TRANSFER PRICING

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TP order passed on 1 Nov. 2019 for AY 2016-17 barred by limitation - M/s. Pfizer Healthcare India Private Limited vs Joint Commissioner of Income Tax [TS-766-HC-2020(MAD)-TP]

Facts:

All Petitioners in batch barring (W.P.No.34568 of 2019) challenged orders passed under Section 92CA(3) of the Act. The petitioners contented that the TP orders passed dated 1st November 2019 for AY 2016-17 is barred by limitation by one day.

The Revenue Department contented that the time frame under Section 92CA(3A) of the Act is only directory and merely a guidance.

High Court's Ruling:

Answering the questions of law in favour of the petitioners and against the Revenue Department, the Hon'ble High Court held that:

- Limitation has been prescribed for each stage/process in an assessment including cases involving TP issues.
- On the question of interpretation of language employed by the provisions, i.e. whether the word 'may' used in Section 92CA(3A) is to be read as 'shall', the Hon'ble High Court observed

Grounds	Relevant Extracts of the ruling
Availability of Alternate Remedy	21. "On the question of alternate remedy, I see no reason to relegate the petitioners to the Assessing Authority for completion of draft assessment that may be challenged before the DRP. Limitation, which is the issue raised in these writ petitions, is a mixed question of law and facts, but there are no disputes on factual aspects in the present case. The writ petitions are thus, held to be maintainable."
Interpretation of word 'may' - The deadline being directory and not mandatory	23 "On the question of interpretation of the language employed in the provisions, the following judgements of the Supreme Court settle the position that one should not proceed blindly on the basis of the words/phrases employed in Statute, whether 'may', 'shall', 'no order shall be passed' or 'within' and the scheme of assessment in entirety as well as the intention of Legislature qua that scheme of assessment must be taken into account." 29. "The provisions of Section 144C prescribe mandatory time limits both pre and post the stage of passing of a transfer pricing order. Assessments involving transfer pricing issues are different and distinct from regular assessments and the intention of Legislature

	is to fast track such assessments. In this scheme of things, I am unable to accept the submission that the period of 60 days stipulated for passing of an order of transfer pricing, is only directory or a rough and ready guideline. This argument is rejected".
Method of calculating limit of 60 days	30. "The submission of the revenue is to the effect that limitation expires only on 12 a m of 01.01.2020. However, this would mean that an order of assessment can be passed at 12 a m 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."

The Hon'ble High Court observed that certain petitioners have challenged the draft assessment orders before DRP and holds that barring these petitioners, the other writ petitions are allowed.

Remand to DRP by ITAT also governed by limitation period under Section 153 – Quashes notices issued by DRP – M/s. Roca Bathroom Products Private Limited vs. DRP / DCIT [TS-764-HC-2020(MAD)-TP]

Facts:

- The Hon'ble Tribunal in case of the Assessee had remanded the matter for fresh adjudication to the DRP and AO for AY 2009-10 and AY 2010-11, respectively.
- No proceedings were initiated by the DRP or AO pursuant to the directions from Hon'ble Tribunal. Only when the Assessee wrote to the income-tax authorities for refund of taxes, notices dated Jan. 2020 were issued by the DRP for aforesaid years.
- The Assessee challenged the notices received as barred by limitation under Section 153 of the Act via writ petition before Hon'ble High Court.
- The Revenue Department contented that Section 144C of the Act is a complete code by itself, not governed by the timelines set out in Section 153 of the Act emphasizing on the opening para of Section 144C(13) of the Act.

High Court's Ruling:

Observing that the orders of the Tribunal have not been given effect to in a proper manner by the Assessing Authority, Hon'ble High Court held as under:

- No doubt, Section 144C of the Act is a self-contained code of assessment and time limits are inbuilt each stage of the procedure contemplated; however this does not lead to the conclusion that overall time limits have been eschewed in the process.
- The Statute having set time limits at every step, there is no reason to take a stand that proceedings on remand to the DRP may be done at leisure sans the imposition of any time limit at all.
- The exclusion of Section 153/153B of the Act is specific to, and kicks in only at the stage of passing of final assessment order after directions are received from the DRP, and not at any other stage of the proceedings under Section 144C.
- The proper course of action would have been for the Assessing Authority to have given effect to the order of the Tribunal by way of a consequential order and thereafter taken proceedings up in accordance with the procedure prescribed in Section 144C.

Thus allowing the writ petition, Hon'ble High Court held notices issued by the DRP after a period of four years from the date of order of the Tribunal would be barred by limitation by application of the provisions of Section 153(2A) of the Act.

Providing letter of Comfort not an international transaction - Asian Paints Ltd vs. Add. CIT [TS-51-ITAT-2021(Mum)-TP]

The Hon'ble Tribunal perusing the content of letter of Comfort noted that there is no liability or responsibility on the Assessee for making good the liability of the AE in case of any default on loan. The only promise made by the Assessee is, it will not make any divestment of the shares during the tenure of the loan. The Hon'ble Tribunal held that letter of comfort cannot be construed to be in the nature of any sort of guarantee in respect of the loan liability of the AE

In view of the above, Hon'ble Tribunal held:

"7. ….On a careful reading of section 92B of the Income Tax Act, 1961 (in short, 'the Act'), more particularly Explanation I(c), we are of the considered opinion that provision of letter of comfort / support cannot be termed as an international transaction within the meaning of the aforesaid provision."

Virtusa Consulting Services Private Limited vs DCIT [TCA No. 996 of 2018-Madras HC]

Virtusa Consulting Services Private Limited ("The assessee"), is engaged in the business of software development services globally. For the AY 2011-12, the assessee considered TNMMethod and benchmarked using itself as the tested party. The TPO rejected the benchmarking analysis carried out by the assessee and undertook a fresh search and arrived at a final list of 12 comparable companies with average operating margin of 18.94%. The DRP upheld the order of the TPO. Further when the matter came up before the Income Tax Appellate Tribunal ("ITAT"), the assessee contended to take the foreign related party ("AE") as the tested party. The ITAT stated that the Indian TP provisions do not allow to select foreign AE as a tested party for benchmarking the international transactions and it is the Indian Entity which should be taken as the tested party. The ITAT however did not adjudicate with regard to the other aspects raised before it.

Madras High Court held

HC opined that the "Tribunal should and shall adjudicate all such issues which have been raised before it by the assessee in the grounds and more specifically pointed out in the miscellaneous application.";

HC noted that the principles that emerged in selection of tested party had been culled out wherein it had been held that the tested party normally should be the least complex party to the controlled transaction. Also, there was no bar neither in the Act nor the guidelines on TP for selection of local or foreign tested party;

HC distinguished ITAT's reliance on Mumbai ITAT ruling in Aurionpro Solutions Limited wherein it was held that the tested party for the purpose of determination of ALP was always the assessee and not the AE. HC stated that this was not a case where there was no material produced by the assessee to establish the functional risk assumed by the foreign AEs. The material was available before the TPO. HC stated that since the TPO has rejected the data placed by the assessee in their TP documentation and undertook a fresh search for external comparables he could not have banned the assessee from raising the issue that the subsidiaries are least complex entities.

The matter was remitted back to the ITAT with a direction to TPO to pass order having due regard to the orders passed by the TPO in the assessee's own case for the subsequent AYs. HC also directed the ITAT to adjudicate on matters raised in the appeal petition.