

**IN THE INCOME TAX APPELLATE TRIBUNAL  
'B' BENCH : BANGALORE**

**BEFORE SHRI N.V VASUDEVAN, VICE PRESIDENT AND  
MS. PADMAVATHY S, ACCOUNTANT MEMBER**

IT(TP)A No.2868/Bang/2018
Assessment year : 2014-15

M/s Rittal India Pvt. Ltd., No.23 & 24,KIADB Industrial Area, Veerapura, Doddaballapur-561 203. <b>PAN – AAACR 7927 A</b>	Vs.	The Asst. Commissioner of Income-tax, Circle-2, LTU Bengaluru.
APPELLANT		RESPONDENT

Assessee by	:	Shri Ramasubramaniam, C.A
Revenue by	:	Dr. Manjunath Karkihalli, CIT(DR)

Date of hearing	:	27.06.2022
Date of Pronouncement	:	28.06.2022

**ORDER**

*Per N.V.Vasudevan, Vice President*

This is an appeal by the assessee against the final order of assessment dated 29/8/2018 passed by the LTU, ACIT, Circle-2, Bangalore u/s 143(3) r.w.s 144C of the Income-tax Act 1961 (Act) in relation to the assessment year 2014-15.

2. The assessee is a company engaged in the manufacturing and sale of enclosures, heat exchangers, industrial cooling equipment, power distribution and MOD. During the previous year, the assessee had international transactions with its associated enterprise (AE). In terms of the provisions of

Sec.92 of the Act, income arising out of an international transaction has to be determined having regard to Arm's Length Price. In terms of Sec.92CA of the Act, the AO made a reference for determination of arms length price (ALP) to the Transfer Pricing Officer (TPO). The TPO determined short fall in ALP to the extent of Rs.29,60,30,584/-. The addition suggested by the TPO was incorporated in the draft order of assessment by the AO. Against the draft assessment order, assessee filed objections before the Dispute Resolution Panel (DRP). The DRP issued directions dated 4/7/2018 based on which, the impugned final order of assessment order was passed by the AO. The assessee is aggrieved by the addition made in the final order of assessment in the form of shortfall in determination of ALP and is therefore preferred the present appeal before the Tribunal.

3. The assessee has raised the grounds with regard to validity of the reference made by the AO to the TPO u/s 92CA of the Act and in this regard has raised ground No.2 which reads as follows:-

2. "Jurisdiction

*2.1, That the learned lower authorities erred in law and on facts in upholding the reference u/s 92CA of the Act as valid even though the reference is not in accordance with the relevant instructions of the Central Board of Taxes.*

*2.2. That the learned lower authorities erred in law and on facts in rejecting the contentions on jurisdiction just because the objection was not raised before the TPO."*

4. In so far as the aforesaid ground of appeal is concerned, the factual details are that in the draft assessment order of the assessment, the AO has observed that an international transaction exceeding Rs.15 crores was entered into by the assessee with its AE and therefore a reference was being made to

the TPO for determining ALP. It was the contention of the assessee before the DRP that as per the instruction No.3 of 2016 dated 20/5/2003 all AOs were mandatorily instructed that they can refer the case to the TPO for determination of ALP only under certain specific circumstances. The relevant part of the said Circular paragraph 3.1 to 3.4 reads thus:

**“3. Reference to Transfer Pricing Officer (TPO)**

**3.1** The power to determine the Arm's Length Price (ALP) in an international transaction or specified domestic transaction is contained in sub-section (3) of section 92C. However, section 92CA provides that where the Assessing Officer (AO) considers it necessary or expedient so to do, he may refer the computation of ALP in relation to an international transaction or specified domestic transaction to the TPO. For proper administration of the Income-tax Act, the Board has decided that the AO shall henceforth make a reference to the TPO only under the circumstances laid out in this Instruction.

**3.2** All cases selected for scrutiny, either under the Computer Assisted Scrutiny Selection [CASS] system or under the compulsory manual selection system (in accordance with the CBDT's annual instructions in this regard -for example. Instruction No. 6/2014 for selection in F.Y 2014-15 and Instruction No. 8/2015 for selection in F.Y 2015-16), on the basis of transfer pricing risk parameters [in respect of international transactions or specified domestic transactions or both] have to be referred to the TPO by the AO, after obtaining the approval of the jurisdictional Principal Commissioner of Income-tax (PCIT) or Commissioner of Income-tax (CIT). The fact that a case has been selected for scrutiny on a TP risk parameter becomes clear from a perusal of the reasons for which a particular case has been selected and the same are invariably available with the jurisdictional AO. Thus, if the reason or one of the reasons for selection of a case for scrutiny is a TP risk parameter, then the case has to be mandatorily referred to the TPO by the AO, after obtaining the approval of the jurisdictional PCIT or CIT.

**3.3** Cases selected for scrutiny on non-transfer pricing risk parameters but also having international transactions or specified domestic

transactions, shall be referred to TPOs only in the following circumstances:

- (a) where the AO comes to know that the taxpayer has entered into international transactions or specified domestic transactions or both but the taxpayer has either not filed the Accountant's report under section 92E at all or has not disclosed the said transactions in the Accountant's report filed;
- (b) where there has been a transfer pricing adjustment of Rs. 10 Crore or more in an earlier assessment year and such adjustment has been upheld by the judicial authorities or is pending in appeal; and
- (c) where search and seizure or survey operations have been carried out under the provisions of the Income-tax Act and findings regarding transfer pricing issues in respect of international transactions or specified domestic transactions or both have been recorded by the Investigation Wing or the AO.

**3.4** For cases to be referred by the AO to the TPO in accordance with paragraphs 3.2 and 3.3 above, in respect of transactions having the following situations, the AO must, as a jurisdictional requirement, record his satisfaction that there is an income or a potential of an income arising and/or being affected on determination of the ALP of an international transaction or specified domestic transaction before seeking approval of the PCIT or CIT to refer the matter to the TPO for determination of the ALP:

- ◆ where the taxpayer has not filed the Accountant's report under section 92E of the Act but the international transactions or specified domestic transactions undertaken by it come to the notice of the AO;
- ◆ where the taxpayer has not declared one or more international transaction or specified domestic transaction in the Accountant's report filed under section 92E of the Act and the said transaction or transactions come to the notice of the AO; and
- ◆ where the taxpayer has declared the international transactions or specified domestic transactions in the Accountant's report filed under section 92E of the Act

but has made certain qualifying remarks to the effect that the said transactions are not international transactions or specified domestic transactions or they do not impact the income of the taxpayer.

In the above three situations, the AO must provide an opportunity of being heard to the taxpayer before recording his satisfaction or otherwise. In case no objection is raised by the taxpayer to the applicability of Chapter X [Sections 92 to 92F] of the Act to these three situations, then AO should refer the international transaction or specified domestic transaction to the TPO for determining the ALP after obtaining the approval of the PCIT or CIT. However, where the applicability of Chapter X [Sections 92 to 92F] to these three situations is objected to by the taxpayer, the AO must consider the taxpayer's objections and pass a speaking order so as to comply with the principles of natural justice. If the AO decides in the said order that the transaction in question needs to be referred to the TPO, he should make a reference after obtaining the approval of the PCIT or CIT.”

5. A perusal of the above paragraphs of the Circular would show that the first main category consists of the cases that are selected for scrutiny on the basis of "transfer pricing risk parameters" and second category comprises of cases that are selected for scrutiny on the basis of "non transfer pricing risk parameters". For the first category, which has been dealt with at para no.3.2 of the 2016 Instruction, it has been stated that all the cases selected for scrutiny on the basis of transfer pricing risk parameters have to be mandatorily referred by the AO to the TPO for determination of ALP. In this case the reasons for selection of assessee's case for scrutiny is not on the basis of transfer pricing risk parameters. Thus para 3.2 of the 2016 Instructions does not apply to the facts of the instant case requiring any mandatory reference to be made by the AO to the TPO. The second main category of the cases selected for scrutiny on the basis of non-transfer pricing risk parameters has been dealt with at para 3.3 of the 2016 Instruction. This mandates making a

reference by the AO to the TPO for the ALP determination in one or more of the three circumstances enumerated in paras (a) to (c). Para 3.3(b) of the 2016 Instruction has been invoked by the AO for seeking approval from the Pr. CIT as well as making a reference to the TPO for the determination of the ALP. The AO sought approval of the Pr. CIT vide his letter dated 25.7.2016 which was granted vide letter dated 26.7.2016. Thereafter, a reference was made to the TPO vide letter dated 28.7.2016. Thus, it is clear that the AO made a reference to the TPO after Instruction No.3/2016 had kicked in on 10-03-2016. The question for consideration was as to whether the reference made by the AO satisfies the prescription of the 2016 Instruction.

6. It was the contention of the assessee before the DRP that as per instruction issued by the CBDT which is applicable for making reference to TPO selected during the year 2015-16, it is only cases involving additions in an earlier assessment year on the issue of transfer pricing in excess of Rs.10 crores or more or substantial recurring question of law or fact, which is either confirmed in appeal or pending before an appellate authority that can be referred to TPO. It was the plea of the assessee that none of the parameters set out in paragraphs 3.2 and 3.3 of Instruction No.3 of 2015 nor the parameters set out in instruction No.8 of 2015 were satisfied in the present case. In so far as the parameter requiring a TP adjustment of Rs.10 crores or more in earlier assessment year is concerned, the assessee pointed out that in none of the earlier assessment years the TP adjustment was Rs.10 crores or more warranting invoking Instruction No.8 of 2015 was made. It was the contention of the assessee before the DRP that since the AO has not followed the binding instruction of CBDT, the reference to TPO is bad in law. It was contended that since the TPO gets jurisdiction only if there is a valid reference

u/s 92CA of the Act and since the reference to the TPO was not valid, the order passed u/s 92CA I of the Act is nullity and cannot be the basis to make the impugned addition in the draft assessment order. The assessee relied on the decision of the Hon'ble Delhi High Court in the case of Indorama Synthetics (India) Ltd., Vs ACIT 386 ITR 665 wherein it was held that Circular No.3 of 2016 is retrospective in operation and applied to all pending cases and even to a case where reference was made earlier prior to the issue of Circular. The assessee also relied on the decisions wherein it is laid down that selection of a case for scrutiny contrary to Instructions of CBDT would make the assessment bad in law, CIT Vs. Best Plastics Pvt. Ltd., 295 ITR 256 (Delhi) and CIT Vs. Nayana P Dedhia 270 ITR 572 (AP) assessee therefore prayed that the order passed u/s 92CA of the Act may be quashed.

7. The DRP however in its directions held as follows:-

*“Panel: It is the contention of the assessee (hat the AO has not followed the procedure and instructions of Board while referring the case to the TPO. During the DRP proceedings the matter was referred to the AO for examination and report. The AO vide letter dated 22/06/2018 informed DRP that the case was referred to TP'O as per (CBDT instruction No. 3 of 2016 after obtaining approval of CIT – LTU as required under the Act. Sec 92CA gives power to the AO to refer the case TPO for determination of Arm's Length Price in appropriate cases. CBDT instructions provide suitable guidelines to AO for proper administration of the discretion provided to the AOs. In this case the CIT LTU gave approval vide Ref. 95/Tech1/PCIT(LTU)/2016-17 after noting that the International transaction for the current year is 107.12 crore and that there was an adjustment in the earlier years. After receiving the reference from AO the TPO proceeded with determination of the Arm's length price and issued show cause notice to the assessee. However, the assessee has not raised any technical or jurisdiction related objection before the AO or TPO and fully cooperated in the proceedings. The TPO proposed adjustment of Rs.29,60,30,584 for the current year. Hence the objections on this count are not acceptable at this stage. Even if*

*assuming that there was procedural error the evidence in the form of TP adjustment in TPO order is still valid as per various Court decisions including few mentioned below which held that evidence gathered even in violation of procedure is valid evidence.*

- 1.State of Maharashtra v. National Damodardas Soni [1980] AIR 593 (SC)*
- 2. Singhs case [1985] 155 ITR 166 (SC)*
- 3. Pooran Mal v Director of Inspection [1974] 93 ITR 505 (SC)*

*The following decisions are also against the assessee.*

- 1. Kerala Financial Corporation Vs CIT 201 FUR 129 (SC)*
- 2. Maruti Suzuki India Ltd Vs. Add]. CIT 328ITR 210 ( Delhi HC)*
- 3. Ranhaxy Laboratories Ltd Vs CIT 345 FUR 193 (Delhi HC)*

*Accordingly, based on above discussion the ground raised by the assessee is rejected.”*

8. Aggrieved by the aforesaid directions of the DRP, the assessee has raised Ground No.2 before the Tribunal.

9. In an earlier hearing, the Id.DR was asked to clarify the basis of which the AO made a reference to the TPO. The JCIT (ODS), Circle-3(1)(1), Bengaluru has addressed a letter to the DR clarifying the position with regard to the basis of making a reference to the DRP by the AO vide letter dated 18/3/2022, which reads as follows:-



To,  
The Commissioner of Income Tax  
Income Tax Appellate Tribunal-2  
Bengaluru

[Through Proper Channel]

Sir,

Sub: Request for reasons for referring the case u/s 92CA of the Income Tax Act- in  
the case of M/s. Rittal (I) Pvt Ltd, PAN AAACR7927A, AY 2014-15 -reg.  
Ref: Letter of CIT, ITAT-2, Bangalore in F.No.CIT/ITAT-2/B/2021-22/5735 dated  
16.03.2022

\*\*\*\*\*

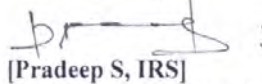
Kindly refer to the above.

2. In the cases of the assessee company M/s. Rittal India Private Limited for AY 2014-15, the scrutiny assessment was completed u/s 143(3) r.w.s 144C of the Income Tax Act, 1961 on 29.08.2018.

3. With regard to the report sought by CIT, ITAT-2, Bengaluru vide the above referred letter it is submitted that the reason for scrutiny selection under CASS does not include Transfer Pricing Issue. However, as per CBDT Instruction 3 of 2016 dated 10.03.2016 para 3.3 (b), the Assessing Officer has referred the case to Transfer Pricing Officer with a remark "TP adjustment for AY 2011-12 is above 10 Crore" after prior approval of CIT, LTU, Bangalore on 26.07.2016. The copy of reasons for scrutiny selection under CASS, reference to TPO and approval of CIT(LTU), Bangalore for referring the case to TPO are also enclosed for kind reference

Submitted for kind consideration

Yours faithfully,



[Pradeep S, IRS]

Joint Commissioner of Income Tax(OSD),  
Circle-3(1)(1), Bangalore.

10. The Id.counsel for the assessee has filed a memo dated 28/5/2022 in response to the aforesaid letter of the JCIT (OSD) dated 18/3/2022 enclosing Final Assessment order and ITAT order for AY 2011-12, to substantiate the Assessee's claim that no TP adjustment of Rs. 10 crore or more was made in that year. The order u/s.92CA for AY 2011-12 and ITAT Order for AY 2011-

12 in Assessee's case was also filed. A perusal of the above documents shows that TP adjustment of more than Rs. 10 crore has not been AY 2011-12. Since the conditions mentioned in para 3.3 of Instruction no. 3/2016 is not satisfied. the reference to the TPO is bad in law and violative to the Instruction no.3/2016. The TP adjustment made for AY 2011-12 was Rs. 1,23,43,326.

11. It was thus submitted by him that factually the reasons given for selecting the assessee's case for making a reference to the TPO u/s 92CA of the Act is incorrect. It was, therefore, submitted by the Id.counsel for the assessee that the order of the reference by the AO to the TPO u/s 92CA of the Act being contrary to the CBDT Instruction No.3 of 2016, the reference to TPO has to be held to be void and the consequent order of the TPO is also liable to be ignored and consequent addition made to the total income of the assessee should also be deleted. In this regard our attention was drawn to decision of the ITAT, Pune Bench in the case of Sava Health Ltd. Vs. DCIT in ITA No.114/PUN/2019 order dated 9/3/2022 for assessment year 2014-15, in the aforesaid decision the Tribunal on identical facts firstly noticed that in para 3.3(b) of the CBDT Instruction No.3 of 2016, twin conditions were required to be satisfied for making a reference to the TPO u/s 92CA of the Act and if none of the 2 conditions are satisfied, the reference made to the TPO is in contravention of the Instruction No.3/16. Since the instruction is binding on the AO reference made by the AO to the TPO contrary to the aforesaid instruction is invalid and consequently the transfer pricing adjustment made on the basis of an order passed by the TPO on an invalid reference cannot be sustained.

12. We have considered the submissions and the material produced before us, which clearly proves that the parameters laid down in para 3.3(b) was the

basis on which the AO made reference to the TPO viz., “where there has been a transfer pricing adjustment of Rs. 10 Crore or more in an earlier assessment year and such adjustment has been upheld by the judicial authorities or is pending in appeal”. Admittedly, the parameter laid down therein has not been satisfied in the present case and consequently, the reference by the AO to the TPO u/s.92CA of the Act is invalid. In the light of the discussion on the validity of an order u/s.92CA and invalidity and sustainability of the consequent addition made to the total income on the basis of such invalid order u/s.92CA of the Act, we are of the view that order of reference to the TPO in the present case is invalid, therefore the addition made based on the basis an order passed by the TPO on an invalid reference by the AO is a nullity and the addition made consequent to such illegal order is liable to be deleted in this short ground. Accordingly, we allow ground No.2 raised by the assessee.

13. In view of the conclusion of ground No.2, we are of the view that other issues raised by the assessee in the grounds of appeal does not require any adjudication.

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

Order pronounced in the open court on 28<sup>th</sup> June, 2022

Sd/-

**(PADMAVATHY S)**

Accountant Member

Bangalore,

Dated, June, 2022

/ vms /

Sd/-

**( N.V VASUDEVAN)**

Vice President

IT(TP) A No.2868/Bang/2018  
M/S.Rittal India Pvt.Ltd.

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.

1. Date of Dictation .....
2. Date on which the typed draft is placed  
before the dictating Member .....
3. Date on which the approved draft comes to Sr.P.S  
.....
4. Date on which the fair order is placed  
before the dictating Member .....
5. Date on which the fair order comes back to the Sr. P.S.  
.....
6. Date of uploading the order on  
website.....
7. If not uploaded, furnish the reason for doing so  
.....
8. Date on which the file goes to the Bench Clerk  
.....
9. Date on which order goes for Xerox &  
endorsement.....
10. Date on which the file goes to the Head Clerk  
.....
11. The date on which the file goes to the Assistant  
Registrar for signature on the order  
.....
12. The date on which the file goes to dispatch section for  
dispatch of the Tribunal Order  
.....
13. Date of Despatch of Order.  
.....