

**THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, MUMBAI**

**SHRI BASKARAN BR, ACCOUNTANT MEMBER
&
MS KAVITHA RAJAGOPAL, JUDICIAL MEMBER**

I.T.A. No.454/Mum/2022

(A.Y. 2017-18)

B Braun Medical (India) Pvt. Ltd. A Wing, 601, 6 th Floor Boomerang, Main Chandivali Farm Road Chandivali, Andheri (East), Mumbai-400072 PAN AACB7394M	Vs.	DCIT-1(2)(1) Ayakar Bhawan, Mumbai- 400020
(Appellant)		(Respondent)

Assessee by	Shri K. Shivaram, Shri Shashi Bakal
Department by	Shri Chetan M. Kacha
Date of Hearing	12.07.2022
Date of Pronouncement	10.10.2022

ORDER

PER KAVITHA RAJAGOPAL :-

This appeal has been filed by the assessee as against the assessment order passed u/s 143(3) r.w.s. 144C(1) of the Act pertaining to assessment year 2017-18. The assessee challenged the ground that the Ld. A.O. has erred in passing the draft order under section 143(3) r.w.s. 144C(1) of the Act instead of assessment order under section 143(3) of the Act and that the impugned order dated 28-01-2022 is barred by the limitation as the last date of passing the order was on 30-09-2021.

2. The assessee has also challenged the assessment order on the ground that the assessee was not granted adequate opportunity of being heard and has also challenged the addition of Rs. 4,38,51,907/- as unexplained purchases as per the data received from the Central Board of Excise and Customs (CBEC) by way of revised grounds of appeals.

3. The Brief fact are that the assessee company was incorporated on 08-04-1994 and is in the field of health care in India, catering to therapeutic segments such as anesthesia, surgery, interventional cardiology, orthopedic, dialysis treatment and homecare. The assessee company is a 100 percent subsidiary of B. Braun Medical Ind. Sdn. Bhd. Malaysia (BB Malaysia). The assessee has filed its return of income on 30-11-2017 declaring total income of Rs. 40,17,42,150/-. The assessee's case was selected for scrutiny. The assessee's case was referred by the Ld. AO to the TPO for determination of ALP for the international transaction entered into by the assessee and the TPO had proposed no variation in income thereafter draft assessment order dated 25-03-2021 was passed under section 144C(2) of the Income-Tax Act. The assessee filed its objection to the proposed additions/disallowance with the Dispute Resolution Panel-1 Mumbai (the 'DRP') on 20-04-2021. After receipt of direction from Ld. DRP, the AO passed final assessment order dated 28-01-2022 under section 143(3) r.w. 144C(13) r.w.s. 144B of the Income-Tax Act.

The Ground No. 1 as per revised ground

4. The assessee has challenged the draft assessment order on the ground that the assessee is not an 'eligible assessee' as per

section 144C(15)(b) of the Income-Tax Act and that the Ld. AO ought not to have passed the draft assessment order u/s 144C(2) and the final assessment order u/s 143(3) of the IT Act.. It is observed that the Ld. AO has referred the assessee's case under section 92CA of the Income-Tax Act to the TPO for determination of arm's length price of the international transaction entered into by the assessee for the impugned year for which the TPO has held that the assesses's international transactions with its AE is considered to have been entered at ALP. Hence no variation was made by TPO. The Ld. AO has proceeded to make addition on the ground that the ITR of the assessee reveals that there is substantial difference between the invoice value of imports and purchases as per export import data received from CBEC.

5. The Ld. AR for the assessee contended that the Ld. AO has erred in not considering the fact that the assessee is not an 'eligible assessee' as per section 144C(15)(b) of the Act and that the Ld. AO ought not to have passed the draft assessment order under section 144C(2) of the Act. Hence the draft assessment order and final assessment order passed by the AO is liable to be quashed since they are not in accordance with the mandate of the Act. The Ld. AR relied on decision of the Co-ordinate Bench in the case of **Maquet Holdings B.V. & Co. Vs DCIT(2019) 106 taxmann.com 68 (Mumbai-Trib.)** in support of above contention. On the other hand the Ld. DR relied on the order of the Ld. AO.

6. Having heard the rival submission and perused the material on record it is evident that the TPO in its reference under section 92CA has held that the assessee's international transaction with its AE are entered at arm's length price and the Ld. TPO made no variation of income under section 92CA(3) of the Act. It is also

observed that since no variation under section 92CA(3) of the Act was warranted and that 'assessee not being a foreign company will not categorize the assessee to be an 'eligible assessee' as per the provision of section 144C(15)(B) of the Act which defines an 'eligible assessee' and for ease of reference the relevant clause is extracted as under:

"(15) For the purposes of this section,

(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."

7. The conditions of the said provision does not hold good in assessee's case wherein it is observed that the assessee is not 'an eligible assessee' under the said provision. Hence the draft assessment order passed under section 144C(1) of the Act and the final assessment order pursuant to the draft order are not in accordance with the mandate of the Act. We would also like to place our reliance on the decision of the co-ordinate bench in case of *Maquet Holdings B.V. and Co. V/s DCIT (Supra)* wherein it was held that the assessee not being an 'eligible assessee' in terms of section 144C(15)(b) of the Act the Assessing officer was held to be not competent to passed the draft assessment order under section 144C(1) of the Act holds good in assessee's case also. In view of the same we hereby conclude that the assessee not being an 'eligible assessee' as per section 144C(15)(b) the draft assessment order

dated 25-03-2021 is accordingly quashed. Consequently, the final assessment order dated 27-01-2021 is not sustainable and hence quashed. Since we have quashed draft assessment order and the final assessment order other grounds of appeal are academic in nature and needs no adjudication.

8. In result of the appeal filed by the assessee is partly allowed

Order pronounced in the open court on 10.10.2022.

Sd/-

(BASKARAN BR)

ACCOUNTANT MEMBER

Sd/-

(KAVITHA RAJAGOPAL)

JUDICIAL MEMBER

Mumbai;

Dated : 10/10/2022

ANIKET RAJPUT (STENOGRAPHER)

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai