

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'C' NEW DELHI**

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER
I.T.A NO. 1980/Del/2014
(Assessment Year : 2009-10)**

M/s. Global One India Pvt. Ltd., DSO 601-603, 607-608, 6 th Floor, DLF South Court, Saket, New Delhi – 110 017 (PAN : AABCG 2558 B) (APPELLANT)	Vs	DCIT, Circle – 12(1), New Delhi (RESPONDENT)
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Appellant by	Shri Kanchan Kaushal, C.A.
Respondent by	Shri Bhuvnesh Kulshrestha, CIT - D.R.

Date of Hearing	03.12.2019
Date of Pronouncement	10.12.2019

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 30.01.2014 passed by the Assessing Officer u/s 143(3) r.w.s. 144C(5) of the Income Tax Act, 1961 for A.Y. 2009-10.

2. The Grounds of appeal are as under:-

“That on the facts and circumstances of the case, and in law:

1. *The assessment order passed by the Learned Assessing Officer ('Ld. AO') under section 143(3) read with section 144C of the Act pursuant to the directions of Learned Dispute Resolution Panel (Ld. DRP) is bad in law and void ab-initio.*
2. *The final assessment order passed by the Ld. AO is barred by limitation as it has not been passed after taking into consideration the Learned Transfer Pricing Officer's ('Ld. TPO') order which has been passed*

subsequent to the time limit prescribed for passing the final assessment order.

- 3 *The Ld. AO has erred in proceeding to compute the total income of the assessee by making an addition of INR 80,746,954, without being in conformity with the Arms Length price as determined by the Ld. TPO pursuant to direction of Ld. DRP.*
4. *The Ld. AO (following the directions of the Ld. DRP) has grossly erred in making a disallowance of INR 256,014,415/- by treating liability towards sundry creditors as income chargeable to tax under section 41(1) of the Act on erroneous assumptions and wrong observations of facts. While doing so, the Ld. AO had erred in:*
 - 4.1 *not providing relief to the Appellant of account of creditors worth INR 1,282,801 due to Power Grid Corporation India Limited in spite of directions from the Ld. DRP.*
 - 4.2 *re considering the amount of sundry creditors as INR 441,635,541 by including expenses payable of INR 21,536,283 as against the amount of INR 420,099,258 appearing in the audited financial statements as on March 31, 2009.*
 - 4.3 *not providing any opportunity to the Appellant before making disallowance in respect of expenses payable amounting to INR 21,536,283.*
 - 4.4 *not providing relief of INR 211,150,180 relating to imports from entities other than group entities in spite of filing complete party-wise details of sundry creditors along with confirmation from Equant Network Systems Ltd., Ireland for taking over/owning up liability amounting to INR 396,771,305.*
 - 4.5 *invoking section 41(1) of the Act mechanically and without appreciating the fact that liability towards sundry creditors amounting to INR 211,150,180 pertains to purchase of capital assets which cannot be considered as a trading liability.*
 - 4.6 *not appreciating the fact that there is no cessation or remission of liability as the amount is still appearing as payable in the books of accounts of the appellant for the relevant previous year i.e. FY 2008-09.*
 - 4.7 *doubting the genuineness of creditors on the basis of unfounded assumptions and without bringing any material on record to doubt the genuineness.*
 - 4.8 *not seeking the independent confirmations from the creditors in spite of powers available to the Ld. AO under the provisions of the Act.*

5. *The Ld. AO (following the directions of the Ld. DRP) has erred in making disallowance of INR 201,134,971 by treating advances received from customers as income chargeable to tax under section 41(1) of the Act. While doing so:*
 - 5.1 *the Ld. AO has erred in invoking the provisions of section 41(1) of the Act, in complete disregard of the fact that the appellant has not claimed any allowance or deduction in respect of Rs. 201,134,971 in any preceding assessment year.*
 - 5.2 *the Ld. AO has further erred in making an unfounded assumption that the liability towards advances received from customers no longer exists, without bringing any cogent material on record.*
 - 5.3 *not seeking the independent confirmations from the creditors inspite of powers available to the Ld. AO under the provisions of the Act.*
6. *The Ld. AO (following the directions of the Ld. DRP) has erred in disallowing an amount of INR 10,932,472 on account of advances written off. While doing so, the Ld. AO and the Ld. DRP has failed to appreciate that this amount represents trade advances written off during normal course of business which is an allowable deduction in view of Supreme Court decision in the case of CIT, Mysore vs. Mysore Sugar Co. Ltd. (1962) 46 ITR 649 (SC).*
7. *The Ld. AO has erred in not allowing deduction under section 80-IA(4) of the Act from the Gross Total Income (as assessed). While doing so:*
 - 7.1 *The Ld. AO has failed to appreciate the fact that the license required for providing internet-related services was obtained by the appellant from the Department of telecommunication(“DOT”) during the month of November 2003 and accordingly the deduction under section 80 IA (4) of the Act could be claimed by the appellant from the Assessment Year 2004-05.*
 - 7.2 *The Ld. AO has failed to appreciate the fact that since AY 2004-05, the appellant has been continuously incurring losses and accordingly no deduction under section 80 IA(4) of the Act was claimed.*

7.3 *The Ld.AO has failed to appreciate the fact that appellant reported losses in its current year's return of income and accordingly no deduction u/s 80 IA (4) of the Act could have been claimed.*

7.4 *The Ld. AO has erred in stating that the appellant has not fulfilled the conditions required for claiming deduction u/s 80 IA (4) of the Act.*

7.5 *The Ld. AO has further erred in stating that the appellant was given full opportunity to furnish the relevant details/ explanations in this regard.*

8. *That the Ld. AO has erred in not granting credit of taxes deducted at source to the extent of INR 449,488.*

9. *The Ld. AO has erred in calculating interest u/s 234 B of the Act.*

10. *The Ld. AO has erred in initiate penalty proceedings under section 271(1)(c) of the Act.*

The above grounds are without prejudice to each other."

3. The assessee company filed a revised return of income on 13.10.2010 declaring a loss of Rs.37,45,15,433/-. The case was selected for scrutiny proceedings. During the course of scrutiny proceedings, the matter was referred by the Assessing Officer to the Transfer Pricing Officer (TPO). The TPO passed an order u/s 92CA(3) of the Act on 14.01.2013 thereby making addition of Rs.8,07,46,954/- on account of adjustment to Arm's Length Price in respect of provision of Telecom services on account of no case for a working capital adjustment. Thereafter, the Assessing Officer passed the draft Assessment Order on 14.03.2013 after making the above Transfer Pricing adjustment of Rs. 8,07,46,954/- and other corporate tax addition amounting to Rs.70,80,40,200/-.

4. Aggrieved by the draft assessment the assessee filed objections before

the Dispute Resolution Panel (DRP). The DRP vide directions dated 19.12.2013 granted relief in respect of addition u/s 92CA of the Act on account of Arm's Length Price determination of Rs. 8,07,46,954/-. The Assessing Officer vide order dated 30.01.2014 passed final assessment order in absence of revised TPO Order in respect of DRP directions to the TPO and assessed the income without following the directions given by the DRP on TP adjustment and assessed the total income at Rs.17,43,13,380/-. Subsequently, the Transfer Pricing Officer vide order dated 21.02.2014 passed an order giving effect to DRP directions and deleted the Transfer Pricing adjustment to the extent of Rs. 8,07,46,954/- as well as corporate tax additions/disallowance was reduced to Rs. 46,80,81,858/-.

5. The assessee filed an appeal before the Tribunal against the Assessment Order for both Transfer Pricing issues as well as corporate tax issues on 04.04.2014 before us.

6. Subsequently, rectification order u/s 154/143(3)/144C was passed on 15.07.2014 thereby deleting the entire Transfer Pricing adjustment and retaining the corporate tax addition to Rs.46,80,81,858/-.

7. The Ld. AR submitted that the assessment order dated 30.01.2014 passed pursuant to the DRP direction is bad in law and void ab initio. The Ld. AR submitted that the DRP has granted relief u/s 92CA on account of Arms' Length Price determination and working capital adjustment. Despite the directions of the DRP which should have been first compiled by the Transfer Pricing Officer, the Assessing Officer did not wait for the order of the TPO and passed the final Assessment Order thereby adding the Transfer Pricing adjustment which was recomputed and held Nil by the DRP. The Revenue authorities cannot overlap the statutory provisions, which are mandatory and

has to be followed by the Revenue under the Income Tax Act, 1961. Thus, the Ld. AR submitted that the assessment order itself is bad in law and the same should be quashed at the threshold.

8. The Ld. DR submitted that the Assessing Officer has passed the order as the assessment was getting time barred and Transfer Pricing Officer has not given the order giving effect well within the stipulated time for final assessment. The Ld. DR further submitted that after passing assessment order, the Transfer Pricing Officer has given final effect to the DRP direction and thereafter the Assessing Officer u/s 154 has rectified the original assessment order well within time thereby deleting the entire Transfer Pricing adjustment. Thus, the Ld. DR submitted that the assessment order is just and proper, therefore, it should not be quashed.

9. The Ld. AR relied upon the following decisions of the Tribunal:

- i. Flextronics Technologies (India) Pvt. Ltd. vs. ACIT Circle 3(1)(1), Banalore [IT(TP)A No.832/Bang/2017]
- ii. Software Paradigms Infotech (P.) Ltd. vs. ACIT [2018] 89 taxmann.com 339 (ITAT Bangalore)
- iii. July Systems & Technologies Pvt. Ltd. vs. DCIT [2018] IT(TP) A No.368/Bang/2016 (ITAT Bangalore)
- iv. ESPN Star Sports Mauritius S.N.C. ET Compagnie vs. Union of India [2016] 388 ITR 383

10. The Ld. AR further submitted that the Assessing Officer is required to pass the final assessment order in conformity with the DRP directions. In the present case, DRP directed the Transfer Pricing Officer to give working capital adjustment and recomputed ALP as per specified guidelines. However, instead of incorporating the recomputed ALP, the Assessing Officer passed the final assessment order identical to the draft Assessment Order on these count. Therefore, the final assessment order passed by the Assessing Officer is not in

conformity with the DRP direction. Thus, the Ld. AR prayed that the said order is null and void, therefore, the assessment order be quashed.

11. We have heard both the parties and perused all the relevant materials available on record. Section 154 of the Income Tax Act is regarding the rectification of mistake and the Assessing Officer on 15.07.2014 has rectified the order thereby giving the final effect of the DRP directions. At the same time, the Assessing Officer was suppose to complete the assessment under Section 143(3) read with Section 144C of the Income Tax Act on the basis of the draft assessment order if the assessee intimates to the Assessing Officer the acceptance of the variation or no objection are received within the period specified in sub section (2) of Section 144C of the Income Tax Act. In the present case, the assessee filed objections before the DRP after passing the draft assessment order. The DRP issued certain directions to the Transfer Pricing Officer. The Assessing Officer was very well aware that the DRP has given certain directions to the Transfer Pricing Officer and it is binding on the Assessing Officer to follow every direction issued by the Dispute Resolution Panel as per as per Section 144C(10) of the Act. Sub-Section (10) of Section 144C is not procedural but a mandatory requirement. If the Transfer Pricing Officer has not passed any order, the Assessing Officer should have taken into account the DRP's direction and would have taken cognizance in the final assessment order, but the Assessing Officer choose not to follow the DRP's direction. Subsequently, when the Transfer Pricing Officer passed the order giving effect to DRP's directions vide order dated 21.02.2014, the Assessing Officer on suo moto basis has rectified the assessment order u/s 154 thereby giving effect to directions of the DRP. As per Section 143(3), the Assessing Officer has to pass the assessment order within the prescribed period otherwise the assessment becomes time barred. The Assessing Officer has followed the statutory provisions of Section 143(3) thereby passing assessment

order. But as per the binding section i.e. Section 144C(10) of the Act, the mandatory provision was not followed by the Assessing Officer, thereby it is binding on the Assessing Officer to follow the directions of the DRP. Therefore, the assessment becomes null and void. As regards rectification, there is no mistake committed on part of Assessing Officer, in fact Assessing Officer was very well aware that the DRP has given certain directions so it could not be termed that there is a mistake apparent on record. When the Assessing Officer has deliberately chosen not to follow a binding provisions u/s 144C of the Act while passing the final assessment order, the Assessment Order, itself becomes null and void. The case laws referred by the Ld. AR are categorically highlighting the same position of law. The submissions of the Ld. DR that after passing assessment order, the Transfer Pricing Officer has given final effect to the DRP direction and thereafter the Assessing Officer u/s 154 has rectified the original assessment order well within time thereby deleting the entire Transfer Pricing adjustment, does not hold the test of legal sanctity as per the provisions of Section 144C(10) of the Act. Thus, assessment order itself is quashed. Therefore, Ground Nos. 1 and 2 of the Assessee's appeal are allowed.

12. As regards to Ground Nos. 3 to 10, the same are on merits. Since the Assessment Order itself becomes null and void, the other issues does not survive.

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

Order pronounced in the Open Court on the 10th day of December, 2019.

Sd/-

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER
Dated: 10/12/2019
*Priti Yadav, Sr. PS **

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR

ITAT NEW DELHI