IN THE INCOME TAX APPELLATE TRIBUNAL, 'J' BENCH MUMBAI

BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No.2933/Mum/2016
(**Assessment Year :2011-12**)

M/s. Shell India Markets Pvt. Ltd. Trent House, First Floor, G-Block, Plot No.C-60 Bandra Kurla Complex Bandra East Mumbai- 400 051	Vs.	Assistant Commissioner of Income Tax (LTU), Mumbai 29th Floor, Centre No.1 World Trade Centre Cuffe Parade, Mumbai
PAN/GI R N o.AAICS1404P		
(Appellant)	..	**(Respondent)**

ITA No.3016/Mum/2016
(**Assessment Year :2011-12**)

Assistant Commissioner of Income Tax (LTU), Mumbai 29th Floor, Centre No.1 World Trade Centre Cuffe Parade, Mumbai	Vs.	M/s. Shell India Markets Pvt. Ltd. Trent House, First Floor, G-Block, Plot No.C-60 Bandra Kurla Complex Bandra East Mumbai- 400 051
PAN/GIR No.A AICS1404P		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Ajit Kumar Jain
Revenue by	Shri Manoj Kumar
Date of Hearing	**10/04/2023**
Date of Pronouncement	**30/06/2023**

□□□□ / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid cross appeals have been filed by the assessee as well as the department against final assessment order dated 26/02/2016 passed u/s.143(3) r.w.s. 144C(13) in pursuance of direction given by the ld. DRP vide order dated 29/12/2015.

2. Before us, the ld. Counsel for the assessee submitted that assessee has raised additional ground vide ground No.48 & 49 that:

- *firstly*, order dated 30/01/2015, passed by ld. TPO is bad in law, time barred by limitation and the same was passed beyond time limit prescribed u/s.92CA(13); and

- *secondly*, the assessment order dated 26/02/2016 passed by ld. AO u/s. 143(3) r.w.s. 144C is *void-ab-initio* being barred by limitation.

3. In support of the said additional ground, assessee has also filed chronology of events as well as relied heavily upon the judgment of Hon'ble Madras High Court in the case of **M/s. Pfizer Healthcare India Pvt. Ltd. vs. JCIT (2021) 433 ITR 28** and the decision of the Co-ordinate Bench of Mumbai Tribunal in the case of **Atos India Pvt. Ltd., in ITA No.1795/Mum/2017.** Apart from that, Ld Counsel also

submitted that in assessee's own case for A.Y.2009-10, this Tribunal vide order dated

14/11/2022 on similar grounds and facts have not only quashed the transfer pricing adjustment but also the assessment order being barred by limitation.

4. The facts in brief qua the legal issue raised are that the assessee company is engaged in business of marketing motor spirit (petrol) and high-speed diesel through retail outlets, providing shared services to its group companies worldwide. Trading and Manufacturing and selling of Modified Bitumen. Emulsion (Bitumen Business). Lubricants and Coolants (Lube

Business), cost recharge to its group companies and providing IT Enabled Services in relation to Scientific and Technical consultancy. It had electronically filed its Return of Income on 29/11/2011 declaring loss of Rs. 105,77,29,782. The case was selected for scrutiny and notice u/s 143(2) vide notice dated 31/07/2012.

5. Thereafter, the ld. AO made a reference to the Transfer Pricing Officer (TPO) u 92CA(1) for determination of arm's length price (ALP) in relation to the international transaction for A 2011-12 vide letter dated 01/07/2013. The ld. TPO thereafter, passed the Transfer Pricing Order dated 30/01/2015 proposing adjustment of Rs. 231, 97,25,209. Subsequently the ld. AO passed Draft Assessment Order dated 02/03/2015 u/s 143(3)

r.w.s 144C(1) of the Act.

6. The assessee thereafter filled its objections before the same Dispute Resolution Panel (DRP). The ld. DRP disposed the objections raised by the assessee vide its directions dated 29/12/2015.

7. After considering the directions given by the ld. DRP, the ld. AO made adjustments/ disallowance in the Final Assessment Order (FAO) dated 26/02/2016 passed u/s 143(3) rws 144C(13) of the Act and determined the assessed income as INR 95,11,65,902 The assessed income is Rs. Nil, after the same is adjusted against unabsorbed business loss. Assessed Long Term Capital Loss to be carried forward is Rs.38,62,584/-.

8. Against the Final Assessment Order (FAC) dated 26/02/2016, the assessee and the Revenue department filed the captioned appeals

9. The Assessee has raised the following grounds in ITA No. 2933/Mum/2016:

Sr. No.	**Particulars**

1	Ground No. 1: erred in completing the assessment of the Appellant under Section 143(3) read with Section 144C(13) of the Income-tax Act, 1961 (Act), wherein the loss assessed is Rs. 38,62584 in pursuance to the directions issued by the DRP, as against the returned loss of Rs. 105 77,29,782
	TRANSFER PRICING GROUNDS:
2	Ground No. 2 to 4 Import of finished goods
3	Ground No. 5 to 6 Sale of Lubricants
4	Ground No. 7 to 13: Provision of shared services by the Appellant at Chennai unit
5	Ground No: 1-4 to 22: Provision of Technical Services by the Appellant through the Bangalore unit
6	Ground No. 23 to 26: Provision of Advisory Services
7.	Ground No. 27 to 32: Payments towards Cost Allocations
	CORPORATE TAX GROUNDS:
8	Ground No. 33 to 35: Disallowance of Amortized Lease Rentals
9	Ground No. 36 to 38: Alternate disallowance of payment for Business Support Services under Section 40(a) of the Act
10	Ground No. 39 to 40: Disallowanceof depreciation claimed on Goodwill arising on merger

11	Ground No. 41 to 42: Disallowance of Repairs & Maintenance expenditure
12	Ground No. 43 to 45: Disallowance of Repairs & Maintenance expenditure

10. The Revenue Department has also filed an appeal against the final assessment vide ITA No. 3016/Mum/2016 and the grounds of appeal are as under:-

Sr. No.	Particulars
	TRANSFER PRICING GROUNDS
1	Ground No. 1: Rejection of comparables Le, Jalan Agencies Limited. TCS e-serve International Limited and Castrol India Limited
	CORPORATE TAX GROUNDS:
2	Ground No. 2 Monthly Lease Rentals
3	Ground No. 3: Tax holiday benefit of 10A/10B

11. Apart from the grounds of appeals stated earlier, the Assessee has also filed additional grounds of appeal in ITA No.

2933/Mum/2016 which are as under:

Sr. No.	**Particulars**

1.	Ground No. 46: Deduction on reversal of provision of service tax
2.	Ground No. 47 Deduction of salary of real estate team.
3.	Ground No. 48: Validity of Order passed under Section 92CA(3) of the Act On the facts and in the circumstances of the case and in law, the order dated 30th January 2015 passed by the learned Transfer Pricing officer is bad in law being barred by limitation as the same is passed beyond the time limit prescribed under Section 92CA(3A) read with section 153(4) of the Act • In view of the above, it is prayed that the Transfer Pricing order dated 30th January 2015 passed by the learned Transfer Pricing Officer be held to be void abinitio.
4.	Ground No. 49: Validity of Order passed under Section 143(3) read with Section 144C(13) of the Act. On the facts and in the circumstances of the case and in law, the assessment order dated 26 February 2016 passed by the Learned AO under Section 143(3) rws
	144C of the Act is void and bad in law since it was barred by limitation as per provisions of the Section 153 of the Act.

5.	Ground No. 50: Lower deduction claimed under Section 10B of the Act • On the facts and in the circumstances of the case and in law, the Appellant for the purpose of computing deduction under Section 10B of the Act in its revised ROI, included suo moto transfer pricing (SMTPA) adjustment amount to arrive at Total Turnover. The learned AO failed to appreciate that this has resulted in the Appellant claiming lower deduction under Section 10B of the Act.

12. In so far as the issue raised by the additional ground No.48 & 49, the ld. Counsel for the assessee submitted that the order of TPO is time barred in terms of section 92CA(3) of the Act read with Section 153) and consequently, the passing of draft assessment order and the entire proceedings initiated u/s 144C is bad in law, because in absence of valid TPO order, the assessee ceases to be an eligible assessee and therefore the provisions of section 144C are not applicable to the assessee. Therefore, the ld. AO was required to complete the assessment within the due date as prescribed u/s 153 of the Act. Since the Final assessment order has been passed beyond the time limit as prescribed u/s 153, the final assessment order is barred by limitation and deserves to be quashed.

13. Following chronology of events is summarized below for the purpose of adjudication aforesaid additional grounds:

Sr. No.	**Particulars**	**Relevant Dates**
1	Assessment Year	2011-12
2	Period of limitation for making an order of assessment as per Sec 153 of the Act	24 months from the end of Assessment Year i.e., 31.03.2014
3	Extension of period of limitation in case reference is made under Sec 92CA of the Act (as per section 153 (1) proviso as amended by Finance Act, 2012).	12 Months i.e. 31.03.2015
4	Proceeding for assessment should be completed on / before this date.	31.03.2015
5	A date prior to the date on which period of limitation expires.	30.03.2015
6	Sixty-day period expires on:	30.01.2015
7	Transfer Pricing order u/s 92CA(3) of the Act ought to be	29.01.2015
	passed on /or before	

8	Date on which Transfer pricing order u/s 92CA(3) is passed.	30.01.2015
9.	**Delay in passing of Transfer Pricing Order for AY 2011-12**	1 day
10.	Draft Assessment order passed on:	02.03.2015
11.	DRP Directions passed on:	29.12.2015
12.	Final Assessment order passed on:	26.02.2016

14. In view of the aforesaid chronology of events, the ld. Counsel submitted that Section 92CA(3) provides that the ld. TPO order should be passed before 60 days prior to the date prescribed u/s.153 of the Act which in this case is 31/03/2015 and consequently, in terms of section 92CA of sub-section (3A) r.w.s. 153(1), 60 days prior to 31st March will be counted from 30 March 2015, i.e., it should be passed on or before 29th January 2015. The 60 days must be counted from 30/03/2015, because the provision envisages 60 days prior to the date on which period of limitation expires that is date before the day of 31/03/2015. **Accordingly, there was 30 days in March, 28 days in February, and 2 days in January**. In support of his contention, he strongly relied upon the case

of M/s. Pfizer Healthcare India Pvt. Ltd. vs. JCIT / Dy.CIT wherein on similar ground writ petition has been filed by the assessee was allowed and the decision of M/s. Atos India Pvt. Ltd. supra also, the case of the assessee for A.Y. 2009-10.

15. On the other hand, ld. DR had filed a comment of the ld. TPO which reads as under:-

"The additional ground No 48 of the appeal filed by the assessee before the Hon" ble ITAT is not acceptable on the following basis:

i. It is submitted that the legislature uses different words such as "from", "to", "before", "after", "prior", "within", "not later than", "not thereafter", "not less than", "at least" for computation of days. The principle of excluding the date of starting day and the inclusion of ending day are provided in Sec. 12 of the Limitation Act and in Sec. 9 of the General Clauses Act and a provision cannot be interpreted ignoring the same.

ii. As per Sec. 9 of the General Clauses Act, in computation of the time limit, the day referred to as "from" has to be excluded and the day referred to as "to" has to be included. In the case on hand, the date of the order dated 30.01.2015 was taken as starting point of limitation and 60 days was computed from 30.01.2015 and rightly the same has to be excluded and the last day 31.03.2015 has to be included and thus the order 30.01.2015 in rightly passed as per Sec.92CA(3A).

iii. When the period is marked by terminus a quo and terminus ad quem, the canon of interpretation envisaged and Section 9 of the General Clauses Act, 1897 require to exclude the first day and to include the last day

iv. Sec.92CA(3A) expressly provides for counting the last day ie. 31.03.2015 and therefore for counting the 60 days the last day

has to be taken into account and thus the order passed by the TPO dated 30.01.2015 is well within the time:

v. When the word "to" is specifically incorporated in Sec.92CA(3A), any other interpretation excluding the last day would be against the plain language of the statute and the intent of the legislature.

vi. The Section 92CA(3A) states that "an order u/s.92CA(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 expires". The Section refers that an order may be made at any time before 60 days and these 60 days have to be prior to the date on which Sec 153 limitation expires. It needs to be noted that the word used regarding limitation in Section 153 is expires that implies that the date on that particular time ceases to exist, that is not alive and it has expired. The last day expires on 00.00 am. It is only after the expiry of this date that an order may not be passed. Therefore, while computing the 60 days period, the last day of March has to be counted for computing the time limitation. If the same is counted, then working reverse the period of limitation for passing of a TP Order expires on 30.01.2015 and since the order is passed on this date, therefore the order is not barred by time limitation.

vii. Sec. 92CA(3A) uses the word may only and the same cannot be construed as shall and equated to limitation especially when further proceedings are contemplated under the Act such as passing draft assessment order, remedy before Dispute resolution panel and final assessment order.

viii. There is no necessity or occasion to read the word "may" as "shall". Sub-sections 3A and 4 were introduced in Sec. 92CA by the very same Finance Act, 2007 and the Legislature has consciously used the word "may" in Sec 92CA(3A) while using the word "shall" in Sec. 92CA(4). Hence, in view of the context and background of the provisions, the word "may" should not and cannot be read as "shall". If such an

interpretation is accepted it will make the provisions of the statute inoperative, it is well settled law of interpretation that any statute or enabling provision must be so construed as to make it operative and effective.

ix. On similar set of facts, the Hon'ble Madras High Court in the case of Pfizer Healthcare Pvt Ltd has ruled in favour of the assessee. The decision of the Hon'ble Court was not accepted by the Department and Department is before the Hon'ble Supreme Court of India on this ground.

16. We have heard rival submissions on the aforesaid legal issues as raised in additional ground and also gone through the chronology of events and the judgment relied upon by the assessee. In this case reference was made by the ld. AO to the ld. TPO u/s.92CA (1) on 01/07/2013. The ld. TPO had passed a transfer pricing order on 30/01/2015 proposing adjustment of Rs.231,97,25,209/-. Thereafter the draft assessment order was passed on 02/03/2015 u/s. 143(3) r.w.s. 144C(1). After receiving the draft assessment order, assessee filed objection before the ld. DRP and the ld. DRP has disposed of the objections vide directions dated 29/12/2015 and finally the assessment order has been passed vide order dated 26/02/2016.

17. The period of limitation for making the assessment order as per Section 153(3) was 31/03/2014, i.e., 24 months from the end of the assessment year. The extension of period of limitation made u/s.92CA (3) and also as per proviso to Section 153(1) was upto 31/03/2015 i.e. after a period of 12

months. The proceedings for the assessment have been completed before 31/03/2015 and prior to the date of which limitation expires as per Section 92CA(3A) was 29/01/2015 as the date prior to the date of which limitation expires is 30/03/2015 and 60 days expires on 31/02/2015. Accordingly, in view of the Section 92CA(3), ld. TPO's order which has been passed u/s.92CA(3) on 29/12/2015 wherein in this case it has been passed on 30/01/2015.

18. Sub-section 3A of section 92CA provides a time limit for passing of the order by the TPO u/s 92CA (3) in the following manner:-

"(3A) Where a reference was made under sub-section (l) before the 1st day of June, 2007 but the order under sub- section (3) has not been made by the Transfer Pricing Officer before the said date, or a reference under sub-section (l) 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:"***

19. Ergo, the TPO can pass an order u/s 92CA of the Act at any time before 60 days prior to the date on which period of limitation referred to u/s 153 expires. Thus 60 days have to be counted prior to the date of last date of limitation u/s 153.

20. Section 153 of the Act as applicable for the AY

2012-13 reads as under:-

'153. (i) ***No order of assessment shall be made under section 143 or section 144 at any time after the expiry of—***

(a) two years from the end of the assessment year *in which the income was first assessable; or*

(b) *one year from the end of the financial year in which a return or a revised return relating to the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year, is filed under sub-section (4) or sub-section (5) of section 139, whichever is later..*

Provided also that in case the assessment year in which the income was first assessable is the assessment year commencing on the 1st day of April, 2009 or any subsequent assessment year and during the course of the proceeding for the assessment of total income, a reference under sub-section (1) of section 92CA is made, the provisions of clause (a) shall, notwithstanding anything contained in the first proviso, have effect as if for the words "two years", the words

"three years" had been substituted."

21. The interpretation of Section 92CA (3) r.w.s. 153 has been dealt by the Hon'ble Madras High Court in the case of **Pfizer Healthcare India Pvt. Ltd**. wherein the Hon'ble High Court had made the following observations:-

" 22. From Section 153, the regular time for passing the assessment order ends on 31.12.2018 and with extension on the matter being referred to TPO, the time limit to pass assessment order would lapse on 31.12.2019. What is not to be forgotten, while interpreting a taxing statute, is the explicit and clear language used by the parliament while enacting the law. If the language employed in any statute is clear and unambiguous from its plain and natural

meaning, external aid for interpretation are unnecessary. In the present case, we are called upon to adjudicate the period of limitation applicable to TPO under Section 92CA(3A) and incidentally under Section 153.

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26. Further, the general interpretation by resorting to the meaning conveyed under the General Clauses Act cannot be adopted while interpreting 92CA (3A), because, the context and the language employed therein are completely different and it is pertinent to note that the words "from" and "to" have not been used. Even the employment of the General Clauses Act will not aid the Revenue, the reason of which will be disclosed a little later in this judgment. But, right now, it is relevant to consider the scope of the word "to".

27. The word "to" is used as a preposition or as an adverb. In popular sense, it is used to express the direction in which a person, thing, or time travels. The flow of direction is to be gauged from the preceding word or words used, like "prior to" or "upto". Keeping the same in mind, if we look at the wording of Section 92CA (3A), we cannot accept the contention of the Revenue that the time to be reckoned is from 31.12.2019 and not 30.12.2019 as has been rightly done by the learned Judge.

28. The word "date" in section 92CA(3A) would indicate 31.12.2019. But the preceding words "prior to" would indicate that for the purpose of calculating the 60 days, 31.12.2019 must be excluded. The usage of the word "prior" is not without significance. It is not open to this court to just consider the word "to" by ignoring "prior". The word "prior" in the present context, not only denotes the flow of direction, but also actual date from which the period of 60 days is to be calculated. It is settled law that while interpreting a statute, it is not for the courts to treat any word(s) as redundant or superfluous and ignore the same. In this connection, it is pertinent to note the judgment of the Apex Court in Grasim Industries Ltd. v. Collector of Customs, [(2002) 4 SCC 297 : 2002 SCC OnLine SC 413], wherein, it was held as follows:

"10. No words or expressions used in any statute can be said to be redundant or superfluous. In matters of interpretation one should not concentrate too much on one word and pay too little attention to other words. No provision in the statute and no word in any section can be construed in isolation. Every provision and every word must be looked at generally and in the context in which it is used. It is said that every statute is an edict of the legislature. The elementary principle of interpreting any word while considering a statute is to gather the mens or sententia legis of the legislature. Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to take upon itself the task of amending or alternating (sic altering) the statutory provisions. Wherever the language is clear the intention of the legislature is to be gathered from the language used. While doing so, what has been said in the statute as also what has not been said has to be noted. The construction which requires for its support addition or substitution of words or which results in rejection of words has to be avoided. As stated by the Privy Council in Crawford v. Spooner [(1846) 6 Moore PC 1 : 4 MIA 179] "we cannot aid the legislature's defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are left there". In case of an ordinary word there should be no attempt to substitute or paraphrase of general application. Attention should be confined to what is necessary for deciding the particular case. This principle is too well settled and reference to a few decisions of this Court would suffice. (See : Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. v. Custodian of Vested Forests [1990 Supp SCC 785 :

AIR 1990 SC 1747] , Union of India v. Deoki Nandan

Aggarwal [1992 Supp (1) SCC 323 : 1992 SCC (L&S) 248 : (1992) 19 ATC 219 : AIR 1992 SC 96] , Institute of Chartered Accountants of India v. Price Waterhouse[(1997) 6 SCC 312] and Harbhajan Singh v.

Press Council of India [(2002) 3 SCC 722 : JT (2002) 3 SC 21].)"

29. The language employed is simple.

31.12.2019 is the last date for the assessing officer to pass his order under Section 153. The TPO has to pass order before 60 days prior to the last date. The 60 days is to be calculated excluding the last date because of the use of the words "prior to" and the TPO has

to pass order before the 60th day. In the present case, the word "before" used before "60 days" would indicate that an order has to be passed before 1/11/2019 i.e on or before 31.10.2019 as rightly held by the Learned Judge.

30. Even considering for the purpose of alternate interpretation, the scope of Section 9 of the General Clauses Act, it is to be noted that an inverted calculation of the period of limitation takes place here. If the last date is taken to be the first date from which the period of 60 days is to be calculated, reading down the provision with the use of the word "from", which denotes the starting point or period of direction in general parlance, would mean that 60 days "from the last date". Even going by Section 9 of the General Clauses Act, when the word "from" is used, then, that date is to be excluded, implying here that 31.12.2019 must be excluded. After excluding 31.12.2019, if the period of 60 days is calculated, the 60th day would fall on 01.11.2019 and the TPO must have passed the order on or before 31.10.2019 as orders are to be passed before the 60th day. Therefore, either way the contention of the Revenue is a fallacy and has no legs to stand.

31. The next contention that has been raised by the learned senior standing counsel for the appellants is that the usage of the word "may" in Section 92CA (3A) indicates that the time fixed is only directory, a guideline, not mandatory and is for the sake of internal proceedings.

32. Let us now examine the relevant procedures relating to Transfer Pricing. After an international transaction is noticed subject to satisfaction of section 92B, a reference is made to the TPO under sub-Section (1) of Section 92CA of the Act. The TPO after considering the documents submitted by the assessee is to pass an order under Section 92CA

(3) of the Act. As per Section 92CA (3A), the order has to be passed before the expiry of 60 days prior to the date on which the period of limitation under Section 153 expires. As per 92CA(4), the assessing officer has to pass an order in conformity with the order of the TPO. After receipt of the order from the TPO determining ALP, the assessing officer is to forward a draft assessment order to the assessee, who has an option either to file his acceptance of the variation of the assessment or file his objection to any such variation with the Dispute Resolution Panel and also the Assessing Officer. SubSection (5) of Section 144C of the Act provides that if any objections are raised by the assessee before the Dispute Resolution Panel, the Panel is empowered to issue such direction as it thinks fit for the guidance of the Assessing Officer after considering various details provided in Clauses (A) to (G) thereof. Sub-Section (13) of Section 144C of the Act provides that upon receipt of directions issued under sub-section (5) of Section 144C of the Act, the Assessing Officer shall in conformity with the directions complete the assessment proceedings. It goes without saying that if no objections are filed by the Assessee either before the DRP or the assessing officer to the determination by the TPO, section 92CA(4) would come into operation. Therefore, it is very clear that once a reference is made, it would have an impact on the assessment unless a decision on merits is taken by DRP rejecting or varying the determination by the TPO.

33. *It would only be apropos to note that as per proviso to Section 92CA (3A), if the time limit for the TPO to pass an order is less than 60 days, then the remaining period shall be extended to 60 days. This implies that not only is the time frame mandatory, but also that the TPO has to pass an order within 60 days.*

34. Further, the extension in the proviso referred above, also automatically extends the period of assessment to 60 days as per the second proviso to Section 153.

35. Also, but for the reference to the TPO, the time limit for completing the assessment would only be 21 months from the end of the assessment year. It is only if a reference is pending, the department gets another 12 months. Once reference is made and after availing the benefit of the extended period to pass orders, the department cannot claim that the time limits are not mandatory. Hence, the contention raised in this regard is rejected.

36. As rightly pointed out by Mr.Ajay Vohra, learned senior counsel for the respondents in WA.Nos.1148 and 1149/2021, the word "may" has to be sometimes read as "shall" and vice versa depending upon the context in which it is used, the consequences of the performance or failure on the overall scheme and object of the provisions would have to be considered while determining whether it is mandatory or directory.

37. At this juncture, it is noteworthy to mention the commentary of Justice G.P.Singh on the interpretation of statutes, Principles of Statutory Interpretation (1st Edn., Lexis Nexis 2015), which is quoted below for ready reference:

"The intention of the legislature thus assimilates two aspects: In one aspect it carries the concept of "meaning" i.e. what the words mean and in another aspect, it conveys the concept of "purpose and object" or the "reason and spirit" pervading through the statute. The process of construction, therefore, combines both literal and purposive approaches. In other words the legislative intention i.e. the true or legal meaning of an enactment is derived by considering the meaning of the words used in the enactment in the light of any discernible purpose or object which comprehends the mischief and its remedy to which the enactment is directed. This formulation

later received the approval of the Supreme Court and was called the "cardinal principle of construction".

38. In case of assessments involving transfer pricing, fixing of time limits at various stages sets forth that the object of the provisions is to facilitate faster assessment involving such determination. In the present case, as rightly held by the learned Judge in paragraphs 22 to 29 of the order dated 07.09.2020, the order of the TPO or the failure to pass an order before 60 days will have an impact in the order to be passed by the Assessing Officer, for which an outer time limit has been prescribed under Sections 144C and 153 and is hence mandatory. What is also not to be forgotten, considering the scheme of the Act, the inter-relatability and inter-dependency of the provisions to conclude the assessment, is the consequence or the effect that follows, if an order is not passed in time. When an order is passed in time, the procedures under 144C and 92CA(4) are to be followed. When the determination is not in time, it cannot be relied upon by the assessing officer while concluding the assessment proceedings.

39. Upon consideration of the judgments and the scheme of the Act, we are of the opinion that the word "may" used therein has to be construed as "shall" and the time period fixed therein has to be scrupulously followed. The word "may" is used there to imply that an order can be passed any day before 60 days and it is not that the order must be made on the day before the 60th day. The impact of the proviso to the sub-section clarifies the mandatory nature of the time schedule. The word "may" cannot be interpreted to say that the legislature never wanted the authority to pass an order within 60 days and it gave a discretion. Therefore, the learned Judge rightly held the orders impugned in the writ petitions as barred by limitation, as the Board, in the Central Action Plan, has specified 31.10.2019 as the date on which orders are to be passed by the TPO, reiterating the time limit to be mandatory.

22. Thus, following the principle of ratio laid down by the Hon'ble Madras High Court, the time limit for passing the ld. TPO order in the case of the assessee was 29/01/2015 as noted above which is not in dispute. **Since the ld. TPO order has been passed on 30/10/2015 which is clearly barred by limitation by one day by virtue of time limit provided u/s.92CA (3) and consequently, the same has to be treated as bad in law and the same is hereby quashed. Thus, in such a situation, if there is no TPO order, consequently the entire transfer pricing adjustment proposed by the ld. TPO in international transaction becomes non-est and to be quashed and being barred by limitation**.

23. The other issue is that once the ld. TPO's order is held to be nullity of cost on the ground of being barred by limitation, then the draft assessment order could not have been passed in the case of assessee because assessee would no longer be treated as eligible assessee. This issue has been dealt in detail by the Coordinate Bench in the case of Atos India Pvt. Ltd., Relevant portion of which reads as under:-

"30. Now another issue which crops up, is, whether, once the TPO order is held to be nullity or quashed on the ground of being barred by limitation, then could AO have passed the draft order treating it to be as „eligible assessee" . Section 144C was brought on the statute as special scheme of assessment and to provide alternative dispute resolution scheme to certain categories of „eligible assessee" . Section 144C provides that the AO has to pass and forward a draft assessment order in the case of „eligible

assessee" if he proposes to make any variation which is prejudicial to the interest of such assessee, Sub-section 15 has defined „eligible assessee" for the purpose of section 144C. The relevant provisions of section 144C(1) and sub section 15 reads 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.*
>
> .
>
> .
>
> .
>
> *(15) For the purposes of this section,—*
>
> *(a) "Dispute Resolution Panel" means…*
>
> *(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."*

31. The aforesaid section envisages that, AO in the first instance has to forward a draft of the proposed order of assessment to the ***"eligible assessee"****, if he proposes to make any variation which is prejudicial to the interest of such assessee. The draft assessment order is to be forwarded to an "eligible assessee", which means that, for this section to apply a person has to be an "eligible assessee" Here, the draft assessment order is to be forwarded* ***only to an "eligible assessee" and not to every assessee under the Act****.*

*32. Thus, under the aforesaid provision, the expression "eligible assessee" is followed by an expression "**means**" and there are two categories referred therein (i) any person in whose case the variation arises as a consequence of TPO" s order and (ii) any NR or Foreign company. The use of the word "means" indicates that the definition "eligible assessee" for the purposes of Section 144C(15)(b) is a hard and fast definition and can only be applicable in the above two categories. Ostensibly, the expression 'eligible assessee' has a restrictive meaning as it covers only the two types of persons mentioned above.*

33. Further, considering the express language employed in defining the term „eligible assessee" under section 144C(15)(b) and section 144C(1) in forwarding a draft assessment order to such an „eligible assessee" only, is plain, clean and unambiguous; the said statute must be interpreted strictly without there being any role of „equity or intendment" in such interpretation.

34. In the present case, the assessee is an Indian company and, thus, a resident in India under section 6 of the Act. Thus, the second condition under section 144C (15)(b)(ii) of the Act for qualifying as an „eligible assessee" is not applicable. As regards the first condition under section 144C(15)(b)(i) of the Act, the same applies where there is a transfer pricing variation arising as a consequence of the order of the Ld. TPO under section 92CA(3) of the Act. In the instant case, it will be apparent that there is no transfer pricing variation arising as a consequence of the order of the Ld. TPO once the said transfer pricing order is held to be time-barred, non-est and void-ab-inito from the very date of its existence and inception. The entire premise to adopt the special procedure under section 144C of the Act and treat the appellant an „eligible assessee" rests on the fact that the order passed under section 92CA(3) of the Act has resulted in transfer pricing variations prejudicial to the interest of the appellant. However, once the transfer pricing order under section 92CA(3) of the Act, per-se, becomes a nullity, there remains no transfer pricing variation arising/ resulting or remaining as a consequence thereto. The effect of passing a null and void transfer pricing order here is that it has to be considered as nonest, meaning thereby, that it entails all the consequences of not having

been passed at all and is ignored for all practical purposes. Thus, in absence of any transfer pricing order being passed at all and any variations arising there from, the entailing consequence in instant case is that the appellant cannot be said to be an „eligible assessee" under section 144C(15)(b)(ii) of the Act.

35. Accordingly, once the assessee becomes an „ineligible assessee" , the very foundation for proceeding to pass the draft assessment order does not survive, meaning thereby, that the draft assessment order passed in the instant case becomes legally invalid and hence, all consequential proceedings on the basis of the said order fail. In the instant case, a reference was made by the Ld. AO to the Ld. TPO as per the provisions of section 92CA(1) of the Act and accordingly the timelines prescribed u/s 153 of the Act remain extended by a year in view of the 3rd proviso of section 153 of the Act. Accordingly, the time limit to complete assessment proceedings u/s 143(3) of the Act in the instant case expired on ***31 March 2016****. As on the date of passing* ***draft assessment order*** *u/s 144C(1) of the Act i.e. on* ***29 March 2016****, the Ld. AO had already received the order passed by the Ld. TPO dated* ***31 January 2016****, which as discussed above, is time barred, illegal and void ab initio, thereby making the Appellant* ***not an eligible assessee*** *u/s 144C(15) of the Act. In view of the same, the Ld. AO was ostensibly required to pass the final assessment order u/s 143(3) of the Act on that day. Having said that, the draft assessment order passed by the Ld. AO under the provisions of law is also illegal and void ab initio which deserves to be quashed.*

36. It is a well-settled proposition now that a draft order passed in case of an „ineligible assessee" vitiates the entire exercise of assessment and all subsequent proceedings are liable to be quashed has been held in the following cases:

(i) Honda Cars India Ltd. v. Dy. CIT [2016] 67 taxmann.com 29/240 Taxman 707/382 ITR 88 (Delhi);

(ii) Pankaj Extrusion Ltd. v. Asstt. CIT [2011] 10 taxmann.com17/198 Taxman 6 (Guj.)

(iii) FedEx Express Transportation and Supply Chain Services (India) (P.) Ltd. v. DCIT [2019] 108 taxmann.com 542 (Mumbai - Trib.)

In case of FedEx Express, the relevant portion of which has been reproduced in the foregoing paras, wherein the Tribunal has expressed the provision and finally deleted the corporate grounds also. We accordingly follow the same reasoning here in this case also.

37. Similarly, in a reverse case scenario, i.e., where a draft assessment order was required to be passed on an 'eligible assessee' as per section 144C(1) of the Act but the same was not so passed, in the following decisions as well, the entire assessment proceedings have been held to be invalid and liable to be quashed:

(i) ***Vijay Television (P.) Ltd. v. DRP [2014] 46 taxmann.com 100/225 Taxman 35/369 ITR 113 (Madras)*** *affirmed by the Division Bench of the Hon‟ble Madras HC in [2018] 95 taxmann.com 101 (Madras);*

(ii) ***International Air Transport Association v. Dy. CIT [2016] 68 taxmann.com 246 (Bombay);***

(iii) ***Zuari Cements Ltd. v. ACIT [Writ Petition No. 5557 of 2012, dated 21-2- 2013] (Andhra Pradesh)****- Revenue‟s SLP dismissed by the Hon‟ble Apex Court in CC No. 16694/2013 on 27th September 2013*

38. What culminates from the aforesaid two sets of parallel decisions is that the provisions of section 144C of the Act are specific and provides for a special code which must be strictly followed since it impacts the rights of an assessee substantively, i.e., the ability to accept or object a draft order proposition, file objections before the Dispute Resolution Panel and ensure a speedy disposal thereof. Any lapse in treating an assessee as „eligible assessee‟ where it is otherwise not one and vice-versa results in fatality, since it becomes a jurisdictional defect and goes on to the roots in deciding the validity of the entire assessment proceedings against the revenue. In this context, on the issue of passing a correct assessment order in first instance (either a draft or a final one), the findings of the ***Hon'ble Madras High Court*** *in case of* ***ACIT v. Vijay Television (P.) Ltd [2018] 95 taxmann.com 101 (Madras)*** *are extremely critical which reads as follows:*

"47. The necessity for the Parliament to incorporate Section 144-C is not only to safeguard the Revenue, but also the assessee and ***any mistake committed by any one of them, the said party is supposed to face the consequences and cannot put the hands of the clock back and start afresh****."*

39. *Further, in case of* ***Zuari Cements Ltd. v. ACIT [Writ Petition No. 5557 of 2012, dated 21-2-2013] (Andhra Pradesh),*** *the Division Bench (DB) of the Andhra Pradesh High Court categorically held that the failure to pass a draft assessment order under Section 144C (1) of the Act would* ***result in rendering the final assessment order "without jurisdiction, null and void and unenforceable****." In that case, the consequent demand notice was also set aside. The decision of the Andhra Pradesh High Court was* ***affirmed by the Supreme Court*** *by the dismissal of the Revenue's SLP (C) [CC No. 16694/2013] on 27th September, 2013.*
40. *The various judgments which have been cited before us that 144C(1) will not apply and there is no variation in the return of income which cannot be disputed. Thus in our view, Ld. AO to acquire a legal and valid jurisdiction for the purpose of forwarding a draft assessment order at the first instance under section 144C(1) of the Act, it is necessary that the* ***assessee must be an 'eligible assessee'*** *within the restrictive and strict four corners of how the said expression has been defined under section 144C(15)(b) of the Act. Here, once it is held that there is no legal or valid transfer pricing order under section 92CA(3) of the Act, there remains no variation arising as a consequence thereto and the case of the assessee, being an Indian company, falls outside the definition of „eligible assessee" as defined under section 144C(15)(b) of the Act. Thus, the Ld. AO cannot be said to acquire a „legal or a valid" jurisdiction under section 144C(1) r.w.s. 144C(15)(b) of the Act to pass or forward a draft assessment order to the appellant who is otherwise an „ineligible assessee" . The action of the Ld. AO in passing the impugned draft assessment order in instant case results in noncompliance of section 144C of the Act which vitiates the entire assessment exercise.*

41. The issue being fairly settled and the intent of legislature in strictly interpreting the provision of section 144C of the Act being repeatedly held so, the act of the Ld. AO in proceeding to pass a draft assessment order on the basis of an order by the Ld. TPO which is barred by limitation and thus bad in law/ non-est, results in an incurable illegality which is liable to be held as null and void, and thus, consequentially holding the final assessment order to be bad in law as well.

42. Thus, despite the fact that the reference made to the Ld. TPO is valid, in absence of a legally valid transfer pricing order and a valid draft assessment order, the Ld. AO cannot assume jurisdiction to proceed with the assessment under Section 144C of the Act and pass the consequential final assessment order. The decisions of the Hon‟ ble jurisdictional High Court in case of International Air Transport Association (supra) and Dimension Data Asia Pacific PTE Ltd. (supra) forties appellant‟ s contentions and the irresistible conclusion that the draft assessment order imbibes a jurisdictional power in terms of Sec. 144C(1) of the Act and creates/ envisages special rights upon the „eligible assessee‟ . If such an order is passed on an assessee who is not an 'eligible assessee' as defined in section 144C(15)(b)(i) of the Act, then it would render the entire proceedings pursuant to such order null and void.

43. We find that section 153(1) of the Act, as it stood applicable for the AY 2012-13, provided a time limit of 3 ***years*** *from the end of AY 2012-13 for completion of assessment under section 143(3) of the Act, i.e., on or before* ***31 March 2016.***

44. In such a case if the Ld. AO invokes the provisions of section 144C of the Act and passes the final assessment order after ***31 January 2016*** *i.e. beyond the period of limitation as stated above, such final assessment order u/s 143(3) r.w.s 144C of the Act is liable to be quashed as being barred by limitation.*

45. In a recent decision of the ***Hon'ble Madras High Court*** *in case of* ***Virtusa Consulting Services Put. Ltd [TS-474-HC2022(MAD)] dated 9 June 2022,*** *it has been held in context of period of limitation under section 153 of the Act as under:*

"17. Further, it is to be noted that the different timelines to be adhered by the TPO, Assessing Officer to pass a draft order, assessee to file their objections, DRP to issue directions and the assessing officer to pass final order, would commence only on a reference to the TPO and not otherwise. At ***this juncture, it is not to be forgotten that the period of 33 months is to pass the final order of assessment after the directions from the DRP.*** *In this case, we find from the undisputed dates and events that not only was the reference to the TPO made after the period of expiry of the period of limitation to pass assessment orders, but also that* ***the assessing officer has failed to pass final assessment orders in time.*** *The time to pass the original assessment would end on 31.12.2008 being 21 months from the end of the assessment year 2006-07 i.e., 31.03.2007. Then the last date for the assessing officer to pass the final assessment order would end on 31.12.2009, even considering the extension by twelve months. In the present case, the order of the DRP itself is only 24.09.2010 much beyond the permissible period."*

46. Thus taking into the provisions of law and the judgment referred to above, we hold that the final assessment order passed on 31 January 2017 is beyond the prescribed period of limitation under section 153 of the Act expiring on 31 March 2016, thus, barred by limitation and is hereby quashed.

24. We also find that this Tribunal in assessee's own case for a.Y.2009-10 in ITA No.1576/Mum/2015 and ITA No.2340/Mum/2015 had also quashed the assessment after observing and holding as under:-

23. A perusal of the above additional grounds of appeal reveal that the assessee has challenged validity of the assessment order passed u/s 143(3) r.w.s. 144(13) of the Act and the validity of the order passed by TPO u/s.92CA(3) of the Act. The issue raised by the assessee in the aforesaid additional grounds goes to the root of validity of assessment. It is no more resintegra that

the assessee can raise legal ground at any stage, even during the appellate proceedings, if the facts are already on record. No fresh documentary evidence is required to be adduced for adjudicating aforementioned additional grounds. Hence, the additional ground No.40 & 41 are admitted for adjudication on merits.

24. The assessee has furnished a table giving relevant dates for calculating limitation for passing order u/s. 92CA(3) of the Act. The same is reproduced herein below:

<table>
<tr><td colspan="3">Particulars</td></tr>
<tr><td colspan="3">Ground No.41 Validity of Order passed under section 92CA(3) of the Act Calculation of due date for passing transfer pricing order under section 92CA(3)</td></tr>
<tr><td>Asst. Order due date as per section 153 of the Act for AY 2009-10</td><td colspan="2">31 March 2013</td></tr>
<tr><td rowspan="4">Transfer Pricing Order due date:

(At least sixty days before the period of limitation referred to in section 153 of the Act)</td><td>Number of Days in March 2013</td><td>30</td></tr>
<tr><td>Number of Days in February 2013</td><td>28</td></tr>
<tr><td>Number of days in January 2013</td><td>2</td></tr>
<tr><td>Total Number of days</td><td>60</td></tr>
</table>

Deadline for passing TP Order for AY 2009 10	*29 January 2013*
Date of TP order passed for A.Y 2009-10	*30 January 2013*
Delay	*1 Day Delay in passing TP Order*

25. *The assessee has determined the period of limitation for passing the order by TPO in accordance with method elucidated by the Hon'ble Madras High Court in the case of Pfizer Healthcare India (P) Ltd. vs. JCIT (supra). Since, the issue raised in the present appeal is similar to the one adjudicated by us in the case of M/s. Mondelez India Foods Private Limited in ITA No.1492/Mum/2015, A.Y.2010-11, the findings given therein would mutatis mutandis apply to the present appeal by the assessee. Consequently, ground No.40 and 41 raised in the appeal are allowed for parity of reasons.*

26. *The grounds/other additional grounds raised in the appeal have become academic, hence, they are left upon for adjudication if the need arises.*

27. *In the result, appeal by assessee is allowed.*

28. *The appeal by the Revenue has become infructuous as the order passed under section 92CA(3)of the Act is held bad in law. Once bedrock for passing the assessment order is eroded the entire proceedings, arising therefrom are vitiated.*

Consequently, appeal of the Revenue is dismissed.

29. *In the result, appeal of the assessee is allowed and that of Revenue is dismissed.*

25. Accordingly, following the aforesaid decisions, we quashed the final assessment order being barred by period of limitation u/s.92CA (3). Once we have quashed the assessment order then, all the grounds raised by the Revenue as well as the assessee become infructuous.

26. **In the result, appeal of the assessee is allowed and the appeal of the Revenue is dismissed.**

Order pronounced on 30th June, 2023.

Sd/- Sd/-
(AMARJIT SINGH) (AMIT SHUKLA)
ACCOUNTANT MEMBER JUDICIAL MEMBER

Mumbai; Dated 30/06/2023
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant 2.
The Respondent.
3. CIT

4. DR, ITAT, Mumbai 5.
Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai