

**IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "A", BANGALORE**

Before Shri Chandra Poojari, AM & Shri George George K, JM

IT(TP)A No.2131/Bang/2016: Asst.Year 2012-2013

M/s.Lam Research (India) Pvt.Ltd. Maruthi Infotech Centre, 2 nd Floor A Block, 11/1 and 12/1 Amarjyothi Layout, Inner Ring Road Bangalore – 560 071. PAN : AABCN2063Q.	v.	The Asst.Commissioner of Income-tax, Circle 4(1)(1) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.Ajit Tolani, CA & Sri.Darpan Kirpalani, Advocate
Respondent by : Ms.Neera Malhotra, CIT-DR

Date of Hearing : 02.09.2021	Date of Pronouncement : 20.09.2021
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ORDER

Per George George K, JM

This appeal at the instance of the assessee is directed against the final assessment order dated 30.09.2016 passed u/s 143(3) r.w.s. 144C(1) of the I.T.Act. The relevant assessment year is 2012-2013.

2. The assessee has raised several grounds and sub-grounds. All the grounds relate to adjustment of Arm's Length Price (ALP). The assessee has also filed additional grounds vide its letter dated 16.02.2021. The assessee in its petition for admission of additional ground submits that the issues raised in the additional grounds is purely legal issue and would not require any investigation of fresh facts. In this context, the learned AR has relied on various case laws. The learned Departmental Representative was duly heard.

2.1 The issue raised in the additional grounds are two folds, namely, (i) the Dispute Resolution Panel (DRP) erred in dismissing the objections of the assessee *in limine* without condoning the delay of 3 days in filing the objections before the Panel; (ii) the assessment order dated 30.09.2016 is barred by limitation as mandated u/s 144C(2) r.w.s. 144C(4) of the I.T.Act.

2.2 The above issues raised by the assessee are legal issue and there is no requirement of investigation of fresh facts. Therefore, the additional grounds are admitted for adjudication in view of the judgment of the Hon'ble Apex Court in the case of National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383 (SC).

3. The brief facts of the case are as follow:

The assessee is a private limited company, wholly owned subsidiary of Novellus Systems International Inc., USA. It is engaged in providing computer development services and IT enabled services for its Associate Enterprises (AEs) on a cost plus mark up basis. During the course of assessment proceedings, the matter was referred by the Assessing Officer (AO) to the Transfer Pricing Officer (TPO) to determine the ALP of the international transactions undertaken by the assessee with its AEs. The TPO passed order dated 20.01.2016 u/s 92CA of the I.T.Act. The TPO made a transfer pricing adjustment of Rs.1,06,63,109. Pursuant to the TPO's order, the A.O. passed a draft assessment order on 23.02.2016. The assessee filed objections dated 30.03.2016 before the DRP.

Since the assessee's objection had to be filed within 30 days from the date of receipt of the draft assessment order and since the assessee's objection was belatedly filed before the DRP by 3 days, the DRP rejected the objections of the assessee *in limine* by stating that the DRP does not have power to condone the delay in filing the objections by the assessee before the Panel. Pursuant to the DRP's rejection of objections, final assessment order was passed on 30.09.2016.

4. Aggrieved, the assessee preferred an appeal to the ITAT. The learned AR has filed paper book-I enclosing therein the objections filed before the DRP, copy of the written submissions filed before the TPO, etc. (all these pertain to the issue on merits with regard to the transfer pricing adjustment). As regards the additional grounds (legal issue), the assessee submitted that there was a delay in filing objections before the DRP by 3 days. However, it was contended that the DRP ought to have condoned the delay of 3 days in filing the objections before the Panel. Further, it was contended that the assessment order is not passed within 30 days from the date of draft assessment order. Therefore, it is barred by limitation. According to the learned AR, the assessee's objections being rejected by the DRP for the reason that it is beyond the prescribed time limit, the same ought not to be taken into consideration. Therefore, the AO ought to have passed an order u/s 144C(4)(b) of the I.T.Act instead of 144C(13) of the I.T.Act. The learned AR submitted that the Bangalore Bench of the Tribunal in the case of *Yokogawa India Ltd. v. ACIT* in IT(TP)A No.1715 & 692/Bang/2016

(order dated 08.03.2021) on identical facts, had held that the assessment order is barred by limitation.

5. The learned Departmental Representative, on the other hand, submitted that the DRP has no power to condone the delay of filing the objections before the Panel. In this context, the learned DR relied on the judgment of the Hon'ble Madras High Court in the case of Inno Estates (P.) Ltd. v. DRP-2 reported in (2018) 96 taxmann.com 646 (Madras). As regards the assessment whether it is time barred, the learned DR relied on the order of the Bangalore Bench of the Tribunal in the case of Himalaya Drug Co. v. DCIT reported in (2017) 84 taxmann.com 8 (Bang-Trib.).

6. We have heard rival submissions and perused the material on record. Two issues are arising for our adjudication, namely, (i) whether the DRP has power to condone the delay in filing the objections of the assessee; and (ii) whether the ITAT can hold the final assessment order dated 30.09.2016 as barred by limitation.

6.1 As regards the first issue is concerned, the learned AR admitted that there was a delay in filing the objections before the DRP by 3 days (the assessee has to file objections before the DRP u/s 144C(2)(b) of the I.T.Act within 30 days from the date of receipt of draft assessment order). The further question is whether the DRP has power to condone the delay. The DRP derives its authorities and powers from the provisions of section 144C of the I.T.Act and its procedures are governed by Income Tax (Dispute Resolution Panel) Rules, 2009. The provisions of the Act or Rule do not give power to

the DRP to condone any delay in filing the objections by the assessee before the Panel. If the Legislature had intended to give such powers, it had been expressly implied as in the case of powers with the CIT(A) u/s 249(3) of the I.T.Act and ITAT u/s 253(5) of the I.T.Act. Therefore, we are of the view that the DRP does not have powers to condone the delay of filing objections by the assessee before the Panel. This view is also endorsed by the Hon'ble Madras High Court in the case of Inno Estates (P.) Ltd. (supra) wherein it was held as follows:-

“27. As found by the Dispute Resolution Panel, an objection is to be filed by an aggrieved assessee within thirty days from the date of receipt of the draft assessment order. Dispute Resolution Panel has no power and / or authority and / or jurisdiction to condone the delay in filing the objection.”

6.2 In view of the aforesaid reasoning and the judgment of the Hon'ble Madras High Court, we hold that the DRP has no power to condone the delay in filing objections by the assessee before the Panel.

6.3 The further issue to be adjudicated is whether the ITAT has power to hold that the assessment order is barred by limitation. As mentioned earlier, the DRP has not given any direction on merits. The DRP has rejected the objections *in limine* for the reason that the same is time barred. In the cases of transfer pricing adjustment, the ITAT has power to entertain an appeal in two situations, i.e., (i) when an order of assessment impugned is an order pursuant to directions of DRP (refer section 253(1)(d) of the I.T. Act; or (ii) from an order of CIT(A) (refer section 253(1)(a) of the I.T.Act. The DRP having only rejected the objections on the ground of limitation. The

DRP did not issue any directions to the AO as contemplated u/s 144C(5) of the I.T.Act. In this case, the final assessment order dated 30.09.2016 was not pursuant to the direction of DRP. Therefore, the correct course open for the assessee would have been to file an appeal before the CIT(A) and pursue the said issue. The Hon'ble Madras High Court in the case of Inno Estates (P.) Ltd (supra) had also decided the above issue indirectly. In the case considered by the Hon'ble High Court, the Advocate for the assessee submitted that the appeal would lie to the ITAT u/s 253(1)(d) of the I.T.Act and not before the CIT(A) u/s 246(1)(a) of the I.T.Act. This contention of the Advocate was rejected by the Hon'ble Madras High Court. The Hon'ble Madras High Court directed the assessee to file an appeal to the CIT(A) instead of ITAT. The relevant facts, the submissions and finding of the Hon'ble Madras High Court read as follows:-

"19. It is well settled that this Court exercising jurisdiction under Article 226 of the Constitution of India does not adjudicate the correctness of an order of assessment. Though the order of the learned Single Judge dismissing the writ petition has been challenged in entirety, the learned counsel appearing on behalf of the appellant contends that an appeal would not lie to the First Appellate Authority under Section 246(1)(a) of the 1961 Act, but to the Income Tax Appellate Tribunal under the provisions of Section 253(1)(d) of the 1961 Act.

20. Section 253(1)(d) of the 1961 Act is set out hereinbelow:

"Section 253.Appeals to the Appellate Tribunal.-

(1) Any assessee aggrieved by any of the following orders may appeal to the Appellate Tribunal d) an order passed by an Assessing Officer under sub-section (3), of section 143 or section 147 or section 153A or section 153C in pursuance of the directions of the Dispute Resolution Panel or an order passed under section 154 in respect of such order."

21. *An appeal from an assessment order under Section 143(2) of the 1961 Act lies before Appellate Commissioner of Income Tax, whereas an appeal from an order passed by an Assessing Officer under Section 143(3) or Section 147 or Section 153A or Section 153C in pursuance of the directions of the Dispute Resolution Panel lies before the Income Tax Appellate Tribunal.*

22. *The question before us is whether the order of assessment impugned is an order in pursuance of directions of the Dispute Resolution Panel.*

23. *In a case where objection is received, the Dispute Resolution Panel might issue such directions as it might think for the guidance of the Assessing Officer to enable him to complete the assessment [Section 144C(5)]. The directions referred to in Section 144C(5) of the 1961 Act are to be issued after considering (i) the draft order; (ii) objections filed by the assessee; (iii) evidence furnished by the assessee; (iv) report of the Transfer Pricing Officer or any other authority; (v) records relating to the draft order; (vi) evidence collected by or caused to be collected by the Dispute Resolution Panel; (vii) result of any enquiry made by or caused to be made by the Dispute Resolution Panel.*

24. *The Dispute Resolution Panel may also make such further enquiry as it thinks fit or cause any further enquiry to be made by any Income Tax Authority and report the result of it to the Dispute Resolution Panel before issuing any directions, referred to in Section 144C(5) of the 1961 Act.*

25. *After considering the aforesaid materials, the Dispute Resolution Panel might confirm, reduce or enhance the variations proposed in the draft order.*

26. *Section 144C(10) of the 1961 Act mandates that every direction issued by the Dispute Resolution Panel shall be binding on the Assessing Officer. The direction is obviously a direction under Section 144C(5) which is given after taking into consideration of the materials stipulated in Section 144C(6) and going through the exercise contemplated, inter alia, under Section 144C(7) of the 1961 Act.*

27. *As found by the Dispute Resolution Panel, an objection is to be filed by an aggrieved assessee within thirty days from the date of receipt of the draft assessment order. Dispute Resolution Panel has power and/or authority and/or jurisdiction to condone the delay in filing the objection.*

28. *When an objection is filed before the Dispute Resolution Panel beyond the stipulated time of thirty days from the date of receipt of the order, there is no objection before the Dispute Resolution Panel in the eye of law.*

29. An order of rejection of an objection on the ground of the same being barred by limitation is not a direction under sub-section 5 read with sub-section 6 to Section 144C of the 1961 Act. Though the impugned order dated 1 0.11.20 16 rejecting the objection on the ground of the bar of limitation is captioned as a direction under Section 144C(5) of the 1961 Act, it is not in fact a direction under Section 144C(5). The quoting of a wrong provision in an order is a mistake apparent on the face of the record and, therefore, inconsequential. The impugned assessment order though stated as an order under Section 143(3) read with Section 144C(13) of the 1961 Act, is not an order in pursuance of the directions of the Dispute Resolution Panel, but an order of assessment simplicitor under Section 143(3) of the 1961 Act from which an appeal would lie to the Commissioner (Appeals). The learned Single Judge rightly dismissed the writ petition and remitted the appellant to his remedy of appeal before the first appellate authority.

30. However, the time granted to the appellant by the learned Single Bench to file an appeal before the First Appellate Authority as against the impugned order passed by the second respondent is extended for a further period of four weeks from date. Needless to mention that it will be open to the appellant assessee to agitate all questions before the First Appellate Authority.”

6.4 In the light of the aforesaid reasoning and the judgment of the Hon'ble Madras High Court (supra), the plea of the assessee that the assessment order is barred by limitation, is not entertained on account of the reason that ITAT does not have jurisdiction for the same. The Bangalore Bench of the Tribunal in the case of Yokogawa India Ltd. v. ACIT (supra) relied by the assessee will not have application, since the ITAT has not considered the judgment of Hon'ble Madras High Court, cited supra. As regards the DR's reliance on the ITAT order in the case of Himalaya Drug Co. v. DCIT (supra), we are not taking note of the same, since we have no jurisdiction to consider the plea of limitation on facts of this case. It is ordered accordingly.

7. In the result, the appeal filed by the assessee is dismissed.

Order pronounced on this 20th day of September, 2021.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K)
JUDICIAL MEMBER

Bangalore; Dated : 20th September, 2021.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The DRP-2, Bangalore
4. The Pr.CIT-4, Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore