12 months of 20 16]
10	29/9/2017	DRP passed direction u/s 144C(5) of the Act
11	30/9/2017	Time limit for passing order u/s 144C(5) of the Act [i.e. nine months from the end of the month in which draft order is forwarded to assessee i.e. 30.12.2016]
12	28/11/2017	Order u/s 143(3) r.w.s 144C of the Act passed
13	30/11/2017	Time limit for passing order u/s 143(3) r.w.s. 144C of the Act expires [i.e. one month from the end of the month in which order of DRP is received by the AO - it is presumed that DRP order is received by AO in October, 2017]

11. Now it is the contention of the assessee that time limit for passing of the order under section 92CA(3) of the Act by the Transfer Pricing Officer expires on 31.10.2016. As the said date is with reference to sixty days prior to the date on which period of limitation stated in section 153 of the Act expires i.e. 31.12.2016. That excluding 31.12.2016, sixty days expires on 1.11.2016. The last date of passing of the order is 31.10.2016. Since the order by the TPO has been passed on 1.11.2016 i.e. one day late, order is time barred. In support of the proposition learned Counsel of the assessee placed reliance upon the decision of Hon'ble Madras High Court in the case of Pfizer Healthcare India P. Ltd. (supra), in which case on identical facts of one day delay, Hon'ble Madras High Court has held that the impugned order was held to be barred by limitation.

12. Furthermore, we note that the ITAT, Delhi Bench in the case of M/s. Louis Dreyfus Commodities India Pvt. Ltd. (ITA No. 2381/Del/2014) has duly taken note of the aforesaid Hon'ble Madras High Court decision and has passed an order holding that the order passed by the TPO was time barred and plea of inadvertence of one day delay was liable to be rejected. We may gainfully refer to the relevant portion of the said ITAT order as under :-

"15. In order to determine if the order dated 31.01.2013 passed by the learned.TPO is barred by limitation as contended by the learned AR for the taxpayer, we would advert to the provisions contained under section 92CA(3) read with section 153 of the Act.

16. Undisputedly, sub-section (3A) to section 92CA has been inserted w.e.f. 01.06.2007 providing time limit for the Transfer Pricing Officer to pass the order i.e. within a period of 60 days prior to the date of completion of assessment as per section 153. So, u/s 92CA (3A) read with section 153, TPO was required to pass the order within the period of 60 days prior to the date on which the period of limitation referred to in section 153 expires i.e. 21 months.

17. In the instant case, undisputedly assessment order was passed on 31.03.2013 and the TPO was required to pass the order within 60 days prior to the date on which period of limitation referred to in section 153 expires.

18. Now, the question arises as to how the period of 60 days prior to the date of TP order i.e. 31.03.2013 is to be computed.

19. Hon'ble Madras High Court in case of M/s. Pfizer Healthcare India Pvt. Ltd. (supra) while dealing with the issue held that for computing the period of 60 days, the last date as per section 153 should be excluded. Operative part of the judgment is extracted for ready perusal as under :-

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

20. In the instant case, Id. AR for the taxpayer contended that the period of 60 days is to be computed as per table given below :-

Date of assessment order	31.03.2013
No. of Days in March	30
No. of Days in February	28
No. of Days in January	2

Total	60 days

21. Identical issue has also been dealt with by the coordinate Bench of the Tribunal in case of Honda Trading Corporation vs. DCIT in ITA No. 1132/Del/2015 order dated 15.09.2015 by returning following findings :-

> "5.27. *It is, therefore, summed up that the time limit for completion of assessment, or in other words, passing of the final assessment order pursuant to the order of the TPO, is contained in section 144C(4) and (13); the time limit given u/s 153 has no relation whatsoever with the passing of the draft order, which should be passed within a reasonable time; and the time limit given in section 153 is relevant for determining the time available with the TPO for passing order u/s 92CA(3).*
>
> *5.28. Turning to the facts of the instant case, we find that the AO passed the final assessment order on 29.1.2015, which is well within a period of one month from the end of the month in which direction was received from the DRP on 24.12.2014. As such, we hold that the final assessment order passed by the AO is within the time prescribed u/s 144C(13). Further since the draft order has also been passed within a reasonable time, the same is also not barred by limitation. The contention of the Id. AR that the draft order passed in this case was barred by limitation, is there/ore, found to be without any substance and hence repelled.*
>
> *B. Time limit for passing of order by the TPO*
>
> *6.1. The Id. AR also challenged the passing of the order by the TPO. It was submitted that the TPO passed order on 31.5.2014, which was time barred and, hence, the same should be annulled leading to the quashing of the final assessment order. In the opposition, the Id. DR supported the Revenue's stand.*
>
> *6.2. We have heard the rival submissions and perused the relevant material on record. It has been noticed above that the provisions of section 92CA requiring the passing of the order by the TPO determining the ALP of the international transactions, came into being by the Finance Act, 2002. As per sub-section (3) of section 92C, the TPO is required to pass the order determining the ALP of the international transactions. No time limit was initially given for the passing of order by the TPO. It is only by the Finance Act, 2007, that sub-section (3A) was inserted providing time limit for the passing an order by the TPO. No amendment has been carried out in this provision thereafter. Sub-section (3A) of section 92CA containing the relevant time limit for the passing of the order by the TPO, reads as under : -*
>
> > *"(3A) Where a reference was made under sub-section (1) before the 1st day of June, 2007 but the order under subsection (3) has not been made by the Transfer Pricing Officer before the said date, or a reference under subsection (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."

6.3. It transpires from a reading of the above provision that where a reference is made to the TPO after 1.6.2007, an 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, or, as the case may be, in section 153B, for making the order of assessment or re-assessment, etc., expires.

6.4. The Id. DR vehemently contended that the use of the word "may' in this provision for the passing of the order by the TPO within a period of 60 days of the limitation set out in section 153 indicates that the adherence to this time limit is not mandatory. He contended that even if the order is passed after the period of 60 days from the period of limitation as given u/s 153, still it would be treated as having been passed within time. This argument was countered by the Id. AR.

6.5. There is no doubt that the legislature has used the word "may" in sub-section (3A) of section 92CA. There is further no doubt that the ambit of the word "may' is different from the word "shall'. Whereas, ordinarily the use of the word "shall" signifies mandatory compliance, the word 'may' signifies directory compliance. But at times, the word "may[1] can also be read as "shall[1] and vice versa. In fact, all depends upon the context and the background of the provision in which such a word is used.

6.6. Section 127 deals with the power to transfer cases. Subsection (1) of this provision provides that: "The Director General or Chief Commissioner or Commissioner may, after giving the assessee a reasonable opportunity of being heard in the matter, wherever it is possible to do so, and after recording his reasons for doing so, transfer any case from one or more Assessing Officers subordinate to him (whether with or without concurrent jurisdiction) to any other Assessing Officer or Assessing Officers (whether with or without concurrent jurisdiction) also subordinate to him'. Dispute arose in Sahara Hospitality Ltd. vs. CIT (2013) 352 ITR 38 (Bom) as to whether or not giving the assessee a reasonable opportunity of being heard before the transfer of case by the Chief Commissioner, in the backdrop of the use of the word "may[1] in the provision, be considered as mandatory. The Hon'ble Bombay High Court has held that the word "may[1] in section 127 should be read as "shall[1] and hence the granting opportunity to the assessee is mandatory.

6.7. Section 16 of the Wealth-tax Act, 1957 deals with the assessment of wealth. Section 16A having marginal note of "Reference to Valuation Officer' provides through sub-section (1) that : "For the purpose of making an assessment (including an assessment in respect of any

assessment year commencing before the date of coming into force of this section) under this Act, where under the provisions of section 7 read with the rules made under this Act or, as the case may be, the rules in Schedule HI, the market value of any asset is to be taken into account in such assessment, the Assessing Officer may refer the valuation of any asset to a Valuation Officer - (a) in a case where the value of the asset as returned is in accordance with the estimate made by a registered valuer if the Assessing Officer is of opinion that the value so returned is less than its fair market value; (b) in any other case, if the Assessing Officer is of opinion- (i) that the fair market value or the asset exceeds the value of the asset as returned by more than such percentage of the value of the asset as returned or by more than such amount as may be prescribed in this behalf; or (ii) that having regard to the nature of the asset and other relevant circumstances, it is necessary so to do'. In Raj Paul Oswal vs. CWT (1988) 171 ITR 489 (P&H), there arose a quarrel as to the meaning of the word 'may' used in section 16A in the context of making reference to the Valuation Officer. Settling the controversy, the Hon'ble High Court held that the word 'may' used in section 16A(1)(b), should be read as "shall'. It held that if the legislative intent had been to accord total discretion to the WTO to make a reference to the Valuation Officer or not in cases which were covered by cls. (a) & (b) of sub-s. (1) of s. 16A of the WT Act, then there was no necessity of providing the guidelines in cl. (a) or in sub-cls, (i) and (ii) of cl. (b) of sub-s. (1) of s. 16A. It was, therefore, held that the legislature by prescribing the contingencies, in which, by implication, it would not be necessary to make a reference, also again by necessary implication be taken to have intended that the reference to Valuation Officer was must if the given contingencies did not exist. In this regard, the Hon'ble High Court observed that : There is no doubt about the fact that the use of expression "may" and "shall" to some extent serves an indicia to the intention of the legislature and helps in deciding as to whether the given requirement is directory or mandatory in character, but the use of expression "may" or "shall" is never considered decisive in that regard'. It was thus held that the moment the estimated value exceeded the returned value of the asset by more than what is envisaged by r. 3B, then the WTO had no option, but to make a reference and he is not to wait for a request from the assessee to make a reference. Similar view has been expressed by the Hon'ble Delhi High Court in Sharbati Devi Jhalani vs. CWT & Ors. (1986) 159 ITR 549 (Del). It is vivid from the above discussion that the use of word 'may' or ^shall' in a provision is not conclusive of its mandatory or directory nature. One needs to go through the text of the provision and the context in which such a word has been used.

6.8. Reverting to section 92CA, we find that the Finance Act, 2007 inserted sub-section (3A) carrying the time limit of sixty days for passing of the order by the TPO before the expiry of time limit for completion of assessment by the AO u/s 153. Despite the use of the word ^may', the time limit for passing the order by the TPO is mandatory, as in the otherwise situation of the TPO having been allowed more time by implication, say of three months or more, could at that time have

frustrated the provisions of section 153 for the passing of the assessment order by the AO. Thus we have no hesitation in holding that the use of the word 'in sub-section (3A) of section 92CA is to be construed as 'shall', thereby making this time limit as mandatory and not directory. As such, it is held that the TPO is bound by the given time limit for passing of his order.

6.9. Having held that the word 'may' in section 92CA(3A) should be read as "shall', we once again note that prior to the insertion of section 144C by the Finance Act, 2009, the time limit for completion of assessment was contained in section 153 and accordingly the time limit for the passing of the order by the TPO was also set out accordingly in section 92CA w.r.t. the time limit for the completion of assessment as per section 153. However, with the insertion of section 144C, the time limit for the completion of assessment, or in other words, for passing of the final assessment order, stood shifted to sub-sections (4) or (13) of section 144C and got detached from section 153. Along with this, passing of draft order also became mandatory, for which we have held above that the same is required to be passed within a reasonable time and it has got no relation with the time limit given in section 153. When the position is such that the draft order has to be passed independent of the time limit given in section 153, there appears some logic in not continuing with the time limit for the passing of the order by the TPO tagged with the time limit given in section 153. It has led to incoherence in the provisions. This position can be set right only with a suitable legislative amendment.

6.10. Having held that the time limit given in sub-section (3A) of section 92CA is mandatory for the passing of the order by the TPO, let us find out the time available with the TPO for the passing of his order. It has been noticed above that the time limit as per section 153(1) read with the third proviso and clause (viii) of the Explanation to the section, comes at 7th June, 2014. Period of 60 days prior to such time limit coming as per section 153, available with the TPO for passing his order, comes to an end on 8th April, 2014. As against this, the order was actually passed by the TPO on 31st May, 2014. Thus, the order passed by the TPO is patently time barred.

C. Consequences of valid draft order and TPO's time barred

7. The Id. AR argued that since the draft order as well as the order of the TPO were time barred, the final assessment order passed by the AO was liable to be set aside. We have held above that the draft order was passed within time and only the order of the TPO is time-barred. When an order is passed without jurisdiction or beyond the permissible time, it is considered as null and void. The effect of passing a null and void order is that it is considered as non est, meaning thereby, that it entails all the consequences of not having been passed at all and is ignored for all practical purposes. The Hon'ble Madras High Court in Vijay Television (P.) Ltd. vs. DRP (2014) 369 ITR 113 (Mad) considered a case in which the assessment order was directly passed without routing

through draft order or DRP. The Hon 'ble Court held it to be a non-curable defect and resultantly the assessment was quashed. It was held that when there is an omission on the part of the AO to follow the mandatory procedure prescribed under the Act, such an omission cannot be termed as a mere procedural irregularity and it cannot be cured. Extantly, we are confronted with a situation in which the draft order has been passed in time but the lapse has come in the passing of the order by the TPO. The consequence of the above scenario is that the passing of a valid and properly timed draft order cannot lead to the setting aside of the final assessment order. However the passing of the time barred order by the TPO, which is again a mandatory procedure prescribed under the Act, would be a non-curable defect, having the consequence as if it was not passed. In such circumstances, though the final assessment order would be saved but the addition on account of transfer pricing adjustment arising from the determination of the ALP of the international transactions by the TPO as emanating from his time barred order, would be unsustainable. We hold accordingly and direct the deletion of addition on account of transfer pricing adjustment made in the final assessment order."

22. Ld. DR for the Revenue, on the other hand, contended that the Id. TPO has passed order in this case well within time but due to inadvertence date of order is written as 31.01.2013 instead of 30.01.2013 and relied upon copy of dispatch register, wherein file of the instant case is reported to be sent to DIT for approval vide dispatch no.897 on 30.01.2013.

23. We are unable to agree with the contention raised by the Id. DR for the Revenue for two reasons :-

(i) that any order passed by the quasi-judicial authority in discharge of its official duties is to be taken at face value; and

(ii) that in case, it was a clerical error as to the date of passing the order, the ld. TPO was well within his rights to get the date rectified u/s 154 of the Act but right from 31.01.2013 no such power has been exercised.

24. Ld. AR for the taxpayer further contended that for argument sake, even if the order passed by the TPO is taken having been passed on 30.01.2013, still it is barred by limitation because order was required to be passed before 60 days prior to the date on which limitation referred to in section 153 expires, which actually expires on 20.01.2013.

25. Computation of period of 60 days given by the taxpayer extracted in the preceding para no.20 cannot be faulted with on any ground because from 31.03.2013, the date of passing order of the AO, 60 days was to be computed by excluding the date of order i.e. 31.03.2013. So, while excluding the date 31.03.2013, the day of passing the order, the order was required to be passed by the TPO by 29.01.2013 whereas the impugned order has been passed on 31.01.2013 which is barred by limitation.

> 26. In view of what has been discussed above and following the decision rendered by Hon'ble Madras High Court and the order passed by the coordinate Bench of the Tribunal in cases of M/s. Pfizer Healthcare India Pvt. Ltd. and Honda Trading Corporation (supra) respectively and mandate of section 92CA (3) read with section 153 of the Act, impugned order passed by the Id. TPO is barred by limitation which was required to be passed by 29.01.2013 and as such is hereby quashed.
>
> 27. Consequent additions made on account of transfer pricing adjustment by way of determining the ALP transaction by the TPO are also not sustainable in the eyes of law, the order of the TPO (supra) being barred by limitation. Since vide assessment order dated 24.02.2014 AO has made addition on account of determination of ALP of international transaction, such addition stands deleted being order of Id. TPO barred by limitation, but the assessment order u/s 143 (3) passed by AO is in time, it stands except those additions proposed by Id. TPO. Thus, additions made by AO, based on order of Id. TPO, stand deleted without entering into grounds raised on merits by the taxpayer. Consequently, the appeal filed by the taxpayer is allowed."

13. Examining the present case on the touchstone of the aforesaid decisions, we find that as per sub-section 3 to section 92CA inserted with effect from 1.6.2007 time limit for TPO to pass the order is within the period of sixty days prior to the date of completion of the order as per section 153 of the Act. Since reference under section 92CA sub section (1) has been made to the TPO the time limit for passing the assessment order as per section 153(4) is extended by 12 months from the time limit as in section 153(1) of the Act. Hence, time limit to pass assessment order in this case is 31.12.2016. Since the TPO order is passed on 1.11.2016, on the touchstone of the aforesaid decisions it is clear that the TPO order passed is time barred as the due date in this case was 31.10.2016.

14. Following the same reasoning as Coordinate Bench decision as above in which Hon'ble Madras High Court decision has been followed, we hold that the order passed by the TPO is time barred and hence, is not legally sustainable. We note that no contrary order of Hon'ble Jurisdictional High Court has been cited before us in this regard.

15. Since we have found that the order passed by the TPO is time barred in this case, the other issues raised by the assessee are only of academic interest. Hence, we are not engaging into the same.

17. In the result, this appeal by the assessee stands partly allowed.

Pronounced in the open court on 22.9.2021.

Sd/-	Sd/-
(PAVANKUMAR GADALE)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 22/09/2021

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

BY ORDER,

//True Copy//

(Assistant Registrar)

PS ITAT, Mumbai