

**IN THE INCOME TAX APPELLATE TRIBUNAL
“K” BENCH, MUMBAI**

**BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.2220/Mum/2019
(A.Y. 2012-13)**

Eclinical Works India Pvt. Ltd., A 701 to 705, Boomerang Chandivali Farm Road, Chandivali Studio, Mumbai - 400 072	Vs.	DCIT-9(2)(2) Aaykar Bhavan, M.K. Road, Mumbai - 400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AABCE6639F		
Appellant	..	Respondent

Appellant by :	Madhur Agrawal
Respondent by :	Aditya M Rai

Date of Hearing	21.06.2023
Date of Pronouncement	30.06.2023

अदेश / O R D E R

Per Amarjit Singh (AM):

This appeal filed by the assessee and directed against the order passed by the ld. CIT(A)-56, Mumbai, dated 14.02.2019 for A.Y. 2012-13. The assessee has raised the following grounds before us:

- “1. On the fact and circumstances of the case, the learned CIT(A) has factually and legally erred in upholding the selection of M/s Excel Infoways Limited as a comparable for determining the arm's length price of the International Transaction entered into by the Appellant Company with its AE.
2. On the fact and circumstances of the case, the learned CIT(A) has factually and legally erred in upholding the selection of M/s Universal Prints System Limited as a comparable for determining the arm's length price of the International Transaction entered into by the Appellant Company with its AE

3. *On the fact and circumstances of the case, the learned CIT(A) has factually and legally erred in upholding the selection of M/s BNR Udyog Limited as a comparable for determining the arm's length price of the International Transaction entered into by the Appellant Company with its AE.*

The Appellant Company craves leave to add, alter, or withdraw all or any of the above grounds of appeal.”

2. Fact in brief is that return of income declaring total income at Rs.252,98,040/- was filed on 28.09.2012. The case was subject to scrutiny assessment and notice u/s 143(2) of the Act was issued on 06.08.2013. The assessee company is engaged in the business of Information Technology Services (I.T) i.e software development, software installation, software testing and other support IT enabled services. During the financial year relevant to the assessment year the assessee had entered into international transactions with its associated enterprises as per Form no. 3CEB to the audit report. Therefore, the assessing officer has referred the case of the assessee u/s 92CA(1) to the Transfer Pricing Officer on 11.08.2014 to determine the Arm's Length Price. Vide order u/s 92CA(3) dated 28.01.2016, the transfer pricing officer has made an upward adjustment to the arm's length price at Rs.7,35,17,512/- in relation to the international transactions entered into by the assessee company with its Associated Enterprises. The assessing officer has passed assessment order u/s 143(3) r.w.s 144C(1) of the Act on 29.03.2016 and total income was assessed at Rs.988,15,549/- after including the upward adjustment of Rs.735,17,512/- made by the Transfer Pricing Officer.

3. Aggrieved, the assessee filed the appeal before the ld. CIT(A). The ld. CIT(A) has partly allowed the appeal of the assessee.

4. During the course of appellate proceedings before us the ld. Counsel filed additional ground of appeal as follows:

Ground No. 4

“On the facts and circumstances of the case and in law, the final assessment order dated 29 March 2016 is invalid and bad in law as it does not comply with the provisions of section 144C of the Income Tax Act.

The Appellant humbly requests your Honours to admit the above additional ground since it is a jurisdictional ground, goes to the root of the matter and does not require investigation of any new facts.

5. The ld. Counsel submitted that additional ground is the legal ground challenging the validity of the assessment order and no further documentary evidences is required to adjudicate this ground of appeal. After considering the decision of Hon’ble Supreme Court of India in the case of National Thermal Power Company vs. CIT (229 ITR 383) these ground of appeal are admitted and is taken up for adjudication.

6. At the outset the ld. Counsel submitted that final assessment order dated 29.03.2016 is invalid as same was passed without passing a draft assessment order u/s 144C(1) of the Act. In support of his contention the ld. Counsel has placed reliance on the decision of Hon’ble High Court of Bombay in the case of SHL (India) P. Ltd. Vs. DCIT (2021) 128 taxman.com 426 (Bombay) and Hon’ble High Court of Bombay in the case of Dimension Data Asia Pacific Pte. Ltd. Vs. DCIT (2018) 96 taxman.com 182 (Bombay).

On the other hand, the ld. D.R supported the order of lower authorities.

7. Head both the sides and perused the material on record. The assessing officer has passed final assessment order on 29.03.2016 after making addition of Transfer Pricing Adjustment of Rs.73,51,752/- as proposed by the Transfer Pricing Officer vide order u/s 92CA(3) of the Act dated 28.01.2016. We have perused the provisions of section 144C(1) of the Income Tax Act which is reproduced as under:

- “144C. (1) The Assessing Officer shall, notwithstanding anything to the contrary contained in this Act, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the eligible assessee if he proposes to make, on or after the 1st day of October, 2009, any variation which is prejudicial to the interest of such assessee.
- (2) On receipt of the draft order, the eligible assessee shall, within thirty days of the receipt by him of the draft order, -
- (a) file his acceptance of the variations to the Assessing Officer; or
(b) file his objections, if any, to such variation with,--
(i) the Dispute Resolution Panel; and
(ii) the Assessing Officer.
- (3) The Assessing Officer shall complete the assessment on the basis of the draft order, if--
(a) the assessee intimates to the Assessing Officer the acceptance of the variation; or *Mugdha 12 of 30 13 Judgment-WPL 11293-21.odt*
(b) no objections are received within the period specified in sub-section(2).
- (4) The Assessing Officer shall, notwithstanding anything contained in [section 153](#) or [section 153B](#), pass the assessment order under sub-section (3) within one month from the end of the month in which,--
(a) the acceptance is received; or
(b) the period of filing of objections under sub-section (2) expires.
- (5) The Dispute Resolution Panel shall, in a case where any objection is received under sub-section (2), issue such directions, as it thinks fit, for the guidance of the Assessing Officer to enable him to complete the assessment.
- (6) The Dispute Resolution Panel shall issue the directions referred to in sub-section (5), after considering the following, namely:--
(a) draft order;
(b) objections fled by the assessee;
(c) evidence furnished by the assessee;
(d) report, if any, of the Assessing Officer, Valuation Officer or Transfer Pricing Officer or any other authority;
(e) records relating to the draft order;
(f) evidence collected by, or caused to be collected by, it; and
(g) result of any enquiry made by, or caused to be made by, it.
- (7) The Dispute Resolution Panel may, before issuing *Mugdha 13 of 30 14 Judgment-WPL 11293-21.odt* any directions referred to in sub-section (5),--
(a) make such further enquiry, as it thinks fit; or
(b) cause any further enquiry to be made by any income-tax authority and report the result of the same to it.
- (8) The Dispute Resolution Panel may confirm, reduce or enhance the variations proposed in the draft order so, however, that it shall not set aside any proposed variation or issue any direction under sub-section (5) for further enquiry and passing of the assessment order.

Explanation.--For the removal of doubts, it is hereby declared that the power of the Dispute Resolution Panel to enhance the variation shall include and shall be deemed always to have included the power to consider any matter arising out of the assessment proceedings relating to the draft order, notwithstanding that such matter was raised or not by the eligible assessee.

- (9) *If the members of the Dispute Resolution Panel differ in opinion on any point, the point shall be decided according to the opinion of the majority of the members.*
- (10) *Every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer.*
- (11) *No direction under sub-section (5) shall be issued unless an opportunity of being heard is given to the assessee and the Assessing Officer on such directions which are prejudicial to the interest of the assessee or the interest of the revenue, respectively.*
- (12) *No direction under sub-section (5) shall be issued Mugdha 14 of 30 15 Judgment-WPL 11293-21.odt after nine months from the end of the month in which the draft order is forwarded to the eligible assessee.*
- (13) *Upon receipt of the directions issued under sub-section (5), the Assessing Officer shall, in conformity with the directions, complete, notwithstanding anything to the contrary contained in [section 153](#) or [section 153B](#), the assessment without providing any further opportunity of being heard to the assessee, within one month from the end of the month in which such direction is received.*
- (14) *The Board may make rules for the purposes of the efficient functioning of the Dispute Resolution Panel and expeditious disposal of the objections fled under sub-section (2) by the eligible assessee.*
- (14A) *The provisions of this section shall not apply to any assessment or reassessment order passed by the Assessing Officer with the prior approval of the Principal Commissioner or Commissioner as provided in sub-section (12) of [section 144BA](#).*
- (14B) *The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of issuance of directions by the dispute resolution panel, so as to impart greater efficiency, transparency and accountability by--*
- (a) *eliminating the interface between the dispute resolution panel and the eligible assessee or any other person to the extent technologically feasible;*
- (b) *optimising utilisation of the resources through economies of scale and functional specialisation;*
- (c) *introducing a mechanism with dynamic jurisdiction for issuance of directions by dispute Mugdha 15 of 30 16 Judgment-WPL 11293-21.odt resolution panel.*
- (14C) *The Central Government may, for the purpose of giving effect to the scheme made under sub-section (14B), by notification in the Official Gazette, direct that any of the provisions of this Act shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification:*

Provided that no direction shall be issued after the 31st day of March, 2022.

- (14D) *Every notification issued under sub-section (14B) and sub-section (14C) shall, as soon as may be after the notification is issued, be laid before each House of Parliament.*
- (15) *For the purposes of this section,--*
- (a) *"Dispute Resolution Panel" means a collegium comprising of three Principal Commissioners or Commissioners of Income-tax constituted by the Board for this purpose;*
- (b) *"eligible assessee" means,--*
- (i) any person in whose case the variation referred to in sub-section (1) arises as a consequence of the order of the Transfer Pricing Officer passed under sub-section (3) of section 92CA; and*
- (ii) any non-resident not being a company, or any foreign company."*

However, after perusal of the material placed on record it is noticed that the assessing officer has not followed the procedure as laid down u/s 144C(1) of the Act which says that the assessing officer shall notwithstanding anything to the contrary contained in this act, in the first instance forward a draft of the proposed order of assessment to the eligible assessee if he proposes to make on or after the first day of October, 2009 any variation which is prejudicial to the interest of such assessee. In the case of the assessee the AO has not passed any draft assessment order as per the requirement u/s 144C(1) of the Act in spite of making a variation of Rs.735,17,512/- to the arm's length price as proposed by the TPO in the assessment order. By not following the procedure laid down in Sec. 144C(1) of the Act, the assessing officer has not furnished a draft assessment order to the assessee, therefore, the assessee could not get an opportunity to raise objection before the DRP in accordance with of Sec. 144C of the Act.

8. We have perused the judicial pronouncements relied upon by the ld. Counsel. The Hon'ble jurisdictional High Court of Bombay in the case of SHL (India) P. Ltd. Vs. DCIT (2021) 128 taxmann.com 426 (Bombay) held that failure on part of the Assessing Officer to follow procedure u/s 144C(1) is not a mere procedural or inadvertent error, but a breach of a mandatory provision which is incurable, Section 292B cannot cure it and the final assessment order passed by the assessing

officer stand vitiated on account of lack of decision which is incurable and deserves to be set aside as void ab initio.

9. We have also perused the decision of Dimension Data Asia Pacific Pte. Ltd. Vs. DCIT (2018) 96 taxmann.com 182 (Bombay) wherein held that assessing officer passed final assessment order u/s 144C(13) r.w.s 143(3) without passing a draft assessment order u/s 144C(1), said order being violative of provisions of Sec. 144C(1) deserved to be set aside.

10. In view of the above facts and decisions of jurisdictional High Court as referred supra we consider that the assessing officer has passed the order dated 29.03.2016 u/s 143(3) r.w.s 144C(1) without complying with the mandatory requirement of Sec. 144C(1) of the Act, therefore, following the aforesaid decision the said order is quashed and set aside. Accordingly, additional ground of appeal filed by the assessee is allowed. All the other normal ground of appeal of the assessee are not discussed therefore, the same left open to be adjudicated in future if it is required.

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

Order pronounced in the open court on 30.06.2023

Sd/-

(Aby T Varkey)
Judicial Member

Sd/-

(Amarjit Singh)
Accountant Member

Place: Mumbai

Date 30.06.2023

Rohit: PS

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

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

सत्यापित प्रति //True Copy//
आदेशानुसार/ BY ORDER,

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